INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

MAINSTREAM RENEWABLE POWER LTD, INTERNATIONAL MAINSTREAM RENEWABLE POWER LIMITED, MAINSTREAM RENEWABLE POWER GROUP FINANCE LTD, HORIZONT I DEVELOPMENT GMBH, HORIZONT II RENEWABLE GMBH, AND HORIZONT III POWER GMBH

Claimants

and

FEDERAL REPUBLIC OF GERMANY

Respondent

ICSID Case No. ARB/21/26

AWARD

Members of the Tribunal
Ms. Wendy Miles KC, President of the Tribunal
Mr. Antolín Fernández Antuña, FCIArb, Arbitrator
Dr. Charles Poncet, M.C.L., Arbitrator

Secretary of the Tribunal
Mr. Govert Coppens

Date of dispatch to the Parties:

13 May 2026

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GLOSSARY OF SELECTED KEY TERMS

Offshore Strategy 2002 / 2002 Strategy	Federal Government's "*Strategy for Using Offshore Wind Energy*" dated January 2002 (R-0009)
2013 Coalition Treaty	Coalition treaty (*Koalitionsvertrag*) between the Christian Democratic Union, the Christian Social Union and the Social Democratic Party of Germany dated 14 December 2013 (BR-0057)
2014 Opinion	Opinion by offshore wind energy associations to Germany on a draft bill by the Federal Ministry for Economic Affairs and Energy for the amendment of the EEG (C-0248)
Applications	Applications for the construction and operation of the "Projects" which were submitted by Mainstream Renewable Power (UK) Ltd to the "BSH" on 27 June 2008 for "Horizont" (subsequently renamed "Horizont I") and 11 July 2008 for "Horizont Ost" and "Horizont West" (subsequently renamed "Horizont II" and "Horizont III", respectively) (C-0092, C-0093, C-0094)
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings (2006)
BfN	Federal Agency for Nature Conservation (*Bundesamt für Naturschutz*)
BFO	Federal Spatial Offshore Grid Plan (*Bundesfachplan Offshore*)
BNetzA	Federal Network Agency (*Bundesnetzagentur*)
BNetzA Position Paper	Position paper setting out non-binding connection criteria in respect of "TSOs'" obligation to perform grid connections pursuant to Section 17(2a) of the "EnWG" issued by the "BNetzA" in October 2009 (R-0008)
BSH	Federal Maritime and Hydrographic Agency (*Bundesamt für Seeschifffahrt und Hydrographie*), which is the agency responsible for the approval procedure / consenting process for the construction and operation of offshore wind farms

Business Plan	Business plan produced by Mainstream in May 2008 (C-0045)
BVerfG	German Constitutional Court / Federal Constitutional Court of the Federal Republic of Germany (*Bundesverfassungsgericht*)
June 2020 Decision / BVerfG Order	Order issued by the "BVerfG" in cases 1 BvR 1679/17 and 1 BvR 2190/17 concerning the "WindSeeG"
Brattle Expert Report	Expert Report of Mr. Richard Caldwell and Dr. Serena Hesmondhalgh of The Brattle Group dated 11 February 2022 and submitted with the Claimants' Memorial on the Merits
Brattle Second Expert Report	Second Expert Report of Mr. Richard Caldwell and Dr. Serena Hesmondhalgh of The Brattle Group dated 5 May 2023 and submitted with the Claimants' Reply
C-[#]	Claimants' Exhibit
Cl. Mem. on Juris.	Claimants' Memorial on Jurisdiction dated 6 May 2022
Cl. Mem. on Merits	Claimants' Memorial on the Merits dated 11 February 2022
Cl. PHB	Claimants' Post-Hearing Brief dated 24 November 2023
Cl. Reply	Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction dated 5 May 2023
Cl. Reply PHB	Claimants' Reply Post-Hearing Brief dated 15 December 2023
Cl. Response on Rule 41(5)	Claimants' response to the Respondent's Rule 41(5) Application dated 22 October 2021
Cl. Rej. on Rule 41(5)	Claimants' observations on the Respondent's Reply on Rule 41(5) dated 15 November 2021
CL-[#]	Claimants' Legal Authority
Compensation Objections	Objections raised by the "Fourth Claimant", "Fifth Claimant" and "Sixth Claimant" respectively to the

	"BSH"'s orders dated 25 January 2023 (C-0251, C-0252 and C-0253) rejecting the Fourth through Sixth Claimants' compensation claims pursuant to Sections 10a and 10b of the "WindSeeG" dated 9 March 2023 (C-0257, C-0258, C-0259)
Declarations	Declarations for Transfer for the "Projects" submitted by the "Fourth Claimant", the "Fifth Claimant" and the "Sixth Claimant" respectively to the "BSH" on 27 March 2023 and pursuant to which they have transferred the exclusive right of use of data in relation to the "Projects" in return for compensation payable by the successful bidder over those sites pursuant to the "WindSeeG" (C-0269, C-0270, C-0271)
Demuth Second Expert Report	Second Expert Report of Mr. Alexander Demuth of Secretariat Advisors dated 4 August 2023 and submitted with the Respondent's Rejoinder
Draft Spatial Planning Ordinance	Draft Ordinance on Spatial Planning in the German Exclusive Economic Zone in the North Sea (*Entwurf der Verordnung über die Raumordnung in der deutschen ausschließlichen Wirtschaftszone in der Nordsee*) dated 2008 (RL-0122)
ECT	Energy Charter Treaty
EEG	Renewable Energy Sources Act (*Erneuerbare Energien-Gesetz*)
Energy Concept	Energy Concept (*Energiekonzept*), adopted in 2010
EnWG	Energy Industry Act (*Energiewirtschaftsgesetz*)
European Commission Submission	Non-disputing party submission filed by the European Commission dated 30 March 2023
Falk Witness Statement	Witness Statement of Mr. Thorsten Falk dated 12 July 2023 and submitted with the Respondent's Rejoinder
Fifth Claimant	Horizont II Renewable GmbH
First Claimant	Mainstream Renewable Power Ltd
FiP	Feed-in premium

FiT	Feed-in tariff (*Einspeisetarif*)
Fourth Claimant	Horizont I Development GmbH
Germany	Federal Republic of Germany
GOWEF / OWF / Offshore Foundation	German Offshore Wind Energy Foundation
Hearing	Hearing on Jurisdiction and the Merits held on 18–28 September 2023
Hofmann Expert Report	Expert Report of Prof. Dr. Ekkehard Hofmann dated 11 February 2022 and submitted with the Claimants' Memorial on the Merits
Hofmann Second Expert Report	Second Expert Report of Prof. Dr. Ekkehard Hofmann dated 5 May 2023 and submitted with the Claimants' Reply
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Ireland	Republic of Ireland
kWh	Kilowatt hour
Nemitz Second Witness Statement	Second Witness Statement of Ms. Martina Nemitz dated 13 July 2023 and submitted with the Respondent's Rejoinder
Nolte Third Witness Statement	Third Witness Statement of Dr. Nico Nolte dated 10 July 2023 and submitted with the Respondent's Rejoinder
OFW	Offshore Wind Energy Forum (*Offshore Forum Windenergie*)
O-NEP	Offshore Grid Development Plan (*Offshore-Netzentwicklungsplan*)
Prall Witness Statement	Witness Statement of Dr. Ursula Prall dated 11 February 2022 and submitted with the Claimants' Memorial on the Merits

Horizont Projects / Projects	Three offshore windfarms on the offshore sites named "Horizont", "Horizont Ost" and "Horizont West" (subsequently renamed "Horizont I", "Horizont II" and "Horizont III")
R-[#]	Respondent's Exhibit
Resp. C-Mem.	Respondent's Counter-Memorial on the Merits dated 26 August 2022
Resp. Mem. on Juris.	Respondent's Memorial on Jurisdiction dated 25 March 2022
Resp. PHB	Respondent's Post-Hearing Brief dated 24 November 2023
Resp. Rej.	Respondent's Rejoinder on the Merits and Reply on Jurisdiction dated 4 August 2023
Resp. Reply PHB	Respondent's Reply Post-Hearing Brief dated 15 December 2023
Resp. Rule 41(5) Application	Respondent's application filed pursuant to Rule 41(5) of the ICSID Arbitration Rules dated 12 October 2021
Resp. Reply on Rule 41(5)	Respondent's reply to the Claimants' Response on Rule 41(5) dated 5 November 2021
RL-[#]	Respondent's Legal Authority
SBT Expert Report	Expert Report of Prof. Dr. Thomas Schomerus, Prof. Dr. Jelena Bäumler and Prof. Dr. Jörg Terhechte dated 26 August 2022 and submitted with the Respondent's Counter-Memorial
Schampers/Hellmund Expert Report	Expert Report of Mr. Arjen Schampers and Mr. Thomas Hellmund of Merkur dated 5 May 2023 and submitted with the Claimants' Reply
Schwencke Witness Statement	Witness Statement of Mr. Tilman Schwencke dated 11 February 2022 and submitted with the Claimants' Memorial on the Merits
Schwencke Second Witness Statement	Second Witness Statement of Mr. Tilman Schwencke dated 5 May 2023 and submitted with the Claimants' Reply

SeeAnlV	Offshore Installations Ordinance (*Seeanlagenverordnung*)
Second Claimant	International Mainstream Renewable Power Limited
Sixth Claimant	Horizont III Power GmbH
Slark Expert Report	Expert Report of Mr. Richard Slark of Alvarez & Marsal dated 26 August 2022 and filed with the Respondent's Counter-Memorial
Slark Second Expert Report	Second Expert Report of Mr. Richard Slark of Alvarez & Marsal dated 4 August 2023 and submitted with the Respondent's Rejoinder
Smith Witness Statement	Witness Statement of Mr. Cameron Smith dated 11 February 2022 and submitted with the Claimants' Memorial on the Merits
Stakeholder Conference / Public Hearing	Stakeholder Conference (*Erörterungstermin*, or "*EÖT*") held for the "Projects" on 5 March 2013
Sustainability Strategy	Germany's April 2002 sustainability strategy (EH-0011)
TenneT	The responsible transmission system operator "TSO" (*Übertragungsnetzbetreiber* or "*ÜNB*") for the "Project" sites
Tr. Day [#], [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 14 September 2021
TSOs	Transmission system operators, the operators of the electricity transmission grid
Umlaut Expert Report	Expert Report of Mr. Till Neupert and Mr. Petja Stöver of Umlaut Energy dated 26 August 2022 and submitted with the Respondent's Counter-Memorial
WindSeeG	Offshore Wind Energy Act (*Gesetz zur Entwicklung und Förderung der Windenergie auf See*)
Wustlich Witness Statement	Witness Statement of Dr. Guido Wustlich dated 5 July 2023 and submitted with the Respondent's Rejoinder

I. INTRODUCTION

A. THE PARTIES

1. This arbitration was commenced by six entities in the Mainstream group of companies including:

   a. Mainstream Renewable Power Limited ("**Mainstream**" or the "**First Claimant**"), a private company limited by shares and incorporated in Ireland in February 2008;

   b. International Mainstream Renewable Power Limited ("**Mainstream International**" or the "**Second Claimant**"), a private company limited by shares and incorporated in Ireland in August 2008;

   c. Mainstream Renewable Power Group Finance Ltd ("**Mainstream Finance**" or the "**Third Claimant**"), a private company limited by shares and incorporated in Ireland in January 2009;

   d. Horizont I Development GmbH ("**Horizont I**" or the "**Fourth Claimant**"), a limited liability company (*Gesellschaft mit beschränkter Haftung*) incorporated in Germany in October 2012;

   e. Horizont II Renewable GmbH ("**Horizont II**" or the "**Fifth Claimant**"), a limited liability company (*Gesellschaft mit beschränkter Haftung*) incorporated in Germany in June 2009; and

   f. Horizont III Power GmbH ("**Horizont III**" or the "**Sixth Claimant**"), a limited liability company (*Gesellschaft mit beschränkter Haftung*) incorporated in Germany in October 2012,

   (jointly, the "**Claimants**").

2. The First Claimant is a developer of wind and solar energy projects. It is the direct parent company of the Second and Third Claimants (owning 94% of the Second Claimant (the remaining 6% is owned by the Third Claimant) and 100% of the Third Claimant). The

Second Claimant is the direct and sole parent company of the Fourth, Fifth and Sixth Claimants.

3. The Claimants are represented in the arbitration by:

Mr. Frode Strømø, Chief Transformation and Legal Officer
Mainstream Renewable Power Limited;

and

Dr. Markus Burgstaller, Partner
Mr. Scott Macpherson, Counsel
Ms. Iris Sauvagnac, Senior Associate
Ms. Bethany Pedder, Associate
Hogan Lovells International LLP
Atlantic House
Holborn Viaduct
London EC1A 2FG
United Kingdom.

4. The Respondent in the arbitration is the Federal Republic of Germany ("**Germany**", the "**Respondent**" or the "**Government**"). The Respondent is represented in the arbitration by:

Dr. Anke Meier
Dr. Barbara Maucher
Noerr PartG mbB
Börsenstr. 1
60313 Frankfurt am Main
Federal Republic of Germany;

and

Ms. Annette Tiemann
Federal Ministry for Economic Affairs and Energy
Scharnhorststraße 34-37
10115 Berlin
Federal Republic of Germany.

B. THE TRIBUNAL AND SECRETARY

5. The Tribunal in the arbitration is comprised of:

> Ms. Wendy Miles KC, President of the Tribunal;
> Mr. Antolín Fernández Antuña, FCIArb, Arbitrator; and
> Dr. Charles Poncet, M.C.L., Arbitrator.

6. The Tribunal Secretary was Ms. Martina Polasek, (then) ICSID Deputy Secretary-General, from commencement of the proceedings to July 2023 and thereafter Mr. Govert Coppens, Legal Counsel, ICSID.

C. THE DISPUTE

7. The dispute has arisen out of the German government's climate change-related measures. These measures concerned its offshore wind regulatory and administrative framework, which existed within its broader renewable energy strategy and policy to scale up renewable electricity generation in accordance with climate change mitigation.[1] The dispute arises out of the German government's initial establishment of a framework, against which the Claimants took their investment decision, which was subsequently adjusted in a manner that, ultimately, deprived the Claimants of almost any value in their initial investment. Another ECT award arose out of the same changes to the German offshore wind regulatory and administrative framework, *Strabag SE, Erste Nordsee-Offshore Holding GmbH and Zweite Nordsee-Offshore Holding GmbH v. Federal Republic of Germany* (ICSID Case No. ARB/19/29), which found the host State to have been in breach of ECT investment protections.

8. The alleged investment comprises the Claimants' three offshore wind farms on the offshore sites, Horizont, Horizont Ost and Horizont West (subsequently renamed Horizont I, Horizont II and Horizont III), in the German North Sea (collectively the "**Horizont Projects**" or "**Projects**"). The planned total maximum capacity for the Horizont Projects was around 1.13 GW in 2008 (approximately 226 wind turbines) with potential to increase

[1] Resp. Rej, para. 362: "*Increasing the legally binding expansion targets to at least 30 GW in 2030 follows from the fact that Respondent is now aligning its entire climate, energy and economic policy with the 1.5-degree climate protection path to which the EU has committed itself under the Paris Agreement*".

to over 1.6 GW by installing larger turbines. The First Claimant applied for consent to develop these in June and July 2008 (the "**Consent Applications**").

9. The alleged host State measures arise out of the Respondent's changes to its offshore wind regulatory framework following the Claimants' investment. In particular, at the date of the Consent Applications, Germany's Federal Government's 2002 Strategy for Using Offshore Wind Energy (*Strategie der Bundesregierung zur Windenergienutzung auf See*) (the "**2002 Offshore Wind Strategy**") enacted various statutory or regulatory instruments applicable to offshore wind in Germany, including:

   a. the 2004 Renewable Energy Sources Act (*Erneuerbare Energien-Gesetz*) (the "**2004 EEG**");

   b. the 2004 Federal Spatial Planning Act (*Raumordnungsgesetz*) (the "**ROG**");

   c. the 2006 Offshore Installations Ordinance (*Seeanlagenverordnung*) (the "**2006 SeeAnlV**"); and

   d. the 2006 Energy Industry Act (*Energiewirtschaftsgesetz*) (the "**2006 EnWG**");

   and published additional guidance and draft statutory or regulatory instruments, variously addressing offshore wind strategy and renewable permitting, grid connection and feed-in tariff regimes.

10. Subsequent to the Consent Applications: (i) the Respondent's 2012 amendments to the SeeAnlV indefinitely delayed the grant of consent/approval; and (ii) the Respondent's 2017 Offshore Wind Energy Act (*Gesetz zur Entwicklung und Förderung der Windenergie auf See*) ("**WindSeeG**") cancelled any rights arising out of the Consent Applications, replacing the existing consent system with a new tender for offshore wind areas in the German North Sea with limited grandfathering benefits. The Claimants argue that the 2012 and 2017 legislation breached the Respondent's Energy Charter Treaty 1998 ("**ECT**") obligation to provide fair and equitable treatment to qualifying investors (Article 10(1)), and the 2017 legislation breached its obligation not to expropriate qualifying investments without fair market value compensation (Article 13).

11. The Respondent disputes the Tribunal's jurisdiction to hear the dispute on three bases:

a. it denies consent to arbitration in intra-European Union ("**EU**") investment disputes, including pursuant to the ECT (*ratione voluntatis*);

b. it denies that the Claimants are qualifying investors within the meaning of the ECT (*ratione personae*); and

c. it denies that the Consent Applications for the Horizont Projects are qualifying investments within the meaning of the ECT (*ratione materiae*).

12. The Respondent further denies that it breached any substantive obligations pursuant to Article 10(1) and Article 13 of the ECT.

D. REQUESTS FOR RELIEF

13. In their Reply, the Claimants make the following request for relief:[2]

> (i) the Tribunal's declaration that the dispute is within the jurisdiction and competence of ICSID and the Tribunal;
>
> (ii) The Tribunal's declaration that all of the Claimants have standing to bring these claims;
>
> (iii) The Tribunal's declaration that the Respondent has violated its international legal obligations under the ECT with respect to Mainstream's investments;
>
> (iv) An award directing the Respondent to pay damages equivalent to the financial loss and damage incurred by Mainstream as a result of the Respondent's violations of its international legal obligations and pre-award interest thereon in the amount of at least EUR 353 million and post-award interest at the rate of six-month EURIBOR plus 4% compounded monthly until the date of the Respondent's full and effective payment;
>
> (v) An award directing the Respondent to pay all costs and fees incurred in connection with these arbitration proceedings, including but not limited to the costs of the Tribunal and ICSID, legal costs, expert fees, consultant fees, and interest on such costs and fees; and

[2] Cl. Reply, para. 542. *See also* Cl. PHB, para. 115 (repeating the request for relief in the Claimants' Reply subject to adjustment for compensation received under Sections 10a and 10b of the WindSeeG).

(vi) Any other relief the Tribunal deems just and proper.

14. In its Rejoinder, the Respondent requests the Tribunal to:[3]

1. Dismiss all Claimants' claims for lack of jurisdiction, in event, dismiss all, or any remaining of, Claimants' claims due to the lack of jurisdiction or for the lack of merit, and

2. Order Claimants to reimburse Respondent all its costs of the proceedings, with interest.

II. PROCEDURAL HISTORY

A. COMMENCEMENT OF THE PROCEEDINGS AND CONSTITUTION OF THE TRIBUNAL

15. On 30 April 2021, ICSID received a request for arbitration dated 30 April 2021 from Mainstream Renewable Power Ltd, International Mainstream Renewable Power Limited, Mainstream Renewable Power Group Finance Ltd, Horizont I Development GmbH, Horizont II Renewable GmbH and Horizont III Power GmbH against the Federal Republic of Germany (the "**Request**"), together with Exhibits C-0001 through C-0033 and Legal Authorities CL-0001 and CL-0002.

16. On 13 May 2021, the ICSID Secretary-General registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

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

18. On 5 June 2021, the Claimants appointed Dr. Charles Poncet, M.C.L., a national of the Swiss Confederation, as arbitrator; Dr. Poncet subsequently accepted his appointment. On

[3] Resp. Rej., para. 912.

12 July 2021, the Respondent appointed Mr. Antolín Fernández Antuña, FCIArb, a national of the Kingdom of Spain, as arbitrator; Mr. Fernández Antuña subsequently accepted his appointment.

19. On 11 August 2021, the Claimants requested that the Chair of the ICSID Administrative Council (the "**Chair**") appoint the arbitrator not yet appointed and designate him or her to be the President of the Tribunal in this case, pursuant to Article 38 of the ICSID Convention and ICSID Arbitration Rule 4. Later that same date, the ICSID Secretariat wrote to the Parties acknowledging the Claimants' request and inquiring whether the Parties would be amenable to ICSID conducting a ballot procedure to assist the Parties in the appointment of a mutually acceptable candidate; the Parties agreed to a ballot procedure by separate letters of 13 August 2021.

20. Following a successful ballot procedure, on 10 September 2021, the Parties appointed Ms. Wendy Miles KC, a national of New Zealand, as President of the Tribunal.

21. On 14 September 2021, the ICSID Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings 2006 (the "**ICSID Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Martina Polasek, ICSID Deputy Secretary-General, was designated to serve as Secretary of the Tribunal; Ms. Polasek was subsequently replaced on 12 September 2023 by Mr. Govert Coppens, ICSID Legal Counsel.

B. THE WRITTEN PHASE AND PRE-HEARING STEPS

22. On 12 October 2021, the Respondent filed an application under Rule 41(5) of the ICSID Arbitration Rules (the "**Rule 41(5) Application**"), together with Legal Authorities RL-0001 through RL-0010.

23. On 15 October 2021, the Tribunal invited the Parties to consult and revert by 19 October 2021 with joint or separate proposals concerning the briefing schedule for the Rule 41(5) Application. The Tribunal also reminded the Parties that, as provided by ICSID Arbitration Rule 41(5), the Tribunal must notify its decision on the Application at the first session or

promptly thereafter; therefore, given the imminent timing of the first session, the Tribunal invited the Parties to consider either a postponement of the first session or an extension of the time limit for the Tribunal's decision on the Rule 41(5) Application.

24. By emails of 19 October 2021, the Parties informed the Tribunal that they had agreed to the following: (i) the Claimants would file their observations on the Rule 41(5) Application on 22 October 2021; (ii) during the first session, the Parties would discuss with the Tribunal whether it requires further written or oral submissions on the Rule 41(5) Application; and (iii) the Tribunal would notify the Parties of its decision on the Rule 41(5) Application as soon as reasonably practicable following the first session, with a reasoned decision to follow at a later date. The Parties' agreement was subsequently approved by the Tribunal on 20 October 2021.

25. Pursuant to the Parties' agreement, on 22 October 2021, the Claimants filed a response to the Rule 41(5) Application (the "**Response on Rule 41(5)**"), together with Exhibits C-0034 through C-0039 and Legal Authorities CL-0003 through CL-0023.

26. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 26 October 2021 (by video conference). During the first session, the Tribunal determined that each Party would file a second round of submissions on the Rule 41(5) Application. Pursuant to those instructions, on 5 November 2021, the Respondent submitted a reply to the Claimants' Response on Rule 41(5) (the "**Reply on Rule 41(5)**"), together with Legal Authorities RL-0011 through RL-0013 and, on 15 November 2021, the Claimants submitted observations thereon (the "**Rejoinder on Rule 41(5)**"), together with Exhibits C-0040 through C-0042 and Legal Authorities CL-0024 and CL-0025.

27. On 22 November 2021, the Tribunal issued Procedural Order No. 1 ("**PO1**") recording the agreement of the Parties on procedural matters. PO1 provides, *inter alia*, that the applicable ICSID Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C., United States of America. Annex C to PO1 also set forth the agreed procedural calendar in the event that the Tribunal dismissed the Rule 41(5) Application, with a scenario involving a request for bifurcation of the proceeding.

28. On 20 December 2021, the Tribunal informed the Parties that the Respondent's Rule 41(5) Application was denied and that a reasoned decision would follow as soon as possible. The Tribunal's reasoned decision was subsequently issued to the Parties on 18 January 2022 (the "**Rule 41(5) Decision**").

29. Following exchanges between the Parties and the Tribunal, on 26 January 2022, the Tribunal amended the procedural calendar contained in Annex C to PO1.

30. Pursuant to the amended procedural calendar, on 11 February 2022, the Claimants filed a memorial on the merits (the "**Claimants' Memorial on the Merits**"), together with the Witness Statement of Dr. Ursula Prall dated 11 February 2022 ("**Prall Witness Statement**"); the Witness Statement of Mr. Tilman Schwencke dated 11 February 2022 ("**Schwencke Witness Statement**"), with Exhibits TS-0001 through TS-0004; the Witness Statement of Mr. Cameron Smith dated 11 February 2022 ("**Smith Witness Statement**"), with Exhibits CS-0001 and CS-0002; the Expert Report of Prof. Dr. Ekkehard Hofmann dated 11 February 2022 ("**Hofmann Expert Report**"), with Exhibits EH-0001 through EH-0041; the Expert Report of Mr. Richard Caldwell and Dr. Serena Hesmondhalgh of The Brattle Group dated 11 February 2022 ("**Brattle Expert Report**"), with Exhibits BR-0001 through BR-0102; Exhibits C-0043 through C-0163; and Legal Authorities CL-0026 through CL-0136.

31. On 25 March 2022, the Respondent filed a memorial on jurisdiction (the "**Respondent's Memorial on Jurisdiction**"), which included a request to bifurcate the proceeding (the "**Respondent's Bifurcation Request**"), together with Legal Authorities RL-0014 through RL-0076.

32. On 6 May 2022, the Claimants filed a memorial on jurisdiction (the "**Claimants' Memorial on Jurisdiction**") wherein they responded to the Respondent's Bifurcation Request, together with Exhibits C-0164 through C-0177 and Legal Authorities CL-0137 through CL-0213. In their Memorial on Jurisdiction, the Claimants referred, *inter alia*, to a 28 April 2022 decision of the Higher Regional Court of Berlin regarding the Respondent's application under Section 1032(2) of the German Code of Civil Procedure

to rule on the admissibility of the arbitral proceedings (the "**April 2022 Berlin Court Decision**").

33. On 23 May 2022, the Respondent informed the Tribunal that it intended to appeal the April 2022 Berlin Court Decision and requesting that the Tribunal stay the current proceeding until the German Federal Court of Justice (*Bundesgerichtshof*) (the "**BGH**") had decided on the Respondent's appeal (the "**Respondent's Application for Stay**").

34. Upon invitation from the Tribunal, on 25 May 2022, the Claimants provided comments on the Respondent's Application for Stay, arguing that it be dismissed. The Claimants also requested that the Tribunal order the Respondent to "*pay all legal fees, costs and expenses incurred by the Claimants with regard to the request to stay this arbitration*". On 30 May 2022, the Respondent objected to the Claimants' request for the Tribunal to make a decision on costs.

35. Also on 30 May 2022, the Claimants clarified that the Respondent had already filed its appeal against the April 2022 Berlin Court Decision on 20 May 2022, and copied the appeal document to the Tribunal.

36. On 1 June 2022, the Tribunal issued Procedural Order No. 2 ("**PO2**") rejecting the Respondent's Application for Stay.

37. On 7 June 2022, the Tribunal issued Procedural Order No. 3 ("**PO3**") wherein it, by majority, denied the Respondent's Bifurcation Request; Mr. Fernández Antuña attached a dissenting opinion.

38. By email of 1 July 2022, the Respondent requested that the ICSID Secretariat "*inquire about the current particulars*" of the Claimants; the Respondent informed that the Claimants were using "*different addresses than those which are currently on ICSID's records*" and there had also been "*certain changes in* [the] *Claimants' management*". Upon invitation from the Tribunal, the Claimants responded by email of 7 July 2022 and attached Exhibits C-0178 through C-0186. The Claimants commented further on this issue by email of 13 July 2022 and attached Exhibit C-0187.

39. On 26 August 2022, the Respondent filed a counter-memorial on the merits (the "**Respondent's Counter-Memorial**"), together with the Witness Statement of Dr. Nico Nolte dated 25 August 2022, with Exhibits NN-0001 through NN-0016; the Witness Statement of Ms. Martina Nemitz dated 26 August 2022, with Exhibits MN-0001 through MN-0011; the Expert Report of Mr. Till Neupert and Mr. Petja Stöver of Umlaut Energy dated 26 August 2022 ("**Umlaut Expert Report**"), with Exhibits UM-0001 through UM-0031; the Expert Report of Mr. Alexander Demuth of Alvarez & Marsal dated 26 August 2022, with Exhibits AD-0001 through AD-0092; the Expert Report of Mr. Richard Slark of Alvarez & Marsal dated 26 August 2022 ("**Slark Expert Report**"), with Exhibits RS-0001 through RS-0074; the Expert Report of Prof. Dr. Thomas Schomerus, Prof. Dr. Jelena Bäumler and Prof. Dr. Jörg Terhechte dated 26 August 2022 ("**SBT Expert Report**"), with Exhibits SBT-0001 through SBT-0189; Exhibits R-0001 through R-0047; and Legal Authorities RL-0077 through RL-0277.

40. By letter of 6 September 2022, the Respondent requested that the 9 September 2022 deadline set for the Parties' exchange of document production requests, as well as "*all subsequent filing deadlines* [be] *postponed by four months*" due to the Russian invasion in Ukraine and the resulting burden on the resources of the German Federal Ministry for Economic Affairs and Energy. On 9 September 2022, the Tribunal invited the Claimants' comments and provisionally moved the deadline for the exchange of the Parties' document production requests to 14 September 2022. The Claimants made their comments by later email of 9 September 2022.

41. On 13 September 2022, the Tribunal transmitted to the Parties an amended procedural calendar with the deadline for the Parties' exchange of document production requests moved to 7 October 2022 and corresponding extensions of the subsequent procedural deadlines. On 14 September 2022, the Tribunal issued an amended Annex C to PO1.

42. On 6 October 2022, the European Commission (the "**European Commission**") filed an application for leave to intervene as a non-disputing party (the "**European Commission Application**"). In accordance with ICSID Arbitration Rule 37(2), on 11 October 2022, the Tribunal invited the Parties to submit their observations on the European Commission

Application. Each Party submitted its respective observations on 25 October 2022; the Claimants also filed Exhibits C-0188 through C-0192 and Legal Authorities CL-0214 through CL-0223, and the Respondent also filed Legal Authorities RL-0228 through RL-0237.

43. Following previous exchanges between the Parties, by the Respondent's email of 10 October 2022 and the Claimants' email of 12 October 2022, the Parties agreed that the place of the hearing would be London, United Kingdom.

44. By email of 2 November 2022, "[i]*n the interest of transparency, and in order that the Tribunal remains informed about the progress of the proceedings before the BGH*", the Claimants provided a copy of their response to the Respondent's appeal of the April 2022 Berlin Court Decision (see above paragraphs 32 and 35).

45. Pursuant to the amended procedural calendar, on 11 November 2022, the Parties exchanged responses and objections on document production; the Respondent also filed Legal Authorities RL-0238 through RL-0246. The Parties' submissions were transmitted to the Tribunal on 14 November 2022.

46. On 2 December 2022, the Parties exchanged replies on document production in the form of completed Stern Schedules; the Respondent also filed Legal Authorities RL-0247 and RL-0248. The Parties' submissions were transmitted to the Tribunal later that same date.

47. On 9 January 2023, the Tribunal issued Procedural order No. 4 ("**PO4**") concerning document production.

48. By letter of 30 January 2023, the Respondent wrote to the Tribunal alleging that the Claimants had not complied with the Tribunal's orders in PO4; upon invitation from the Tribunal, the Claimants responded by letter of 2 February 2023, wherein they argued that the Respondent's document production was "*defective*".

49. On 1 February 2023, the Tribunal issued Procedural Order No. 5 ("**PO5**") concerning the European Commission Application. The Tribunal directed the European Commission to

file a brief written submission, limited in scope, by 30 March 2023; all other requests were denied.

50. On 3 February 2023, the Tribunal invited further comments from the Respondent on the Claimants' compliance with PO4; the Respondent responded by letter of 7 February 2023.

51. By email of 10 February 2023, the Claimants informed the Tribunal that they had completed their production of documents to the Respondent as ordered in PO4 and reserved their rights to respond to the Respondent's 7 February letter.

52. On 6 March 2023, the Tribunal issued Procedural Order No. 6 ("**PO6**") concerning production of documents. In PO6, the Tribunal, *inter alia*, "*ma*[de] *no orders against the Claimants on the basis that document production was finally completed by 10 February 2023*".

53. On 10 March 2023, the Respondent filed what it referred to as a "*Protest against PO 6*", together with Legal Authorities RL-0249 through RL-0252. Therein, the Respondent, *inter alia*, protested "*against the retention of certain documents by* [the] *Claimants on the grounds of legal privilege*", including the Claimants' internal communications with their witness, Dr. Ursula Prall (the "**Dr. Prall communications**"); the Respondent argued that by calling Dr. Prall as a witness, the Claimants "*waived any legal privilege attached to the legal advice*" given by Dr. Prall and are therefore "*estopped from claiming legal privilege*". Upon invitation from the Tribunal, the Claimants responded by letter of 16 March 2023 and argued that the Respondent's "*Protest against PO 6*" should be rejected. The Respondent made further comments by letter of 24 March 2023 and filed Legal Authorities RL-0253 and RL-0254.

54. Pursuant to PO5, on 30 March 2023, the European Commission filed a non-disputing party submission (the "**European Commission Submission**").

55. On 5 May 2023, the Claimants filed a reply on the merits and counter-memorial on jurisdiction (the "**Claimants' Reply**"), together with the Second Witness Statement of Mr. Tilman Schwencke dated 5 May 2023 ("**Schwencke Second Witness Statement**"), with Exhibits TS-0005 through TS-0007; the Second Witness Statement of Dr. Ursula Prall

dated 5 May 2023, with Exhibits UP-0001 through UP-0012; the Expert Report of Mr. Arjen Schampers and Mr. Thomas Hellmund of Merkur dated 5 May 2023 ("**Schampers/Hellmund Expert Report**"), with Exhibits MK-0001 through MK-0082; the Second Expert Report of Mr. Richard Caldwell and Dr. Serena Hesmondhalgh of The Brattle Group dated 5 May 2023, with Exhibits BG-0103 through BG-0176; the Second Expert Report of Prof. Dr. Ekkehard Hofmann dated 5 May 2023 ("**Hofmann Second Expert Report**"), with Exhibits EH-0042 through EH-0058; Exhibits C-0193 through C-0283; and Legal Authorities CL-0228 through CL-0280.

56. Also by letter of 5 May 2023, the Claimants informed the Tribunal that their witness, Mr. Cameron Smith, would be unable to continue to participate in the arbitration (including giving evidence at the hearing) due to a medical condition. Upon invitation from the Tribunal, the Respondent provided its comments by letter of 17 May 2023 and filed Legal Authorities RL-0255 and RL-0256. The Respondent requested, *inter alia*, that the Tribunal strike Mr. Smith's Witness Statement from the record and "[e]*ntirely disregard*" the Statement in its eventual award.

57. On 26 May 2023, the Tribunal confirmed to the Parties that Mr. Cameron Smith's Witness Statement currently remained admissible and that it would consider what, if any, weight to accord the Statement in its eventual award. The Tribunal also directed that, in the event that the Respondent notified its intention to cross-examine Mr. Smith at the hearing, the Claimants were to submit an update concerning Mr. Cameron Smith's health at that time.

58. On 30 May 2023, the Tribunal issued Procedural Order No. 7 ("**PO7**") concerning the Respondent's 10 March "*Protest against PO 6*". In PO7, the Tribunal, *inter alia*, invited the Parties to comment on the appointment of a third-party neutral reviewer to review privilege in respect of certain documents in the Claimants' Privilege Log, and invited the Parties to provide any additional submissions as to the law applicable to privilege and waiver of the Dr. Prall communications and the scope of waiver; the Parties' responses were requested by 2 June 2023. Following a request from the Respondent, the deadline was subsequently extended to 16 June 2023.

59. On 31 May 2023, the Claimants filed an application for provisional measures (the "**Claimants' Provisional Measures Application**"), together with the Witness Statement of Dr. Markus Burgstaller dated 30 May 2023; Exhibits C-0284 through C-0303; and Legal Authorities CL-0281 through CL-0306. In the Provisional Measures Application, the Claimants requested the Tribunal to issue recommendations that, *inter alia*, the Respondent withdraw its appeal of the April 2022 Berlin Court Decision before the BGH and that the Respondent "*refrain*[ ] *from initiating any further applications or proceedings against any of the Claimants or related entities before any national court that have the purpose of preventing the Claimants or related entities from continuing the Arbitration*". Later that same date, the Tribunal invited the Respondent's observations on the Provisional Measures Application by 9 June 2023.

60. Further to the Tribunal's invitation in PO7, by letter of 1 June 2023, the Claimants, *inter alia*, informed the Tribunal that they were willing to produce to the Respondent the documents proposed to be submitted to a third-party neutral reviewer, subject to certain conditions.

61. On 9 June 2023, the Respondent submitted observations on the Claimants' Provisional Measures Application, together with the Witness Statement of Dr. Matthias Koch dated 7 June 2023; the Second Witness Statement of Dr. Nico Nolte dated 8 June 2023; Exhibit R-0048; and Legal Authorities RL-0257 through RL-0274.

62. On 16 June 2023, the Respondent responded to the Tribunal's directives in PO7 and confirmed that, further to the Claimants' 1 June letter, a neutral third-party reviewer of the Claimants' Privilege Log was "*no longer required*".

63. On 14 July 2023, the Claimants wrote to the Tribunal asking it to indicate when it intended to issue its decision on the Provisional Measures Application.

64. On 17 July 2023, the Tribunal issued Procedural Order No. 8 ("**PO8**") concerning the Claimants' Provisional Measures Application. The Tribunal denied the Claimants' Application; however, it did "*require that the Respondent* […] *refrains from initiating any further applications or proceedings against any of the Claimants or related entities before*

any national court that have the purpose of preventing [them] *from continuing the Arbitration* […] *or, at minimum, notifies the Claimants and the Tribunal well in advance of any further filing before any national court with a connection to the Arbitration*".

65. On 21 July 2023, the Tribunal wrote to the Parties regarding logistics for the upcoming hearing, including inquiring whether either Party objected to public access at the hearing; the Claimants informed the Tribunal of their objection on 26 July 2023. By letter of 28 July 2023, the Respondent stated its preference that the hearing be open to the public. On 4 August 2023, the Tribunal took note of the Parties' positions and informed them that the hearing would be closed to the public pursuant to ICSID Arbitration Rule 32(2).

66. On 4 August 2023, the Respondent filed a rejoinder on the merits and a reply on jurisdiction (the "**Respondent's Rejoinder**"), together with the Witness Statement of Dr. Guido Wustlich dated 5 July 2023 ("**Wustlich Witness Statement**"), with Exhibits GW-0001 through GW-0011; the Witness Statement of Mr. Thorsten Falk dated 12 July 2023 ("**Falk Witness Statement**"), with Exhibits TF-0001 through TF-0026; the Witness Statement of Mr. Dirk Wendel dated 3 August 2023, with Exhibits DW-0001 through DW-0008; the Second Witness Statement of Ms. Martina Nemitz dated 13 July 2023 ("**Nemitz Second Witness Statement**"), with Exhibits MN-0012 through MN-0015; the Third Witness Statement of Dr. Nico Nolte dated 10 July 2023 ("**Nolte Third Witness Statement**"), with Exhibits NN-0017 through NN-0021; the Second Expert Report of Mr. Till Neupert and Mr. Petja Stöver of Umlaut Energy dated 3 August 2023, with Exhibits UM-0032 through UM-0070; the Second Expert Report of Mr. Richard Slark of Alvarez & Marsal dated 4 August 2023 ("**Slark Second Expert Report**"), with Exhibits RS-0075 through RS-0087; the Second Expert Report of Prof. Dr. Thomas Schomerus, Prof. Dr. Jelena Bäumler and Prof. Dr. Jörg Terhechte dated 4 August 2023, with Exhibits SBT-0190 through SBT-0245; the Second Expert Report of Mr. Alexander Demuth of Secretariat Advisors dated 4 August 2023, with Exhibits SE-0093 through SE-0152; Exhibits R-0049 through R-0092; and Legal Authorities RL-0275 through RL-0328.

67. By separate letters of 7 August 2023, each Party informed the Tribunal of the witnesses and experts that it wished to examine during the hearing. In its letter, the Respondent called

the Claimants' witness, Mr. Cameron Smith, with the request that the Claimants submit a "*proper medical certificate*" concerning his inability to appear and testify as a witness at the hearing; the Respondent also upheld its request that, if the Claimants did not present Mr. Cameron Smith for cross-examination, his Witness Statement must be disregarded by the Tribunal and struck from the record (see above paragraphs 56–57). In their letter, the Claimants stated that Mr. Cameron Smith remained "*unable to testify at the final hearing*" and they offered to provide an updated medical certificate as confirmation.

68. On 10 August 2023, the Respondent requested that the Tribunal's decision concerning public access to the hearing be issued as a Procedural Order, which would then be published on the ICSID website in accordance with the publication provisions of PO1.

69. Also on 10 August 2023, the Tribunal invited the Claimants to provide an update on Mr. Cameron Smith's health status by 14 August 2023; the Claimants did so, stating that Mr. Smith's health "*remains the same as in the Claimants' letters of 5 May 2023 and 7 August 2023. He* […] *remains unable to testify at the final hearing, whether in person or remotely*". The Claimants stated that they would provide an updated medical certificate as soon as it was available. Finally, the Claimants argued that Mr. Cameron Smith's evidence "*has important corroborative value and sufficient weight should be accorded to it as a result*".

70. Later on 14 August 2023, the Claimants wrote to the Tribunal concerning the Witness Statements of Dr. Guido Wustlich, Mr. Thorsten Falk and Mr. Dirk Wendel submitted with the Respondent's Rejoinder (the "**New Witness Evidence**"), asserting that this evidence "*was submitted belatedly with the Rejoinder in circumstances where it could and should have been submitted with the Respondent's Counter-Memorial*". The Claimants requested that the Tribunal order: (i) that "*the New Witness Evidence shall not form part of the record in the Arbitration*", and (ii) that the Respondent "*re-submit its Rejoinder without reference to the New Witness Evidence by no later than 31 August 2023*" (the "**New Evidence Application**"). Upon invitation from the Tribunal, by letter of 15 August 2023, the Respondent provided brief observations on the New Evidence Application and argued that it should be rejected by the Tribunal.

71. On 16 August 2023, the Tribunal held a pre-hearing organizational conference with the Parties by video conference ("**PHC**"). During the PHC, the Parties, *inter alia*, made further oral submissions concerning the New Evidence Application.

72. On 17 August 2023, the Tribunal issued Procedural Order No. 9 ("**PO9**") concerning the organization of the upcoming hearing. Further to the Respondent's 10 August request, Section (II)K(1) of PO9 indicates that the hearing would be closed to the public (see above paragraphs 65 and 68).

73. Also in PO9, the Tribunal dismissed the New Evidence Application, with reasoning to follow in a separate Order; the Tribunal invited the Claimants to introduce new evidence that is "*strictly responsive*" to the New Witness Evidence by 13 September 2023.

74. On 24 August 2023, the Tribunal issued Procedural Order No. 10 ("**PO10**") containing the reasoning for its decision on the New Evidence Application.

75. On 1 September 2023, the Claimants requested leave from the Tribunal to introduce new evidence into the record. Upon invitation from the Tribunal, the Respondent provided observations on the request on 14 September 2023.

76. Also on 1 September 2023, the Claimants provided an updated medical certificate for Mr. Cameron Smith (see above paragraph 69).

77. On 11 September 2023 and further to a request from the Tribunal, the Parties submitted a joint "**Agreed Chronology**" relating to this arbitration.

78. On 13 September 2023, pursuant to the Tribunal's invitation in PO9, the Claimants filed Exhibits C-0304 through C-0310 in response to the New Witness Evidence.

79. On 15 September 2023, the Tribunal informed the Parties that the Claimants' 1 September request to introduce new evidence was granted, "*with the Tribunal's reasoning to follow as part of the Tribunal's eventual ruling in this arbitration*"; the Claimants therefore filed Exhibits C-0311 through C-0337 and EH-0024 on 15 September 2023.

C. SUBSTANTIVE ORAL HEARING

80. A hearing on jurisdiction and the merits was held at the International Centre for Dispute Resolution in London, United Kingdom, from 18 to 28 September 2023 (the "**Hearing**"). The following persons were present at the Hearing:[4]

Tribunal:

Ms. Wendy Miles KC	President
Mr. Antolín Fernández Antuña, FCIArb	Arbitrator
Dr. Charles Poncet, M.C.L.	Arbitrator

ICSID Secretariat:

Mr. Govert Coppens	Secretary of the Tribunal

For the Claimants:

Counsel:

Dr. Markus Burgstaller	Hogan Lovells International LLP
Mr. Scott Macpherson	Hogan Lovells International LLP
Dr. Alexander Koch	Hogan Lovells International LLP
Ms. Iris Sauvagnac[+]	Hogan Lovells International LLP
Ms. Eden Jardine[+]	Hogan Lovells International LLP
Ms. Beth Pedder[+]	Hogan Lovells International LLP
Mr. Aun Hussain[+]	Hogan Lovells International LLP
Ms. Denise Hotham-Kellner	Hogan Lovells International LLP
Ms. Alexandra Damerau	Hogan Lovells International LLP

Parties:

Ms. Mary Quaney[*]	Mainstream Renewable Power Ltd.
Ms. Birgitte Karlsen[+]	Mainstream Renewable Power Ltd.
Mr. Aidan Guinan[+]	Mainstream Renewable Power Ltd.
Mr. Remi Tissa	Mainstream Renewable Power Ltd.
Mr. Radu Bostan[+]	Mainstream Renewable Power Ltd.
Mr. Bernard Casey[+]	Mainstream Renewable Power Ltd.

[4] The "*" symbol denotes a remote participant (i.e., appearing by video conference only) and the "+" symbol denotes a hybrid participant (i.e., appearing in-person and by video conference).

Mr. Jun Yanagisawa*	Mainstream Renewable Power Ltd.

Witnesses:

Dr. Ursula Prall
Mr. Tilman Schwencke

Experts (with technical support):

Prof. Dr. Ekkehard Hofmann+	University of Trier
Mr. Arjen Schampers+	Merkur Offshore GmbH
Mr. Thomas Hellmund+	Independent Consultant
Mr. Richard Caldwell	The Brattle Group
Dr. Serena Hesmondhalgh	The Brattle Group
Ms. Flora Triolo	The Brattle Group
Mr. Rishi Tanna	The Brattle Group
Ms. Claudia Cuchi*	The Brattle Group
Ms. Denisa Mackova*	The Brattle Group
Mr. Christopher Nance*	The Brattle Group

For the Respondent:

Counsel:

Dr. Anke Meier	Noerr PartG mbB
Dr. Barbara Maucher	Noerr PartG mbB
Mr. Christof Federwisch	Noerr PartG mbB
Ms. Lucie Gerhardt	Noerr PartG mbB
Dr. Kathrin Nordmeier	Noerr PartG mbB
Ms. Judith Fuchs	Noerr PartG mbB
Mr. Philip Müller	Noerr PartG mbB
Mr. Georg Zimmermann	Noerr PartG mbB
Dr. Frederike Dalitz*	Noerr PartG mbB

[redacted]

Parties:

Ms. Annette Tiemann	Federal Ministry for Economic Affairs and Energy
Mr. Thomas Klippstein	Federal Ministry for Economic Affairs and Energy

Ms. Rebecca Leinen	Federal Ministry for Economic Affairs and Energy
[redacted]	Federal Ministry for Economic Affairs and Energy
[redacted]	Federal Ministry for Economic Affairs and Energy
[redacted]	Federal Ministry for Economic Affairs and Energy
[redacted]	Federal Ministry for Economic Affairs and Energy
[redacted]	Federal Ministry for Economic Affairs and Energy
Mr. Tim Drunkenmölle*	Federal Ministry for Economic Affairs and Energy
[redacted]	Federal Ministry for Economic Affairs and Energy
[redacted]	Federal Ministry for Economic Affairs and Energy
[redacted]	Federal Ministry for Economic Affairs and Energy
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[redacted]	Federal Ministry for Economic Affairs and Energy
[redacted]	Ministry of Finance
[redacted]	Ministry of Finance
[redacted]	Federal Foreign Office, Embassy London
[redacted]	Federal Foreign Office, Embassy London
[redacted]	Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection
[redacted]	Federal Chancellery
[redacted]	Federal Chancellery

Witnesses:

Dr. Guido Wustlich	Federal Ministry for Economic Affairs and Energy
Mr. Thorsten Falk	Federal Ministry for Economic Affairs and Energy
Mr. Dirk Wendel	Federal Central Tax Office
Dr. Nico Nolte	Federal Maritime and Hydrographic Agency
Ms. Martina Nemitz	Federal Maritime and Hydrographic Agency

Experts (with technical support):

Mr. Alexander Demuth	Secretariat International
Mr. Christian Gruschewitz	Secretariat International
Mr. Daniel Bäumler	Secretariat International
Mr. Richard Slark	Alvarez & Marsal
Ms. Lucia Yau	Alvarez & Marsal
Ms. Maja Dobrowolska	Alvarez & Marsal
Ms. Xeumin Jia	Alvarez & Marsal

Mr. Petja Stöver	Umlaut
Mr. Till Neupert	Umlaut
Mr. Rames Reese	Umlaut
Prof. Dr. Thomas Schomerus	Leuphana University Lüneburg
Prof. Dr. Jörg Terhechte	Leuphana University Lüneburg
Prof. Dr. Jelena Bäumler	Leuphana University Lüneburg

Court Reporter:

Mr. Trevor McGowan	The Court Reporter Ltd

Interpreters:

Ms. Barbara Bethaeusser-Conte	English-German Interpreter
Ms. Silke Schoenbuchner	English-German Interpreter
Ms. Barbara Weller	English-German Interpreter

Technical Support:

Mr. Dino Pierdica	IDRC Zoom Operator

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

On behalf of the Claimants:

Witnesses:

Dr. Ursula Prall
Mr. Tilman Schwencke

Experts:

Prof. Dr. Ekkehard Hofmann	University of Trier
Mr. Thomas Hellmund	Independent Consultant
Mr. Arjen Schampers	Merkur Offshore GmbH
Mr. Richard Caldwell	The Brattle Group
Dr. Serena Hesmondhalgh	The Brattle Group

On behalf of the Respondent:

Witnesses:

Dr. Nico Nolte	Federal Maritime and Hydrographic Agency
Ms. Martina Nemitz	Federal Maritime and Hydrographic Agency
Dr. Guido Wustlich	Federal Ministry for Economic Affairs and Energy
Mr. Thorsten Falk	Federal Ministry for Economic Affairs and Energy
Mr. Dirk Wendel	Federal Central Tax Office

Experts:

Prof. Dr. Thomas Schomerus	Leuphana University Lüneburg
Prof. Dr. Jelena Bäumler	Leuphana University Lüneburg
Prof. Dr. Jörg Terhechte	Leuphana University Lüneburg
Mr. Petja Stöver	Umlaut
Mr. Till Neupert	Umlaut
Mr. Richard Slark	Alvarez & Marsal
Mr. Alexander Demuth	Secretariat International

D. POST-HEARING STEPS

82. As noted at paragraph 79 above, on 15 September 2023, the Tribunal informed the Parties that the 13 new documents that the Claimants had requested be introduced in their application of 1 September 2023 would be allowed onto the record, with the Tribunal's reasoning to follow as part of the Award. Those reasons are as follows:

a. in PO9, paragraph 48, the Tribunal had accepted the existence of special circumstances for any new documents that were strictly responsive evidence to the Respondent's three new witness statements, but none of the 13 new documents was within that category;

b. PO1, paragraph 16.4, permits the admission out of time of new documents in the event of "*special circumstances based on a reasoned request*", having provided a reasonable opportunity for the other side to respond;

c. the PO1, paragraphs 16.4.1 and 16.4.2 requirements for the Claimants' full application and the Respondent's opportunity to respond were complied with;

d. two of the 13 new documents satisfied the special circumstances requirement because both post-dated the last filing, namely:

   i. declarations of acceptance by Germany regarding the transfer of rights for "*reusable data*" for the Projects ("**Declarations of Acceptance**"); and

   ii. documents relating to the recent auctions held over sites overlapping with the Project sites ("**Auction Documents**");

e. three of the 13 new documents in the form of native files, legal authorities and translations, satisfied the special circumstances requirement because these related to documents that were already part of the evidential record and, in the Tribunal's view, potentially would assist it to determine the dispute between the Parties, namely:

   i. native version of **Exhibit SE-0117**, in order that its metadata may be reviewed in addition to screenshots of that metadata ("**Native SE-0117**");

   ii. additional legal authorities arising out of the Respondent's submissions in the Rejoinder on the intra-EU Objection ("**Intra-EU Authorities**");

   iii. additional English translations of partially translated documents filed with the Parties' submissions;

f. at least one of the 13 new documents appeared already to be in the evidential record, namely:

i. minutes of a meeting held at the Federal Maritime and Hydrographic Agency ("*Bundesamt für Seeschifffahrt und Hydrographie*" or "**BSH**"), the agency responsible for the approval procedure/consenting process for construction and operation of offshore wind farms on 2 November 2009 ("**BSH Minutes**"); and

g. the remaining seven of the 13 new documents did not post-date the last filing and were not in the same 'pragmatic' usefulness category of native files, legal authorities and translations, but nevertheless satisfied the special circumstances requirement because they: (i) directly responded to a point or challenge raised in the Rejoinder, (ii) potentially may be relevant to the facts in issue in the dispute (as crystalised following the Rejoinder), (iii) potentially had value to the Tribunal in its determination, (iv) were not claimed to cause prejudice by their late inclusion, (v) were submitted in good time following the Rejoinder and prior to the Hearing, (vi) were limited in number and length, and (vii) at least some were already available to the Respondent, namely:

i. presentation delivered by Dr. Nico Nolte dated 29 May 2008 ("**Nolte Presentation**");

ii. email from Mr. Tilman Schwencke to Ms. Martina Nemitz and [redacted] dated 6 March 2013 ("**Schwencke Email**");

iii. email from [redacted] to Mr. Tilman Schwencke dated 6 June 2010 ("[redacted] **Email**");

iv. permit applications for Horizont II and Horizont III as amended on 28 August 2009 and submitted on 22 December 2009 ("**Permit Applications**");

v. BSH Offshore Flyer dated 2018 ("**BSH Flyer**");

vi. four screenshots of Mainstream's website accrediting Mainstream's experience in developing offshore wind farms beyond consent, including

two screenshots of Mainstream's webpages mentioned in footnotes 224 and 225 of the Schampers/Hellmund Expert Report; and

vii. press release by Mainstream dated 18 December 2010 relating to the Shady Oaks Wind Farm ("**Shady Oaks Press Release**").

83. Upon invitation from the Tribunal made during the Hearing, on 6 October 2023, the Respondent provided a "*list of the intra-EU issues regarding jurisdiction on which it requests a ruling from the Tribunal*".

84. Also during the Hearing, the Tribunal had directed that the Parties should ensure that the "*entirety of prior awards are included on the record*". In accordance with these directions, on 9 October 2023, the Claimants filed Exhibits C-0338 and C-0339 (updated English translations as agreed by the Parties) and on 10 October 2023, the Claimants filed Legal Authorities CL-0309 through CL-0364; and on 24 November 2023, the Respondent filed Legal Authorities RL-0329 through RL-0375.

85. On 20 October 2023, the Tribunal subsequently directed the Parties to provide further details and explanations regarding certain quantum calculations, together with their post-Hearing briefs, by 24 November 2023.

86. On 21 November 2023, the Claimants requested leave from the Tribunal to file additional legal authorities into the record with their post-Hearing brief. Upon invitation from the Tribunal, the Respondent submitted its observations on the request on 1 December 2023. On 4 December 2024, the Tribunal communicated to the Parties its decision to grant the Claimants' request, and confirmed that it would consider any request from the Respondent to file a responsive authority should it wish to do so.

87. On 24 November 2023, the Parties filed simultaneous post-Hearing briefs (the "**Claimants' Post-Hearing Brief**" and the "**Respondent's Post-Hearing Brief**); the Claimants also filed Exhibits C-0340 through C-0359, and the Respondent filed Legal Authorities RL-0376 through RL-0378. Also on 24 November 2023, the Parties provided their further explanations on quantum pursuant to the Tribunal's 20 October 2023 directions.

88. Following exchanges between the Parties, the transcript of the Hearing was finalised on 2 December 2023.

89. On 15 December 2023, the Parties filed simultaneous reply post-Hearing briefs (the "**Claimants' Reply Post-Hearing Brief**" and the "**Respondent's Reply Post-Hearing Brief**"); the Claimants also filed Exhibit C-0360 and Legal Authorities CL-0365 through CL-0367.

90. Following a request from the Respondent and the subsequent agreement of the Claimants, on 18 December 2023, the Tribunal extended the deadline for the Parties to file their costs submissions to 16 February 2024.

91. On 16 February 2024, the Parties filed simultaneous costs submissions (the "**Claimants' Costs Submission**" and the "**Respondent's Costs Submission**"); the Claimants also filed Exhibits C-0361 through C-0407, and the Respondent filed Legal Authority RL-0379.

92. On 21 February 2024, the Parties informed the Tribunal of their agreement to submit reply costs submissions by 7 March 2024; the Tribunal confirmed the Parties' agreement on 22 February 2024.

93. On 7 March 2024, the Parties filed simultaneous reply costs submissions (the "**Claimants' Reply Costs Submission**" and the "**Respondent's Reply Costs Submission**"); the Claimants also filed Exhibits C-0408 through C-0411 and Legal Authorities CL-0368 through CL-0372.

E. POST-HEARING ADDITIONAL DOCUMENTS

94. On 4 July 2024, the Claimants requested leave from the Tribunal pursuant to PO1 to file additional documents into the record, "*on account of the special circumstances that exist following the hearing and post-hearing submissions in this Arbitration*". Upon invitation from the Tribunal, the Respondent submitted its observations on the request on 10 July 2024.

95. On 30 September 2024, the Respondent requested leave from the Tribunal pursuant to PO1 to file into the record two recent decisions of the German Federal Constitutional Court

(*Bundesverfassungsgericht*). Upon invitation from the Tribunal, the Claimants submitted their observations on the request on 11 October 2024, noting that they did not oppose the request so long as they be provided the opportunity to comment on those documents. The Claimants also reminded the Tribunal of their 4 July 2024 request to introduce new documents which had not yet been determined.

96. On 30 October 2024, the Claimants wrote to the Tribunal, *inter alia*, concerning compensation received by certain Claimants from a sale of assets, reducing the total amount claimed. Upon invitation from the Tribunal, the Respondent provided observations on the Claimants' updated damages calculation on 11 November 2024.

97. On 13 November 2024, the Tribunal informed the Parties that it granted the Claimants' 4 July 2024 application to introduce new documents and granted the Respondent's 30 September 2024 application to introduce new documents. The Tribunal also requested that the Parties submit into the record three prior awards dealing with the intra-EU jurisdictional objection. The Tribunal ordered the Parties to submit all new documents by 14 November 2024 and make any observations thereon by 28 November 2024.

98. Pursuant to the Tribunal's directions of the previous date, on 14 November 2024, the Claimants filed Exhibits C-0412 through C-0414 and Legal Authority C-0373, and the Respondent filed Legal Authorities RL-0380 through RL-0386. The Parties subsequently filed their observations on the new documents on 28 November 2024.

99. Subsequently on 28 November 2024, the Claimants wrote to the Tribunal stating that the Respondent "*ha*[d] *made observations on its own documents added to the record*" and requested leave from the Tribunal to submit observations on Exhibits C-0412 through C-0414. The Tribunal granted the Claimants' request on 3 December 2024, and the Claimants made their observations on 4 December 2024.

(1) The Strabag v. Germany *Award of 18 December 2024*

100. On 13 March 2025, the Claimants further requested that the Tribunal order the Respondent to produce the award rendered on 18 December 2024 in the case *Strabag SE, Erste Nordsee-Offshore Holding GmbH and Zweite Nordsee-Offshore Holding GmbH v. Federal*

Republic of Germany (ICSID Case No. ARB/19/29) (the "***Strabag* Award**") pursuant to PO1 and ICSID Arbitration Rule 34(2)(a). Upon invitation from the Tribunal, on 4 April 2025, the Respondent commented on the Claimants' request and argued that it should be denied.

101. On 7 April 2025, the Claimants requested leave from the Tribunal to add the *Strabag* Award into the record in light of the fact that the Award had entered the public domain on 4 April 2025. Upon invitation from the Tribunal, on 25 April 2025, the Respondent commented on the Claimants' request and argued that it should be denied.

102. On 5 May 2025, the Tribunal informed the Parties that it granted the Claimants' request to submit the *Strabag* Award into the record and invited the Claimants to circulate the Award at their earliest convenience. The Tribunal also requested that the Respondent introduce into the record at its earliest convenience the accompanying decision on rectification issued on 30 April 2025 in *Strabag SE, Erste Nordsee-Offshore Holding GmbH and Zweite Nordsee-Offshore Holding GmbH v. Federal Republic of Germany* (ICSID Case No. ARB/19/29) (the "***Strabag* Rectification Decision**"). In its message, the Tribunal stated that it did "*not wish to receive written observations on these rulings*".

103. Subsequently on 5 May 2025, the Claimants submitted the *Strabag* Award into the record as Legal Authority CL-0374.

104. On 9 May 2025, the Respondent filed what it termed a "*protest*" against the Tribunal's decision of 5 May 2025. Therein, the Respondent, *inter alia*, requested the "*opportunity to comment on the* [Strabag] *Award in writing*". The Respondent also stated that as the *Strabag* Rectification Decision had not entered the public domain, the Decision "*remains confidential*" and the Respondent is "*not in a position to submit this Decision as a legal exhibit in these proceedings*". On 11 May 2025, the Claimants commented on the Respondent's request stating, *inter alia*, that they did not object to the Respondent being granted leave to comment on the *Strabag* Award so long as the Claimants were granted the opportunity to respond.

105. On 13 May 2025, the Tribunal directed the Parties to (i) submit their respective observations on the *Strabag* Award by 27 May 2025; and (ii) submit updated statements of costs by 17 June 2025.

106. On 27 May 2025, each Party filed its observations on the *Strabag* Award (the "**Claimants' Observations on *Strabag***" and the "**Respondent's Observations on *Strabag***").

107. On 5 June 2025, the Secretary of the Tribunal transmitted to the Parties a further disclosure by Dr. Poncet.

108. On 17 June 2025, each Party filed its updated costs submission (the "**Claimants' Update on Costs**" and the "**Respondent's Update on Costs**"). In its cover email, the Respondent requested leave to comment on the Claimants' Update. On 23 June 2025, the Tribunal granted each Party leave to respond to the other's Update on Costs by 30 June 2025.

109. On 25 June 2025, the Respondent submitted a list of questions to Dr. Poncet in light of his 5 June further disclosure. On 30 June 2025, Dr. Poncet made an additional disclosure to the Parties.

110. On 30 June 2025, each Party commented on the other's Update on Costs (the "**Claimants' Reply Update on Costs**" and the "**Respondent's Reply Update on Costs**").

(2) The International Court of Justice Advisory Opinion of 23 July 2025

111. On 31 July 2025, the Claimants requested leave from the Tribunal to submit into the record the International Court of Justice Advisory Opinion of 23 July 2025 on the Obligations of States in Respect of Climate Change (the "**ICJ Advisory Opinion**").

112. Upon invitation from the Tribunal, on 6 August 2025, the Respondent commented on the Claimants' request, stating its objection thereto on the alleged bases that:

a. the ICJ Advisory Opinion "*is of no relevance to these arbitration proceedings*";

b. the Claimants' case relies on an alleged violation of the ECT, not any violation of the UNFCCC "*on which the ICJ rendered its ICJ Opinion*"; and

c. the Claimants "*(correctly) do and did not claim damages on the basis of an alleged violation of the ECT's preamble …* [nor] *on the basis that, allegedly, Respondent would not fulfill its obligations under the Climate Change Convention*", and "[h]*ence, the ICJ Opinion does not contribute anything to the solution of the current dispute and should not be added to the record*".

113. On 2 September 2025, the Tribunal rejected the Respondent's objections and admitted the ICJ Advisory Opinion into the record. Subsequently, later that same date, the Claimants filed the Opinion as Legal Authority CL-0375.

(3) The German Federal Constitutional Court Decision of 18 September 2025

114. On 24 September 2025, the Respondent requested leave from the Tribunal to submit into the record a further decision of the German Federal Constitutional Court dated 18 September 2025, in response to Claimants' constitutional complaint (*Case No. 2 BvR* 1277/23) regarding the decision by the German Federal Court of Justice of 27 July 2023 about the inadmissibility of intra-EU arbitration (the "**2025 German Federal Constitutional Court Decision**").

115. On 1 October 2025, the Claimants confirmed that they did not oppose admission of the Decision on the condition that they were granted leave to file observations thereon.

116. On 2 October 2025, the Tribunal admitted the Decision into the record and invited each Party to submit its observations by 10 October 2025; on that date, both Parties submitted observations and the Respondent filed the Decision as Legal Authority RL-0387.

117. The proceeding was closed on 6 May 2026.

III. FACTUAL BACKGROUND

118. The facts set out below are largely uncontentious. They outline the development of the German offshore wind farm regulatory framework from 1997, the Claimants' 2008 Consent Applications thereunder, and further developments that followed.

A. REGULATORY FRAMEWORK AND EVENTS LEADING UP TO THE 2008 APPLICATIONS

119. Although the Parties disagree as to the maturity and certainty of the German renewable energy framework prior to 2008, in particular for offshore wind farms, a number of important regulatory elements were in place in the decade leading up to the commencement of the Claimants' activity in Germany. The renewable energy regulatory framework, where relevant, governed: (i) site control; (ii) permitting; (iii) offtake (or revenue); and (iv) grid connection. The laws falling within the relevant German offshore wind regulatory framework were introduced from 1997 to 2008.

120. In the period prior to the 2002 Offshore Wind Strategy, the following German regulatory framework governed offshore wind farms:

a. as to site control and permitting, on 23 January 1997, the first German Offshore Installations Ordinance (the *Seeanlagenverordnung* or "**1997 SeeAnlV**") was enacted and it entered into force on 1 February 1997; it was designed to streamline and improve the regulatory approval and planning process for offshore wind farm development in the exclusive economic zone ("**EEZ**"), pursuant to which:[5]

i. developers were required to obtain approval from the BSH to build and operate offshore wind energy projects;

ii. the BSH administrative procedure required developers to file an initial application, participate in public participation, conduct a public stakeholder conference and participate in a public hearing; and

[5] **SBT-0013**, Ordinance on Installations Seaward of the Boundary of the German Territorial Sea (*Seeanlagenverordnung – SeeAnlV*) 1 February 1997, as amended ("**1997 SeeAnlV**").

iii. the BSH would approve an application once each step was successfully completed, and all administrative requirements complied with, granting an exclusive right to develop a particular area in the EEZ;

b. as to grid connection, on 29 April 1998, the German Energy Industry Act (the *Energiewirtschaftsgesetz* or "**1998 EnWG**") entered into force; it was designed to reform and liberalize German electricity (and gas) markets to align with EU directives and complementing the 1997 SeeAnlV by regulating grid connection issues and general supply for offshore projects; and

c. as to offtake revenue, on 29 March 2000, the Renewable Energy Sources Act (the "**2000 EEG**") entered into force, which provided for the following for renewable energy generated in Germany at that time:[6]

i. feed-in tariff ("**FiT**") for renewables producers for 20 years from date of commissioning the renewable energy installation;

ii. feed-in premium ("**FiP**"), paid for every kWh from wind energy sold on the electricity market; and

iii. transmission system operators ("**TSOs**") requirement to "*purchase all electricity offered from* [offshore wind farms] *as a priority*".[7]

121. On 3 February 2001, the European Commission Official Journal (2001/C 37/03) published Community guidelines on State aid for environmental protection.[8]

122. On 13 March 2001, the Court of Justice of the European Union ("**CJEU**") issued the judgment in the *PreussenElektra* case, which ruled that the predecessor to the EEG (the

[6] **C-0076**, Renewable Energy Sources Act (*Erneuerbare Energien-Gesetz*), 29 March 2000 ("**2000 EEG**").

[7] **C-0076**, 2000 EEG, Sec. 3(1).

[8] **SBT-0233**, Community guidelines on State aid for environmental protection (2001/C 37/03), Official Journal of the European Communities (C 37/3), 3 February 2001.

Stromeinspeisungsgesetz 1998 (Electricity Feed-in Act 1998), which aimed to promote electricity generation from renewable sources) was not to be categorised as State aid.[9]

123. In September 2001, the EU issued Directive 2001/77/EC on the promotion of electricity produced from renewable sources.

124. In January 2002, the Federal Government published its 2002 Offshore Wind Strategy, which was a political strategy setting targets for offshore wind expansion and led to the enactment of various statutory or regulatory instruments applicable to offshore wind in Germany.[10]

125. Following the publication of the 2002 Offshore Wind Strategy, the following events occurred:

a. in April 2002, the Federal Government published its further "*Sustainability Strategy*";[11]

b. on 4 April 2002, the SeeAnlV first amendment entered into force (the "**2002 SeeAnlV**"), expanding on special suitability areas for offshore wind farms and introducing (among other provisions) Section 3a, which empowered the Federal Ministry for Transport, Building and Housing to designate special suitability areas for offshore wind farms in the German EEZ;[12]

c. on 18 December 2002, the BSH approved the Butendiek offshore wind farm, developed by wpd AG (a German developer);[13] and

[9] **RL-0310**, *PreussenElektra AG v. Schleswag AG*, CJEU Case C-379/98, Judgment, 13 March 2001.

[10] **R-0009**, Federal Government, Strategy for using Offshore Wind Energy (*Strategie der Bundesregierung zur Windenergienutzung auf See*), January 2002 ("**2002 Offshore Wind Strategy**").

[11] **EH-0011**, Federal Government, Perspectives for Germany: Our Strategy for Sustainable Development ("**Sustainability Strategy**"), April 2002.

[12] **RL-0115**, Amendment to 1997 SeeAnlV, 4 April 2002 ("**2002 SeeAnlV**").

[13] **R-0013**, Approval for OWF Butendiek, 18 December 2002.

d. on 30 March 2004, the German Government responded to questions raised in the German Federal Parliament ("**Bundestag**") regarding the 2002 Offshore Wind Strategy.[14]

126. On 24 June 2004, the Federal Spatial Planning Act (the *Raumordnungsgesetz* or "**ROG**"), first enacted in 1965 as the central legal framework governing the organisation of land and resources in Germany, was amended to include:

a. Section 18a (now Section 17), extending scope to Germany's EEZ in the North and Baltic Seas, authorising the Federal Government to establish maritime spatial plans and requiring those plans to balance economic and scientific uses with the safety of maritime traffic and the protection of the marine environment; and

b. Section 7(4) "*General Provisions on Spatial Development Plans*", which included a power for BSH to designate areas "*which are designated for specific, spatially significant functions or uses and exclude other spatially significant uses in this area insofar as these are not compatible with the priority functions, uses or objectives of spatial planning (priority areas)*", and provided that "*special weight is to be given to certain spatially significant functions or uses when weighing them against competing spatially significant uses (reserved areas)*".[15]

127. On 21 July 2004, the 2004 Renewable Energy Sources Act (the "**2004 EEG**") replaced the 2000 EEG.[16] The 2004 EEG:

a. introduced targets for German renewable electricity supply of 12.5% by 2010 and 20% by 2020;[17]

b. extended the higher initial feed-in tariff remuneration period to 12 years and confirmed minimum remuneration to be paid for 20 years from the start of operations;

[14] **C-0208**, Bundestag Document 15/2809, 30 March 2004.
[15] **RL-0117**, Federal Spatial Planning Act (*Raumordnungsgesetz*), 20 July 2004.
[16] **C-0077 / SBT-0052**, Amendment to 2000 EEG, 21 July 2004 ("**2004 EEG**").
[17] **C-0077 / SBT-0052**, 2004 EEG, Section 1(2).

c. amended the tariff degression start date provisions; and

d. for offshore wind farms, increased the initial higher feed-in tariff period and postponed the tariff degression start date for projects located further from the coastline.[18]

128. Following the 2004 EEG, the German government and agencies took several further steps relating to or affecting offshore wind farm development in Germany, including:

a. in 2005, the German Energy Agency ("*Deutsche Energie-Agentur*" or "**DENA**") published the first grid study on onshore and offshore grid integration to 2020;[19]

b. on 22 November 2005, Dr. Angela Merkel of the Christian Democrats ("**CDU**") was elected Chancellor, governing in coalition government with the Social Democrats ("**SPD**");

c. on 16 December 2005, BSH published the designation of first suitability areas for offshore wind energy in the German EEZ pursuant to the 2002 SeeAnlV Section 3a;[20]

d. on 22 March 2006, the then-Minister for Environment, Nature Conservation and Nuclear Safety (responsible for offshore wind), Minister Sigmar Gabriel, characterised Germany's renewable energy policy in the press as being "*ambitious*" and "*sensibly designed*";[21] and

e. on 25 October 2006, the Bundestag produced Document 16/3158 on the German grid connection regime.[22]

[18] **C-0077 / SBT-0052**, 2004 EEG, Section 10(3).

[19] *See* **R-0011**, DENA, Grid Study II – Integration of Renewable Energy Sources in the German Power Supply System from 2015–2020 with an Outlook to 2025, November 2010, p. 2.

[20] **SBT-0097**, BSH, Designation of the Special Suitability Zone for Wind Turbines in Nördlich Borkum, 16 December 2005.

[21] **C-0044**, BMUV, Press Release, "*Renewable energies create jobs*", 22 March 2006.

[22] **C-0218 / RL-0126**, Bundestag Document 16/3158, 25 October 2006.

129. Two further legislative or regulatory changes were enacted at the end of 2006 and a third in June 2007 as follows:

a. on 31 October 2006, the 2006 Offshore Installations Ordinance (the "**2006 SeeAnlV**") entered into force, which established at Section 3 the legal requirements for approval (or consent) for an offshore wind farm (the "**Permit Procedure**");[23]

b. on 17 December 2006, the EnWG was amended to add Section 17(2a) (the "**2006 EnWG**"), which obliged TSOs to construct and operate grid connection lines from the offshore substation to the technically and economically most favourable connection point of the next transmission or distribution grid on land, and expressly applied to offshore wind farms under construction by 31 December 2011;[24] and

c. on 12 June 2007, the BSH published the "*Standard Konstruktive Ausführung von Offshore Windenergieanlagen*" (the "**BSH 2007 Construction Standard**").[25]

130. Following those late 2006 and mid-2007 amendments, the German government and agencies took several further steps relating to or affecting offshore wind farm development in Germany, including:

a. in January 2007, the Federal Agency for Nature Conservation (together with the German Offshore Wind Energy Foundation) issued a publication entitled "*Offshore wind power deployment in Germany*" ("**BMU Paper**") which:[26]

i. "*described section 17 (2a) as a 'substantial improvement'*";

ii. "*revealed that Germany exaggerated the extent to which the practical problems with the grid connection regime were known prior to the BNetzA Position Paper*";

[23] **C-0073**, Further Amendment to 1997 SeeAnlV, 31 October 2006 ("**2006 SeeAnlV**").

[24] **RL-0125**, Energy Industry Act (*Energiewirtschaftsgesetz*) as amended, 17 December 2006 ("**2006 EnWG**").

[25] **MK-0026**, BSH, "*Standard: Structural design of offshore wind turbines*", 12 June 2007, p. 36, Table 2.

[26] Cl. PHB, paras. 28(ii)(b)(3)-(4); **C-0306**, German Offshore Wind Energy Foundation and the Federal Agency for Nature Conservation, *Offshore wind power deployment in Germany*, January 2007 ("**BMU Paper**"), pp. 6, 11.

iii. "*posited that only a 'moderate upgrade' of the network would be required*"; and

iv. "*sought to incentivise investors with this messaging*";

b. on 18 September 2007, Minister Gabriel spoke of the German Government's plans to "*strengthen incentives*" for offshore wind in order that Germany could achieve its renewable energy targets[27] (by 2007, Germany was ranked by Ernst & Young as best "*near term*" and second best "*long term*" worldwide for offshore wind);[28]

c. on 10 October 2007, BSH published an Explanatory Memorandum to new draft provisions for the 2004 EEG, which specified that the legal, regulatory and political framework was to take into account "*the protected confidence of investors*", among other things;[29]

d. on 17 October 2007, the BSH extended the deadline for the start date for the Butendiek offshore wind farm construction to 31 December 2011;[30]

e. on 9 November 2007, the 2007 EEG Progress Report was published,[31] and regular publicly available EEG Progress Reports notified further changes;[32]

f. in December 2007, the German Government articulated its "*Integrated Energy and Climate Programme*",[33] which stated that:

i. it had "*elaborated a historic energy and climate programme which is without precedent both in the history of German climate policy and*

[27] **C-0046**, BMUV, Press Release, "*Federal Environment Minister Sigmar Gabriel opens the HUSUMwind wind energy fair*", 18 September 2007.

[28] **C-0045**, Mainstream, "*Business Plan for Offshore Wind in Germany*", May 2008 ("**Business Plan**"), p. 1.

[29] **C-0080**, BSH, "*Explanatory Memorandum on the individual provisions regarding Article 1 of the Renewable Energy Sources Act*", 10 October 2007, p. 78.

[30] **R-0014**, Letter from BSH to OSB Offshore-Bürger-Windpark Butendiek, 17 October 2007.

[31] **SBT-0019**, Bundestag Document 16/7119, 9 November 2007.

[32] SBT Expert Report, paras. 45, 58.

[33] **C-0081**, BMUV, "*The Integrated Energy and Climate Programme of the German Government*", December 2007.

internationally. No other comparable industrialised country has an equally ambitious and concrete programme!";

ii. it sought to give the energy industry "*reliable and competitive framework conditions for their investments*" through legislative proposals to define targets until 2020; and

iii. "*supporting these with concrete measures*" would "*promote*[ ] *Germany as an industrial and investment location*";

g. on 4 January 2008, the Federal Government published an Explanatory Memorandum to a draft 2009 EEG;[34] and

h. on 6 March 2008, the Federal Network Agency ("*Bundesnetzagentur*" or "**BNetzA**") presented on the grid connection regime.[35]

131. Against the developing regulatory and policy environment, as it existed by March 2008, the First Claimant (having been incorporated in Ireland on 8 February 2008),[36] published its "*Business Plan for Offshore Wind in Germany*" in May 2008.[37] Mainstream's executives took part in a series of fact-finding meetings in Hamburg and Husum, meeting various German offshore developers and advisors regarding the Mainstream Projects.[38]

132. On 6 June 2008, the Bundestag adopted the extension of the application of Section 17(2a) of the EnWG to projects that started construction by 31 December 2015 (the "**2008 EnWG Extension**").[39]

133. In summary therefore, by late June/early July 2008, the German renewable energy framework provided for:

[34] **EH-0024**, Federal Government, "*Draft of a law to revise the law on renewable energies in the electricity sector and to amend related provisions*", 4 January 2008 ("**Explanatory Memorandum to 2009 Draft EEG**").

[35] **C-0217**, BNetzA, "*Grid Connection OWP*", 6 March 2009.

[36] **C-0002**, Extract from the Irish Companies Registration Office for Mainstream Renewable Power Limited, 20 April 2021.

[37] **C-0045**, Business Plan.

[38] Schwencke Witness Statement, para. 35.

[39] **C-0215**, Bundestag Plenary Minutes 16/167, 6 June 2008; **C-0216**, Bundestag Document 16/9477, 4 June 2008.

a. site control and offshore permitting by application of the 2004 Federal Spatial Planning Act (ROG) and 2008 SeeAnlV;

b. revenue regime (offtake) by application of the 2004 EEG, providing specifically for offshore wind farms;

c. grid access by application of the 2006 EnWG, including the 2008 EnWG Extension;[40] and

d. building permitting by application of the BSH 2007 Construction Standard.

B. THE CLAIMANTS' JUNE/JULY 2008 APPLICATIONS

134. On 27 June 2008, Mainstream Renewable Power (UK) Ltd, a UK subsidiary of the First Claimant, submitted its Consent Application for the Horizont I Project.[41]

135. On 30 June 2008, the Federal Government published the Draft Ordinance on Special Planning in the German Exclusive Economic Zone in the North Sea (*Entwurf der Verordnung über die Raumordnung in der deutschen ausschließlichen Wirtschaftszone in der Nordsee*) ("**Draft Spatial Planning Ordinance**").[42] This included Section 3.5.1, which confirmed priority areas for Offshore Wind Farm development and stated that Offshore Wind Farm "*installations are not permissible outside the designated priority areas*", with some grandfathering for "*[a]lready approved PWFs*".[43]

136. On 9 July 2008, Dr. Ursula Prall, the Claimants' legal counsel, had written to Mr. Tilman Schwencke, Mainstream's German Offshore Project Manager regarding the Draft Spatial Planning Ordinance.[44]

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[40] **RL-0125**, Energy Industry Act (*Energiewirtschaftsgesetz*) as amended, 17 December 2006 ("**2006 EnWG**").

[41] **C-0092**, Application for the Construction and Operation of the Horizont (subsequently renamed Horizont I) Offshore Wind Farm, 27 June 2008 ("**Horizont I Application**").

[42] **RL-0122**, Draft Ordinance on Special Planning in the German Exclusive Economic Zone in the North Sea (*Entwurf der Verordnung über die Raumordnung in der deutschen ausschließlichen Wirtschaftszone in der Nordsee*), 30 June 2008 ("**Draft Spatial Planning Ordinance**").

[43] **RL-0122**, Draft Spatial Planning Ordinance, Sec. 3.5.1.

[44] **C-0153**, Letter from Dr. Ursula Prall to Mr. Tilman Schwencke, 9 July 2008.

137. On 11 July 2008, Mainstream Renewable Power (UK) Ltd submitted two further Consent Applications for Horizont Ost and Horizont West.[45]

C. CHANGES TO THE REGULATORY FRAMEWORK FOLLOWING THE 2008 APPLICATIONS

138. On 26 July 2008, a further amended SeeAnlV (Offshore Installations Ordinance), which had streamlined the regulatory approval process for the development of offshore wind farms, entered into force (the "**2008 SeeAnlV**").[46] The 2008 SeeAnlV included:

a. at Section 3, legal requirements for approval (or consent) for offshore wind farms;

b. new grounds for refusal of approval or consent, including incompatibility with spatial planning as well as other overriding public interests; and

c. at Section 16a, applicability to all projects applied for prior to 26 July 2008 (provided that the public notification of the project pursuant to Section 73(5) of the Administrative Procedure Act, in conjunction with Section 9(1) of the Environmental Impact Assessment Act and Section 2a of the 2008 SeeAnlV, had taken place prior).

139. On 18 August 2008, the Second Claimant was incorporated in Ireland.[47] In September 2008, the First Claimant finalised its Offshore Wind Strategy,[48] and on 4 September 2008, issued a Board Report entitled "*German Offshore, Green field development ('Horizont')*".[49]

140. Further in September 2008, in response to the 30 June 2008 Draft Spatial Planning Ordinance:

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[45] **C-0093**, Application for the Construction and Operation of the Horizont Ost (subsequently renamed Horizont II) Offshore Wind Farm, 11 July 2008 ("**Horizont II Application**"); **C-0094**, Application for the Construction and Operation of the Horizont West (subsequently renamed Horizont III) Offshore Wind Farm, 11 July 2008 ("**Horizont III Application**").

[46] **EH-0003 / RL-0114**, Further Amendment to 1997 SeeAnlV, 26 July 2008 ("**2008 SeeAnlV**").

[47] **C-0003**, Extract from the Irish Companies Registration Office for International Mainstream Renewable Power Limited, 20 April 2021.

[48] **C-0082**, Mainstream Board Report, "*Offshore Wind Strategy*", September 2008.

[49] **C-0096**, Mainstream Board Report, "*German Offshore, Green field development ('Horizont')*", 4 September 2008 ("**September 2008 Mainstream Board Report**").

a. on 12 September 2008, a number of offshore wind industry organisations published an industry position paper;[50]

b. on 15 September 2008, the Government of the Free State of Bremen set out its concerns in correspondence to the Federal Ministry of Transport, Building and Urban Affairs;[51] and

c. on 13 October 2008, the Federal Ministry of Transport, Building and Urban Affairs produced an internal note.[52]

141. On 16 September 2008, the Claimants' Consent Applications were sent to relevant public stakeholders.[53]

142. Subsequently, in the period from late 2008 to early 2009:

a. on 25 October 2008, the 2009 EEG was published (entering into force on 1 January 2009);[54]

b. on 6 January 2009, Mr. Jörg Kuhbier, the then-chairman of the Offshore Wind Energy Forum (*Offshore Forum Windenergie*) and the German Offshore Wind Energy Foundation, wrote to the Federal Ministry for Economic Affairs and Technology regarding grid connection issues under the 2006 EnWG Section 17(2a);[55] and

c. on 2 February 2009, the Bundestag published Document 16/11835, a "*Report on the Development and Future Prospects of the Maritime Industry in Germany*".[56]

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[50] **C-0219**, Offshore Wind Industry Alliance, "*Statement on the Draft Ordinance on Spatial Planning in the German Exclusive Economic Zone*", 12 September 2008 ("**Offshore Wind Industry Alliance 2008 Position Paper**").

[51] **C-0221**, Letter from the Government of the Free State of Bremen to the federal Ministry of Transport, Building and Urban Affairs, 15 September 2008.

[52] **C-0222**, Ministry of Transport, Building and Urban Affairs, Draft Note, 13 October 2008 (discussing the Draft Spatial Planning Ordinance) ("**Ministry of Transport, 2008 Internal Note**").

[53] **C-0001**, Minutes of the Public Hearing for the Applications for Planning Approval for the Projects, 5 March 2013 ("**2013 Stakeholder Conference Minutes**"), p. 1.

[54] **C-0078**, Further Amendment to 2000 EEG, 1 January 2009 ("**2009 EEG**").

[55] **R-0016**, Letter from Mr. Jörg Kuhbier to Federal Ministry for Economic Affairs and Technology, 6 January 2008.

[56] **UP-0002**, Bundestag Document 16/11835, 2 February 2009, p. 20.

143. In early 2009, the Claimants continued to take steps to organise their companies and strategy for German offshore wind. For example:

a. on 12 January 2009, the Third Claimant was incorporated in Ireland;[57]

b. in February/March 2009, the Claimants produced an internal document entitled "*The paper needs to justify compelling reasons for investing this heavily in the early years against with this in mind*",[58] stating that:

> We came late into the process in terms of German offshore. Our site is therefore second to third tier in terms of attractiveness (very far offshore and deep water). We have known this from the beginning, but we should be careful of comparing it to valuations for Butendiek and Gabbard, both tier one sites and therefore far more attractive.

c. in February/March 2009, the Claimants also produced a further Board Report entitled "*German Offshore, Green field development ('Horizont')*";[59] and

d. on 4 March 2009, Dr. Prall wrote further to the Federal Ministry for Economics and Technology regarding grid connections for offshore wind farms.[60]

144. In April 2009, the Federal Ministry for Economic Affairs published the Coordinate Report for the Sixth Maritime Conference in Rostock on 29 and 30 March 2009.[61]

145. On 30 April 2009, the Claimants' Consent Applications Conference (*Antragskonferenz*) took place regarding the approval procedure for the construction and operation of the wind turbines in the EEZ of Germany in the North Sea at BSH Gauss Saal for Horizont, Horizont Ost and Horizont West.[62]

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[57] **C-0005**, Extract from the Irish Companies Registration Office for Mainstream Renewable Power Group Finance Limited, 26 April 2021.

[58] **R-0049**, Mainstream Internal Document, "*The paper needs to justify compelling reasons for investing this heavily in the early years against with this in mind*" (undated).

[59] **C-0098**, Mainstream Board Report, "*German Offshore, Green field development ('Horizont')*", dated February/March 2009 ("**February/March 2009 Mainstream Board Report**").

[60] **R-0060**, Letter from Dr. Ursula Prall to Federal Ministry for Economic Affairs and Technology, 4 March 2009.

[61] **R-0004**, Federal Ministry for Economic Affairs, "*Coordinate Report for the Sixth Maritime Conference in Rostock on 29/30 March 2009*".

[62] **C-0097**, Minutes of the Application Conference held on 30 April 2009, 7 September 2009 ("**Minutes of April 2009 Application Conference**").

146. On 19 May 2009, BSH produced a form letter template to be distributed to "*approval holders, applicants for offshore wind farms as well as approval holders and transmission operator applicants for export power systems of offshore wind farms in the EEZ*", regarding Standard Directive No. 23 ("*condition*[s] *subsequent for the latest date for start of construction*").[63]

147. In June 2009, the Claimants proceeded to take the following further steps:

a. the First Claimant issued a Board Paper entitled, "*German Offshore, Green Field Development ('Horizont')*";[64]

b. on 8 June 2009, the Fifth Claimant was incorporated in Germany;[65] and

c. on 17 June 2009, the Fifth Claimant reached a settlement with competitors surveying sites overlapping with the Project sites, leading to a change in the layout of the Horizont Project sites.[66]

148. On 19 June 2009, a draft 2009 SeeAnlV ("**Draft 2009 SeeAnlV**") was published.[67]

149. Following the publication of the Draft 2009 SeeAnlV, the Claimants proceeded to take the following further steps:

a. on 30 June 2009, Mr. Tilman Schwencke corresponded with the BSH regarding the Draft 2009 SeeAnlV;[68]

b. on 9 July 2009, the Claimants met regarding the future of the Horizont Projects in Dublin;[69]

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[63] **R-0006**, BSH Form Letter Template, May 2009 (regarding the amendment of standard ancillary provision no. 23 and the introduction of milestone requirements).

[64] **C-0090**, Mainstream Board Report, "*German Offshore, Green Field Development ('Horizont')*", June 2009 ("**June 2009 Mainstream Board Report**").

[65] **C-0009**, Extract from the German Commercial Register for Horizont II Renewable GmbH, 15 April 2021.

[66] **C-0089**, Cooperation Agreement between Northern Energy Holding GmbH, Germany Mainstream Renewable Power Developments GmbH and others, 2009; **C-0090**, June 2009 Mainstream Board Report.

[67] **RL-0124**, Proposed Further Amendment to 1997 SeeAnlV, 19 June 2009 ("**Draft 2009 SeeAnlV**").

[68] **R-0035**, Email from Mr. Tilman Schwencke to BSH, 30 June 2009.

[69] **R-0063**, Document presented at meeting on the future of the Horizont Projects, 9 July 2009.

c. on 13 July 2009, Mainstream Renewable Power (UK) Ltd transferred the three Consent Applications to the Fifth Claimant;[70]

d. on 28 July 2009, the First Claimant presented a paper at the Board of Directors meeting regarding the status and the geotechnical campaign of the Horizont Projects;[71]

e. on 30 July 2009, the Offshore Wind Energy Forum (*Offshore Forum Windenergie*), of which the Claimants were members, responded to the consultation on the Draft 2009 SeeAnlV, which related to the Horizont Projects, among others;[72]

f. in July 2009, Fugro Consult GmbH commenced geotechnical surveys of the Horizont Project sites;[73] and

g. on 28 August 2009, the Horizont and Horizont Ost Consent Applications were partially withdrawn and amended as a result of an amendment to the layout of the Project sites (leading also to a change of name of the Projects to Horizont I, Horizont II and Horizont III), and the application for Horizont West was withdrawn in full.[74]

150. On 25 September 2009, the Spatial Planning Ordinance (first published on 30 June 2008) entered into force.[75]

151. In the course of October 2009, the Claimants proceeded to take the following further steps:

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[70] **C-0095**, Letter from Mainstream to BSH, 13 July 2009.

[71] **C-0223**, Paper presented at Mainstream Board of Directors meeting, 28 July 2009.

[72] **C-0224**, Offshore Wind Energy Forum, "*Statement on the draft of an ordinance amending the regulations on offshore installations*", 29 June 2009.

[73] **C-0167**, Fugro Geotechnical Report No. 6409058 (2), 27 July 2009.

[74] **C-0051**, Letter from Mainstream to BSH (partial application withdrawal for Horizont (subsequently renamed Horizont I)), 28 August 2009, **C-0052**, Letter from Mainstream to BSH (partial application withdrawal for Horizont Ost (subsequently renamed Horizont II)), 28 August 2009; **C-0053**, Letter from Mainstream to BSH (application withdrawal for Horizont West (subsequently renamed Horizont III), 28 August 2009; **C-0054**, Letter from Mainstream to BSH (application for amendment for Horizont (subsequently renamed Horizont I)), 28 August 2009; **C-0055**, Letter from Mainstream to BSH (application for amendment for Horizont Ost (subsequently renamed Horizont II)), 28 August 2009; **C-0056**, Letter from Mainstream to BSH (application for amendment for Horizont West (subsequently renamed Horizont III)), 28 August 2009.

[75] **RL-0123**, Ordinance on Spatial Planning in the German Exclusive Economic Zone in the North Sea, 25 September 2009; **C-0220**, Federal Law Gazette, Part I, No. 61, 25 September 2009, Annex.

a. on 14 October 2009, the Claimants conducted preliminary soil investigations for the Projects;[76] and

b. on 28 October 2009, the First Claimant presented a paper at the Board of Directors Meeting.[77]

152. Also in October 2009, the German authorities governing offshore wind took additional steps including:

a. in October 2009, the BNetzA published a Position Paper on the grid connection obligation pursuant to the 2006 EnWG Section 17(2a) ("**BNetzA Position Paper**");[78] and

b. on 9 October 2009, the BSH confirmed that changes to the Applications for the Horizont and Horizont Ost Projects (to Horizont I, Horizont II and Horizont III) did not require a new application conference or new applications because the changes were not sufficiently substantial.[79]

153. On 28 October 2009, Chancellor Merkel was re-elected and formed a coalition government with the Free Democratic Party ("**FDP**").

154. On 2 November 2009, the BSH conducted a meeting regarding the Draft 2009 SeeAnlV.[80]

155. On 15 December 2009, the First Claimant presented a paper at the Board of Directors Meeting,[81] and on 22 December 2009, the Fifth Claimant submitted results of surveys and studies to the BSH.[82]

[76] **MK-0024**, Preliminary Soil Investigation Report for the Horizont Projects, 14 October 2009.

[77] **C-0099**, Paper presented at Mainstream Board of Directors meeting, 28 October 2009.

[78] **R-0008**, BNetzA, "*Position paper on the grid connection obligation pursuant to Section 17(2a) EnWG*", October 2009.

[79] **C-0234**, BSH, Internal note, 9 October 2009.

[80] **R-0059**, Federal Ministry of Transport, Building, and Urban Affairs, Minutes of meeting held on 4 November 2009.

[81] **C-0091**, Paper presented at Mainstream Board of Directors meeting, 15 December 2009 ("**15 December 2009 Board Paper**").

[82] **C-0001**, 2013 Stakeholder Conference Minutes, pp. 1-2.

156. In early 2010, the German authorities proceeded to take additional steps in relation to its offshore wind as follows:

a. on 22 March 2010, BSH produced an internal note on the submitted documents required to receive the first BSH clearance;[83]

b. on 31 March 2010, the Bundestag responded to tabled questions on the grid connection regime;[84] and

c. in April 2010, the first offshore wind farm in the German EEZ, the test project Alpha Ventus, was commissioned.[85]

157. Thereafter, in mid-2010, the Claimants took the following further steps concerning the Projects:

a. on 20 May 2010, the First Claimant presented to HSH Nordbank regarding funding;[86]

b. on 1 June 2010, the First Claimant presented a paper at the Board of Directors Meeting;[87] and

c. on 9 July 2010, the Fifth Claimant sent the Application documentation submitted on 22 December 2009 to the relevant specialist authorities and public agencies, associations, and relevant companies for comment.[88]

158. In the final quarter of 2010, the German offshore wind farm industry continued to develop:

a. on 4 August 2010, seven offshore wind energy organisations published a position paper on strategic grid infrastructure;[89]

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[83] **C-0235**, BSH, Note re "*Application for the construction and operation of the 'Horizont II' offshore wind farm*", 22 March 2010.
[84] **C-0226**, Bundestag Document 17/920, 31 March 2010.
[85] **R-0001**, Alpha Ventus, "*Fact-Sheet*", April 2020.
[86] **C-0087**, Mainstream, Presentation for HSH Nordbank, "*Offshore Wind Projects Mainstream Renewable Power*", 20 May 2010.
[87] **C-0100**, Paper presented at Mainstream Board of Directors meeting, 1 June 2010.
[88] **C-0001**, 2013 Stakeholder Conference Minutes, p. 2.
[89] **R-0020**, German Offshore Wind Energy Foundation, Position paper, 4 August 2010.

b. on 28 September 2010, the German Federal Government published the Energy Concept (*Energiekonzept*);[90] and

c. in 2010, the first high voltage direct current ("**HVDC**") grid connection "*BorWin1*" was commissioned in the EEZ.[91]

159. As to the continuing progress of the Claimants' Projects, in December 2010 and January 2011, Mainstream took the following steps:

a. in December 2010, Mainstream's Mr. Schwencke became an Offshore Wind Energy Forum board member,[92]

b. on 22 December 2010, the Fifth Claimant received a letter from the BSH regarding the determination of scope for Mainstream's environmental investigations;[93] and

c. on 26 January 2011, Mr. Schwencke met with N-ERGIE, a German energy company.[94]

160. The German authorities continued to develop the German offshore wind farm regulatory framework, taking the following additional steps in early 2011:

a. in January 2011, BNetzA updated its Position Paper;[95]

b. on 17 February 2011, BSH further extended the deadline for start of construction works of OWP Butendiek to 31 December 2014;[96] and

c. on 13 April 2011, the Federal Government published the Second Report on the Development and Future Prospects of the Maritime Industry in Germany.[97]

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[90] **R-0007**, Bundestag Document 17/3049, 28 September 2010.

[91] **R-0054**, TenneT, "*BorWin1: About the project*".

[92] **R-0055**, Email from Mr. Tilman Schwencke to Mr. Eddie O'Connor, 8 October 2010.

[93] **C-0171**, Letter from BSH to Fifth Claimant, 22 December 2010.

[94] **R-0064**, Summary of meeting between N-ERGIE and Mr. Tilman Schwencke held on 26 January 2011.

[95] **SBT-0048**, BNetzA, "*Annex to the position paper on the grid connection obligation pursuant to Section 17(2a) EnWG*", January 2011.

[96] **R-0015**, Letter from BSH to OSB Offshore-Bürger-Windpark Butendiek, 17 February 2011.

[97] **R-0043**, Bundestag Document 17/5572, 13 April 2011.

161. On 20 April 2011, the Claimants produced the Mainstream Presentation entitled "*German Offshore & Horizont*" for the "*Mainstream SMT*" (likely Senior Management Team).[98]

162. On 6 May 2011, the Federal Government published the Draft Federal Maritime Responsibilities Act (Draft of First Act for the amendment of shipping regulations), Bundesrat Document 255/11.[99]

163. On 24 May 2011, Mainstream's Mr. Schwencke presented on the Mainstream Projects at the Ecosummit 2011.[100]

164. From June to November 2011, the German authorities and national electricity transmission system operator (again, "**TSO**"), TenneT, took the following further steps:

a. on 6 June 2011, Parliamentary groups of the CDU/CSU and FDP published the Draft Act on Measures to Accelerate the Expansion of Electricity Grids, Bundestag Document 17/6073;[101]

b. on 4 August 2011, TenneT sent a letter to offshore wind developers regarding its obligations to provide an individualised grid connection;[102]

c. on 7 November 2011, TenneT sent a letter to the Federal Chancellery regarding the grid connection regime;[103] and

d. on 10 November 2011, the BSH sent a letter to Mainstream regarding documents submitted to obtain the first BSH clearance.[104]

165. On 31 January 2012, the 2008 SeeAnlV was amended (the "**2012 SeeAnlV**") to streamline administrative procedures regarding site control for existing offshore wind farm projects

[98] **R-0062**, Mainstream, Presentation for Mainstream SMT, "*German Offshore & Horizont*", 20 April 2011. *See* Resp. Rej., fn. 438.

[99] **RL-0284**, Bundesrat Document 255/11, 6 May 2011.

[100] **R-0066**, Ecosummit TV Episode, Video of a presentation by Mr. Tilman Schwencke at Ecosummit 2011; **R-0067**, Mr. Tilman Schwencke, Presentation at Ecosummit 2011.

[101] **RL-0133**, Bundestag Document 17/6073, 6 June 2011.

[102] **R-0025**, Letter from TenneT to OWF developers (regarding current timelines for grid connections), 4 August 2011.

[103] **R-0024**, Letter from TenneT to Federal Chancellery, 7 November 2011.

[104] **MN-0012**, Letter from BSH to Mainstream, 10 November 2011.

and applications, providing a legal framework for approval of installations and structures to be administered by the BSH.[105] According to the Claimants, the 2012 SeeAnlV indefinitely delayed the granting of approvals for their Consent Applications in breach of the ECT fair and equitable treatment standard of protection.

166. Despite this, the Claimants took additional steps in relation to the Mainstream Projects through the end of 2012 as follows:

a. on 6 March 2012, the First Claimant presented a paper at its Mainstream Board of Directors Meeting following the change in law impacting site control;[106]

b. on 15 March 2012, the Fifth Claimant submitted revised Consent Applications reflecting the new "*planning approval procedure*" impacting site control;[107] and

c. on 22 March 2012, the German Offshore Wind Energy Foundation Working Group (of which the Claimants were members) "*Acceleration of Offshore Grid Connections*" published proposals on grid connections.[108]

167. From June 2012, the German agencies took a number of additional steps in connection with the German offshore wind industry, impacting the Mainstream Projects, as follows:

a. on 12 June 2012, the BSH notified the Fifth Claimant that the Projects would continue in accord with the planning approval procedure regarding site control;[109]

b. on 15 June 2012, pursuant to the 2012 SeeAnlV Section 10, according to the Claimants' internal meeting minutes, a "*development freeze was enacted*";[110] and

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[105] **RL-0119**, Further Amendment to 1997 SeeAnlV, 31 January 2012 ("**2012 SeeAnlV**").

[106] **C-0103**, Paper presented at Mainstream Board of Directors meeting, 6 March 2012.

[107] **R-0037**, Mainstream, Application for Planning Approval Procedure for Horizont II, 15 March 2012; **R-0038**, Mainstream, Application for Planning Approval Procedure for Horizont I, 15 March 2012; **R-0039**, Mainstream, Application for Planning Approval Procedure for Horizont III, 15 March 2012.

[108] **R-0022**, German Offshore Wind Energy Foundation, "*Suggested solutions for connecting offshore wind farms to the grid*", 22 March 2012.

[109] **C-0102**, Letter from BSH to Fifth Claimant, 12 June 2012.

[110] **C-0001**, 2013 Stakeholder Conference Minutes, p. 4. *See also* **CL-0347**, *Strabag SE, Erste Nordsee-Offshore Holding GmbH and Zweite Nordsee-Offshore Holding GmbH v. Federal Republic of Germany*, ICSID Case No. ARB/19/29, Award, 18 December 2024 ("***Strabag v. Germany***"), para. 105 and fn. 50: "*In 2011, in connection with the 2011 Energy Act, the BSH had been tasked*

c. on 20 June 2012, the BSH sent the first draft of the offshore grid plan (later renamed the Federal Spatial Offshore Grid Plan) to stakeholders for consultation.[111]

168. On 27 July 2012, the German Offshore Wind Energy Foundation published a paper entitled "*Key Points of a System Change in the Grid Connection of Offshore Wind Farms*".[112]

169. On 28 August 2012, the Fifth Claimant submitted the updated Consent Application documents for Horizont I.[113]

170. In September 2012, the European Commission informed Germany of its intention to launch an investigation regarding the EEG status as State aid under EU law.[114]

171. On 24 September 2012, the Federal Government published the Draft Third Act on the Revision of Energy Industry Regulations, Bundestag Document 17/10754, proposing the system change for offshore wind farm grid connections.[115]

172. In addition, in September and October 2012, specifically in relation to the Mainstream Projects Consent Applications:

a. in September 2012, the BSH wrote to the Fifth Claimant regarding its Horizont I-III Addendum requesting public interpretation and request for an adjustment of the change ban;[116]

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to develop a federal spatial offshore grid plan (Bundesfachplan Offshore or the 'BFO'); under the 2012 Offshore Installations Ordinance, the BSH was given the competence to reserve a specific area in the EEZ for grid connection facilities by issuing a development freeze", referring to the 2012 SeeAnlV Section 10(1), Sentence 1, noting that "*At the time, the plan was called 'offshore netplan' ('Offshore-Netzplan'); the term 'BFO' was introduced by the Energy Act, 28 December 2012 ('2012 Energy Act')*".

[111] **NN-0010 / RL-0146**, Federal Spatial Offshore Grid Plan for the North Sea (*Bundesfachplan Offshore*), 22 February 2013 ("**BFO**").

[112] **R-0076**, German Offshore Wind Energy Foundation, "*Position Paper: Key Points of a System Change in the Grid Connection of Offshore Wind Farms*", 27 July 2012 ("**GOWEF, 2012 Position Paper**").

[113] **C-0108**, Mainstream, Updated Application for Planning Approval Procedure for Horizont I, 28 August 2012.

[114] Wustlich Witness Statement, para. 52.

[115] **RL-0145**, Bundestag Document 17/10754, 24 September 2012.

[116] **C-0236**, BSH, "*Horizont I-III, Addendum to the application documents with the request for public interpretation and request for an adjustment of the change ban*", September 2012.

b. on 16 October 2012, the Fourth and Sixth Claimants were incorporated in Germany;[117]

c. on 29 October 2012, the Claimants produced an internal document entitled "*Horizont Update*";[118]

d. on 29 November 2012, the BSH confirmed to the Claimants that, on their face, the submitted documents were suitable for discussion at a stakeholder conference;[119]

e. on 5 December 2012, the Fifth Claimant submitted supplementary documentation for the Projects;[120] and

f. on 18 December 2012, the Claimants presented a paper at the Board of Directors Meeting.[121]

173. On 28 December 2012, the 2012 EnWG entered into force, which:

a. replaced individual entitlement to a grid connection with non-discriminatory allocation of available capacities; and

b. required construction of offshore grid connection lines to be carried out by TSOs:

i. on the basis of an offshore grid development plan (*Offshore-Netzentwicklungsplan*) ("**O-NEP**") to be confirmed by the BNetzA; and

ii. a Federal Spatial Offshore Grid Plan for the North Sea (*Bundesfachplan Offshore*) ("**BFO**") to be published by the BSH.[122]

174. The 2012 EnWG changed the offshore wind farm grid connection regime that had been in place at the time the Consent Applications were submitted. According to the Claimants,

[117] **C-0007**, Extract from the German Commercial Register for Horizont I Development GmbH, 15 April 2021; **C-0012**, Extract from the German Commercial Register for Horizont III Power GmbH, 15 April 2021.

[118] **R-0069**, Horizont Update, 29 October 2012.

[119] **NN-0012**, Letter from BSH to Mr. Tilman Schwencke, 29 November 2012.

[120] **C-0001**, 2013 Stakeholder Conference Minutes, p. 2.

[121] **C-0057**, Paper presented at Mainstream Board of Directors meeting, 18 December 2012 ("**18 December 2012 Board Paper**").

[122] **C-0105**, Amendment to 2006 EnWG, 20 December 2012 ("**2012 EnWG**").

this, coupled with the ultimate O-NEP entering into force in 2014, terminated the Claimants' alleged entitlement to grid connection, resulting in further breach of the fair and equitable treatment standard.

175. Subsequently and between 4 January 2013 and 4 February 2013, the Claimants nevertheless proceeded to submit the entirety of their Consent Applications documentation to the BSH. To the extent that the documentation did not include business or trade secrets, it was also displayed in the BSH in Hamburg and Rostock for public inspection.[123]

176. On 30 January 2013, Mainstream's Mr. Schwencke emailed Mr. Paolo Sammaritano and Mr. Davide Di Federico.[124]

177. On 22 February 2013, the BSH published the Federal Spatial Offshore Grid Plan for the North Sea (BFO),[125] and on 2 March 2013, the TSOs published the First Draft O-NEP 2013.[126]

178. On 4 March 2013, the Fifth Claimant transferred:

a. the Consent Application for Horizont I to the Fourth Claimant; and

b. the Consent Application for Horizont III to the Sixth Claimant,

whereas the Fifth Claimant remained the Applicant for Horizont II (but was renamed).[127]

179. On 5 March 2013, the Claimants' Consent Applications "**Stakeholder Conference**" (*Erörterungstermin*) took place in Germany.[128] Following the Stakeholder Conference, a number of follow-up steps took place:

[123] **C-0001**, 2013 Stakeholder Conference Minutes, pp. 2-3.
[124] **C-0279**, Email from Mr. Tilman Schwencke to Messrs. Paolo Sammartino and Davide Di Federico, 30 January 2013.
[125] **NN-0010**, BFO.
[126] **C-0107**, "*Offshore Network Development Plan 2013: First Draft of TSOs*", 2 March 2013 ("**First Draft O-NEP 2013**").
[127] **C-0172**, Email from Mr. Tilman Schwencke to Ms. Martina Nemitz, 4 March 2013.
[128] **C-0001**, 2013 Stakeholder Conference Minutes; **C-0109**, Mainstream, Presentations for Stakeholder Conference, 5 March 2013.

a. on 20 March 2013, Mr. Schwencke asked Dr. Ursula Prall to draft a memorandum on the status of the Horizont Projects,[129] (and on 16 April 2013, Dr. Prall emailed Mr. Schwencke regarding the memorandum);[130]

b. on 16 May 2013, the BSH, the Claimants and neighbouring developers met regarding the route of the export cable connecting the Projects, one of the follow-up pieces of work following the Stakeholder Conference;[131]

c. on 21 May 2013, the First Claimant presented April 2013 Board papers at the Board of Directors Meeting;[132] and

d. on 12 June 2013, the GOWEF produced a presentation on the German offshore grid connection regime.[133]

180. On 24 June 2013, the TSOs published the Second Draft O-NEP 2013.[134] Following that draft, the Claimants, the industry groups and others took a number of steps:

a. on 2 July 2013, the First Claimant presented June 2012 Board papers at the Board of Directors Meeting;[135]

b. on 20 September 2013, Mr. Schwencke sent an email to Mr. Chris Hill;[136] and

c. in September 2013, Dr. Ursula Prall, produced the Draft Memorandum on the status of the Horizont Projects;[137]

181. On 22 September 2013, the 2013 German Federal Election took place and the CDU/CSU led by Chancellor Merkel won (its coalition partner the FDP did not get enough votes to

[129] **R-0070**, Dr. Ursula Prall, Memorandum on the status of the Horizont Projects.

[130] **R-0071**, Email from Dr. Ursula Prall to Mr. Tilman Schwencke, 16 April 2013.

[131] **C-0116**, Minutes of meeting between the Claimants, TenneT and BSH, 16 May 2013.

[132] **C-0110**, Paper presented at Mainstream Board of Directors meeting, 21 May 2013 ("**21 May 2013 Board Paper**").

[133] **C-0227**, renewableUK, Presentation, "*The New Grid Connection Regime – Perspectives for Offshore Wind Farms in Germany*", 12 June 2013.

[134] **R-0042**, 50Hertz Transmission GmbH/Amprion GmbH/TenneT/TransnetBW GmbH, Second Draft O-NEP 2013.

[135] **C-0117**, Paper presented at Mainstream Board of Directors meeting, 2 July 2013.

[136] **R-0057**, Email from Mr. Tilman Schwencke to Mr. Chris Hill, 20 September 2013.

[137] **R-0072**, Dr. Ursula Prall, Draft Memorandum on the status of the Horizont Projects.

enter the Bundestag). On 14 December 2013, the CDU/CSU and SDP entered into a coalition agreement to form the new government.[138]

182. On 18 December 2013, the European Commission launched an investigation regarding the qualification of the EEG as State aid under EU Law (*State aid SA.33995 (2013/C*).[139]

183. Also on 18 December 2013, the Board paper was presented at the Mainstream First Claimant's Board of Directors Meeting.[140]

184. On 19 December 2013, the BNetzA confirmed the O-NEP 2013.[141]

185. Thereafter in early 2014, several steps were taken following the O-NEP 2013, including some specifically concerning the Mainstream Projects, as follows:

a. on 20 February 2014, wpd AG, a German wind farm developer and operator, published its presentation on the status of the German grid connection regime;[142]

b. on 25 February 2014, Mainstream's Mr. Schwencke sent an email to his colleague Mr. Smith concerning developments;[143]

c. on 26 February 2014, the Claimants submitted an expert report on the flight corridor for the helicopter landing deck to the BSH, one of the follow-up pieces of work following the Stakeholder Conference;[144]

d. also on 26 February 2014, the Federal Agency for Nature Conversation ("**BfN**") commented on the environmental impact of the service operation vessel planned

[138] **BR-0057**, Coalition Agreement 2013, 14 December 2013.

[139] **GW-0009**.

[140] **C-0118**, Paper presented at Mainstream Board of Directors meeting, 18 December 2013 ("**18 December 2013 Board Paper**").

[141] **C-0106** BNetzA, "*Confirmation of Offshore Network Development Plan 2013*", 19 December 2013.

[142] **C-0228**, wpd AG, Presentation, "*Wind – Offshore Grid Connection*", 20 February 2014.

[143] **C-0119**, Email from Mr. Tilman Schwencke to Mr. Cameron Smith, 25 February 2014.

[144] **MN-0005**, supplemental statement of position regarding the expert report 12.017 in connection with the construction of a helicopter landing deck (helideck) at the offshore wind farm "Horizont I", 16 February 2014.

for the Projects, after Mainstream submits documents following a request at the Stakeholder Conference;[145]

e. on 4 March 2014, the German Offshore Wind Energy Forum provided an opinion on a draft bill by the Federal Ministry for Economic Affairs and Energy for the amendment of the EEG (EEG 2014);[146] and

f. also on 4 March 2014, the Ministry of Lower Saxony for Environment, Energy and Climate Protection submitted a letter to the Federal Ministry for Economic Affairs and Energy.[147]

186. In April and May 2014, the German government published two additional regulatory instruments impacting offshore wind farms, as follows:

a. on 16 April 2014, the TSOs published the first Draft Offshore Grid Development Plan 2014 ("**O-NEP 2014**");[148] and

b. on 5 May 2014, the Federal Government published the Draft Act on the Fundamental Reform of the Renewable Energy Sources Act and on the Amendment of further Provisions of the Energy Industry Bundestag Document 18/1304 ("**Draft EEG 2014**").[149]

187. Subsequently, on 26 May 2014, the Claimants received the BSH's reply to their expert report on the flight corridor for the helicopter landing deck.[150]

[145] **NN-0007**, Statement of Position from the Federal Agency for Nature Conservation (*Stellungnahme des Bundesamtes für Naturschutz*), 26 February 2014.

[146] **C-0248**, Statement by Offshore Wind Energy Forum, 4 March 2014.

[147] **C-0246**, Ministry of Lower Saxony for Environment, Energy and Climate Protection, letter relating to the draft of a law on the fundamental amendment of the Renewable Energy Act (EEG 2014), 4 March 2014.

[148] **R-0073**, 50Hertz Transmission GmbH/Amprion GmbH/TenneT/TransnetBW GmbH, First Draft O-NEP 2014.

[149] **R-0028**, Bundestag Document 18/13045, May 2014.

[150] **MN-0006** Letter from BSH to Horizont I, Horizont II, and Horizont III, 4 July 2014.

188. On 28 June 2014, the European Commission published the Guidelines on State aid for environmental protection and energy 2014-2020, 28 June 2014 in the Official Journal (*2014/C 200/01*).[151]

189. On 1 August 2014, the EEG 2014 entered into force, introducing legally binding targets of 6.5 GW for 2020 and 15 GW for 2030 for installed offshore wind capacity.[152]

190. On 29 September 2014, the BSH met with the Claimants.[153]

191. On 4 November 2014, the TSOs published the Second Draft O-NEP 2014.[154]

192. On 10 November 2014, Mr. Schwencke sent the legal opinion prepared by Dr. Prall to the BSH raising issues with the changes.[155]

193. On 4 February 2015, the Federal Ministry for Economic Affairs and Energy published the Market Analysis of Offshore Wind Energy ("*Marktanalyse Windenergie auf See*").[156]

194. On 6 March 2015, the BSH wrote to all projects developers located in Zones 3, 4 and 5 informing them that "*until further notice*" the projects located there would not receive planning approval because such approval was not currently justified.[157]

195. On 7 July 2015, Dr. Prall produced a presentation on grid planning in the North and Baltic Sea.[158]

[151] **RL-0148**, European Commission, Guidelines on State aid for environmental protection and energy 2014-2020, 28 June 2014, (2014/C 200/01).

[152] **C-0079**, EEG 2014 of 21 July 2014 (BGBl. I p. 1066), dated 21 July 2014.

[153] **C-0124**, Email from Mr. Tilman Schwencke to Dr. Nico Nolte, 10 November 2014.

[154] **EH-0035**, Offshore Network Development Plan 2014: Second Draft of TSOs 4 November 2014.

[155] **C-0123**, Legal opinion by Dr. Ursula Prall, 10 November 2014, **C-0124**, Email from Mr. Tilman Schwencke to Dr. Nico Nolte, 10 November 2014.

[156] **R-0029**, Federal Ministry for Economic Affairs and Energy, Market Analysis Offshore Wind Energy dated 4 February 2015.

[157] **C-0020**, Letter from BSH to the Claimants, 6 March 2015.

[158] **R-0019**, Presentation of Dr. Ursula Prall on grid planning in the North and Baltic Sea, 7 July 2015.

196. On 24 March 2015, the BSH wrote to the Fourth, Fifth and Sixth Claimants, informing them that planning approval for the Projects was "*not currently justified*" and that no planning approval decision would be taken "*for the moment*".[159]

197. On 21 June 2016, CDU/CSU and SPD Parliamentary groups published the Draft Act on the Introduction of Tendering for Electricity from Renewable Energies and on further Amendments to the Law on Renewable Energies, Bundestag Document 18/8860.[160]

198. On 1 January 2017, the WindSeeG entered into force, ending the regulatory approvals process for the Projects and introducing a new tender-based system. The Projects did not qualify for the transitional provisions contained in the WindSeeG.[161]

199. On 28 July 2017, 17 companies (including the Claimants) challenged the WindSeeG Section 46(3), as being unconstitutional before the BVerfG.[162]

200. The WindSeeG, which permitted the removal of the Horizont Projects from the transition provisions for offshore wind in Germany, was a further change in the offshore wind farm permitting framework in place in June 2008, the date of the Claimants' Consent Applications. According to the Claimants, the WindSeeG and removal of the Projects pursuant to it constitutes a further breach of fair and equitable treatment pursuant to the ECT and, in addition, amounts to an expropriation without proper compensation.

201. In summary, the Claimants rely on individual and cumulative changes to the German offshore wind farm regulatory framework from 2012 to 2017 as constituting breach of the fair and equitable treatment standard pursuant to the ECT and, ultimately, expropriation, based on:

    a. the effect of the 2012 SeeAnlV and O-NEP 2014 on the Claimants' alleged legitimate expectations in relation to the grid connection;

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[159] **C-0125**, Letter from BSH to Fourth, Fifth and Sixth Claimants, 24 March 2015.

[160] **RL-0149**, Bundestag Document 18/8860, 21 June 2016.

[161] **C-0126**, Offshore Wind Energy Act (*Gesetz zur Entwicklung und Förderung der Windenergie auf See*), 13 October 2016 ("**WindSeeG**").

[162] **C-0126**, WindSeeG; **EH-0002**, Constitutional complaint against Section 46(3) WindSeeG, 28 July 2017, Annex B12.

b. the effect of the 2014 EEG on the Claimants' alleged legitimate expectations in relation to the offtake entitlement;

c. the 2017 WindSeeG on the Claimants' alleged legitimate expectation changes to continue to participate in the approval process at all and the alleged expropriation of their Projects having lost the ability to do so; and

d. the cumulative loss allegedly arising out of those breaches.

IV. JURISDICTIONAL OBJECTIONS

202. The Tribunal must determine three separate jurisdictional arguments that it lacks jurisdiction to decide this dispute between the Claimants and the Respondent, namely:

a. lack of jurisdiction *ratione voluntatis* (i.e., the "*intra-EU objection*");

b. lack of jurisdiction *ratione materiae*; and

c. for the Fourth, Fifth and Sixth Claimants, lack of jurisdiction *ratione personae*.

203. On 30 March 2023, the European Commission submitted its intervenor submission in support of lack of jurisdiction *ratione voluntatis*. The Tribunal takes each of the three jurisdictional objections in turn, including the arguments put forward by the European Commission, starting with jurisdiction *ratione voluntatis* (i.e., the "*intra-EU objection*").

A. JURISDICTION *RATIONE VOLUNTATIS* (THE INTRA-EU OBJECTION)

204. The Respondent submits that the Tribunal lacks jurisdiction *ratione voluntatis* because there is no valid arbitration agreement between the Parties providing consent in accordance with the ICSID Convention, Article 25(1), which requires written consent of both Parties.[163]

[163] Resp. Mem. on Juris., paras. 26 *et seq*.

205. Ultimately, the Respondent raises three primary arguments: (i) there is no valid arbitration agreement, as determined by the German Federal Court of Justice;[164] (ii) the Respondent did not consent to jurisdiction on the basis of EU law;[165] and (iii) the Tribunal has no jurisdiction based on proper interpretation of ECT Article 26, pursuant to international law.[166] These arguments engage German law, EU law and other international law principles.

206. In support of (i), the Respondent relies on the German Federal Court of Justice's Decision in *Germany v. Mainstream and others* dated 27 July 2023.[167]

207. In support of (ii), the Respondent relies on:

a. EU measures reaffirming the inadmissibility of intra-EU arbitration;[168]

b. jurisprudence of the Court of Justice of the European Union ("**CJEU**") as to its interpretation of ECT Article 26(3), namely:

i. the applicability of *Slowakische Republik v. Achmea BV*, Case C-284/16, Judgment dated 6 March 2018 (the "***Achmea* Judgment**") to intra-EU arbitration under the ECT in (i) *Republic of Moldova v. Komstroy LLC*, Case C-741/19, Judgment dated 2 September 2021 (the "***Komstroy* Judgment**") and (ii) *Republic of Poland v. PL Holdings S.à r.l.* Case C-109/20, Judgment dated 26 October 2021 (the "***PL Holdings* Judgment**"); and

ii. the applicability of the *Achmea* Judgment to ICSID arbitration in *European Commission v. European Food SA and others*, Case C-638/19 P, Judgment dated 25 January 2022 (the "***European Food* Judgment**");[169]

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[164] Resp. Rej., paras. 39-45.

[165] Resp. Mem. on Juris., paras. 30 *et seq*.

[166] Resp. Mem. on Juris., paras. 91 *et seq*.

[167] **RL-0275**, *Federal Republic of Germany v. Mainstream Renewable Power Limited and others*, German Federal Court of Justice, Case No. I ZB 43/22, Decision, 27 July 2023 ("**27 July 2023 BGH Decision**").

[168] Resp. Mem. on Juris., paras. 33-42.

[169] Resp. Mem. on Juris., paras. 43-56; **RL-0004**, *Slovak Republic v. Achmea B.V.*, CJEU Case C-284/16, Judgment, 6 March 2018 ("***Achmea* Judgment**"); **RL-0007**, *Republic of Moldova v. Komstroy LLC*, CJEU Case C-741/19, Judgment, 2 September 2021

c. developments in other EU Member State courts and tribunals, including the Lithuania Supreme Court, Svea Court of Appeal, the German Federal Court of Justice and the *Kammergericht Berlin*;[170] and

d. alleged absence of loss of rights for EU-based investors.[171]

208. In support of (iii), the Respondent relies on international law to support four propositions as follows:

a. there is no jurisdiction for intra-EU disputes under the ECT based on interpretation of the ECT wording, context, object and purpose, including based on supplementary means of interpretation (the Vienna Convention on the Law of Treaties ("**VCLT**"), Articles 30, 31 and 32);[172]

b. there is no jurisdiction for intra-EU disputes under the ECT based on the primacy of EU law over general international law pursuant to VCLT Article 5;[173]

c. there is no jurisdiction based on other international agreements, which show that ECT Article 26(4) is inapplicable intra-EU;[174] and

d. there is no jurisdiction for intra-EU disputes under the ECT based on an arbitration agreement pursuant to private law.[175]

209. The Tribunal sets out below a key events timeline regarding the intra-EU objection, the key treaty provisions engaged and brief summaries of the positions of the Parties and the

("***Komstroy* Judgment**"); **RL-0014 / CL-0220**, *Republic of Poland v. PL Holdings S.à r.l.*, CJEU Case C-109/20, Judgment, 26 October 2021 ("***PL Holdings* Judgment**"); **RL-0019**, *European Commission v. European Food SA and others*, CJEU Case C-638/19 P, Decision, 25 January 2022 ("***European Food* Judgment**").

[170] Resp. Mem. on Juris., paras. 57-81; **RL-0015**, *Veolia Environnement S.A. and others v. Republic of Lithuania*, Supreme Court of Lithuania, Case No. e3K-3-121-916/2022, Decision, 18 January 2022 ("***Veolia v. Lithuania***"); **RL-0026**, *Italian Republic v. Greentech Energy Systems A/S and others*, Svea Court of Appeal, Case No. T 3229-19, Decision, 11 February 2021 ("***Italy v. Greentech***"); **RL-0028**, German Federal Court of Justice, Case No. I ZB 16/21, Decision, 17 November 2021 ("**17 November 2021 BGH Decision**"); **RL-0029**, Letter from *Kammergericht* Berlin to Noerr (re *Germany v. Mainstream*), 1 February 2022 ("**1 February 2022 *Kammergericht* Berlin Letter**").

[171] Resp. Mem. on Juris., paras. 82-90.

[172] Resp. Mem. on Juris., paras. 95-139.

[173] Resp. Mem. on Juris., paras. 140-148.

[174] Resp. Mem. on Juris., paras. 149-155.

[175] Resp. Mem. on Juris., paras. 156-159.

European Commission as a non-disputing third party, followed by the Tribunal's reasoning, analysis and decision regarding the Respondent's intra-EU jurisdiction objection.

(1) Event Timeline for the Intra-EU Objection

210. The Tribunal has included a chronology above, setting out key regulatory and policy events and steps taken by the Claimants in relation to their Mainstream Projects Consent Applications. However, given that the Respondent's arguments based on the VCLT are impacted by the timing of events, the Tribunal includes an additional timetable of events relating specifically to this objection below.

DATE	EVENT
16 April 1998	ECT entered into force for Germany
14 July 1999	ECT entered into force for Ireland
13 December 2007	Lisbon Treaty entered into force
June 2015	European Commission Infringement Proceedings
7 April 2016	Non-Paper from Germany *et al.*
6 March 2018	CJEU issued *Achmea* Judgment
19 July 2018	European Commission Communication regarding intra-EU investment
31 October 2018	BGH set aside *Achmea* Award

November 2018 to June 2019	EU Member States establish *ad hoc* Special Group to address effects of *Achmea* Judgment and prepare draft plurilateral text
15 January 2019	Declaration of 22 EU Member States on the Legal Consequences of the Judgment of the CJEU in *Achmea* and on Investment Protection in the EU
14 May 2019	European Commission issued recommendation to European Council to mandate negotiation of modernising ECT
2 July 2019	General Secretariat of Council of EU confirmed negotiating directives for ECT modernisation
24 October 2019	EU Member States Ambassadors and Permanent Representatives reach agreement on Termination Treaty
5 May 2020	Signature of Termination Agreement by 23 EU Member States, including Germany and Ireland
27 May 2020	EU Proposal Paper re ECT Modernisation
29 August 2020	Termination Treaty entered into force (Germany signatory but not Ireland)
3 March 2021	Advocate General Opinion on *Komstroy* Judgment
30 April 2021	Claimants file Request for Arbitration with ICSID
13 May 2021	ICSID registration of Claimants' Request for Arbitration
2 September 2021	CJEU issued *Komstroy* Judgment

25 October 2021	CJEU issued *PL Holdings* Judgment
25 January 2022	CJEU issued *European Food* Judgment

(2) Key Treaty Provisions

211. The key treaty provisions relevant to the Respondent's intra-EU objection are as follows.

212. The key provisions in the Treaty on the Functioning of the European Union (the "**TFEU**") are Articles 267 and 344, which provide as follows:[176]

> *Article 267*
>
> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give a judgement, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
>
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.
>
> *Article 344*
>
> 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.

[176] **CL-0009**, Treaty on the Functioning of the European Union, 26 October 2012 ("**TFEU**"), Arts. 267, 344.

213. The key provisions in the Treaty on European Union (the "**TEU**") are Articles 4(3) and 19(1), which provide as follows:[177]

Article 4

…

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

…

Article 19

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

…

214. The key provisions in the Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (the "**MS Declaration**" or the "**Declaration**") are the Preamble and paragraphs 1 to 5, which provide as follows:[178]

[Preamble]

…

[177] Treaty on European Union, 26 October 2012 (available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF) ("**TEU**"), Arts. 4(3), 19(1).

[178] **RL-0006**, Declaration of the Representatives of the Government of the Member States, 15 January 2019 ("**2019 Declaration**"), Preamble, paras. 1-5.

Union law takes precedence over bilateral investment treaties concluded between Member States.[*] As a consequence, all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable. They do not produce effects including as regards provisions that provide for extended protection of investments made prior to termination for a further period of time (so-called sunset or grandfathering clauses). An arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty.

[*] With regard to agreements concluded between Member States, see judgments in *Matteuci*, 235/87, EU:C:1988:460, paragraph 21; and *Budējovicky Budar*, EU:C:2009:521, C-478/07, paragraphs 98 and 99 and Declaration 17 to the Treaty of Lisbon on primacy of Union law. The same result follows also under general public international law, in particular from the relevant provisions of the Vienna Convention on the Law of the [*sic*] Treaties and customary international law (*lex posterior*).

…

[Declaration]

Taking into account the foregoing, Member States declare that they will undertake the following actions without undue delay:

1. By the present declaration, Member States inform investment arbitration tribunals about the legal consequences of the *Achmea* judgment, as set out in this declaration, in particular all pending intra-EU investment arbitration proceedings brought either under bilateral investment treaties concluded between Member States or under the Energy Charter Treaty.

2. In cooperation with a defending Member State, the Member State, in which an investor that has brought such an action is established, will take the necessary measures to inform the investment arbitration tribunals concerned of those consequences. Similarly, defending Member States will request the courts, including in any third country, which are to decide in proceedings relating to an intra-EU investment arbitration award, to set these awards aside or not to enforce them due to a lack of valid consent.

3. By the present declaration, Member States inform the investor community that no new intra-EU investment arbitration proceedings should be initiated.

4. Member States which control undertakings that have brought investment arbitration cases against another Member State will take steps under their national laws governing such undertakings, in compliance with Union law, so that those undertakings withdraw pending investment arbitration cases.

5. In light of the *Achmea* judgment, Member States will terminate all bilateral investment treaties concluded between them by means of a plurilateral treaty or, where that is mutually recognized as more expedient, bilaterally.

…

215. The key provision in the **ICSID Convention** is Article 25(1), which provides as follows:

> **Article 25**
>
> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

216. The key treaty provisions in the **ECT** are Articles 1, 16, 25, 26, 27 and 36, which provide in relevant part as follows:[179]

> *Article 1 - Definitions*
>
> [**UNDERSTANDINGS**
>
> …
>
> **2. With respect to Article 1(5)**
>
> …
>
> (b) The following activities are illustrative of economic activity in the energy sector:
>
> …
>
> (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;
>
> …
>
> (vii) research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at improving energy efficiency.]

[179] **CL-0001 / RL-0084**, Energy Charter Treaty, 17 December 1994 ("**ECT**"), Arts. 1, 16, 25-27, 36.

…

(2) "Contracting Party" means a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which the Treaty is in force.

(3) "Regional Economic Integration Organization" means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.

…

(10) "Area" means with respect to a state that is a Contracting Party:

(a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and

(b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.

With respect to a Regional Economic Integration Organisation which is a Contracting Party, Area means the Areas of the member states of such Organization, under the provisions contained in the agreement establishing that Organization.

…

Article 16 - Relation to other Agreements

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,

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

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

…

Article 25 - Economic Integration Agreements

(1) 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 their being parties thereto.

(2) For the purposes of paragraph (1), "EIA" means an agreement substantially liberalizing, *inter alia*, trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame.

(3) This Article shall not affect the application of the GATT and Related Instruments according to Article 29.

Article 26 - Settlement of Disputes between an Investor and a Contracting Party

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

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

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

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

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

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

…

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

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

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

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

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

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

…

Article 36 - Voting

…

(7) A Regional Economic Integration Organization shall, when voting, have a number of votes equal to the number of its member states which are Contracting Parties to this Treaty; provided that such an Organization shall not exercise its right to vote if its member states exercise theirs, and vice versa.

217. The key treaty provisions in the **VCLT**, which entered into force between Ireland and Germany in 2006, after the entry into force between the Parties of the ECT in 1999, but which both Parties rely on in the arbitration and treat as applicable are Articles 5, 7, 26, 27, 28, 30, 31, 32, 37 and 41 as follows:[180]

Article 5
Treaties constituting international organizations and treaties adopted within an international organization

[180] **CL-0017**, Vienna Convention on the Law of Treaties, 23 May 1969 ("**VCLT**"), Arts. 5, 7, 26-28, 30-32, 37, 41.

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

…

Article 7
Full powers

…

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(*b*) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(*c*) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

…

Article 26
"Pacta sunt servanda"

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27
Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

Article 28
Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

…

Article 30
Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

…

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

…

3. There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) leaves the meaning ambiguous or obscure; or

(*b*) leads to a result which is manifestly absurd or unreasonable.

…

Article 37
Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

…

Article 41
Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) the possibility of such a modification is provided for by the treaty; or

(*b*) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

218. Certain other treaty provisions are included in the discussion below.

(3) Submissions of the Parties

a. The Respondent's Position

219. The Respondent argues that the Tribunal has no jurisdiction on the basis that the Claimants cannot avail themselves of the arbitration offer in ECT Article 26, because it is inapplicable to intra-EU disputes following the judgments of the CJEU in *Achmea* and *Komstroy*, and the subsequent judgments in *PL Holdings* and *European Food*.[181]

220. There were shifts in the Respondent's position between its Rule 41(5) Application (12 October 2021) and its Memorial on Jurisdiction (25 March 2022). Ultimately the Respondent led with a German law argument, followed by EU law and finally its international law interpretation pursuant to the VCLT, introducing a new VCLT Article 5 argument towards the end of the proceeding. In order to avoid any question that it has not fully tracked the entirety of the Respondent's case over the course of submissions, the Tribunal requested that the Respondent summarise its full list of issues to be addressed regarding the "*interim EU Objection*" on jurisdiction. The Respondent provided this full list on 6 October 2023 (see above paragraph 83).

221. The Respondent's full and final list of issues dealing with this objection is set out below (footnotes omitted):

a. based on the July 2023 German Federal Court Decision:

> [1.1] In its decision dated 27 July 2023, the German Federal Court of Justice found that Art. 26 ECT does not provide the basis for a valid arbitration agreement in the present ICSID proceedings. The decision is binding on all Parties to this Arbitration.

b. based on its EU Law interpretation:

> 2. Art. 26(2)(c) ECT does not apply in intra-EU investor-State relationships pursuant to and in accordance with Art. 19(1) TEU and Arts. 267 and 344 TFEU, as confirmed by the CJEU in the *Achmea*, *Komstroy*, *PL Holdings* and

[181] Resp. Rule 41(5) Application, paras. 3-6; Resp. Mem. on Juris., paras. 4-8.

European Food Judgment as well as the *Romatsa* Decision and Opinion 1/20. There is no loss of rights for EU based investors.

2.1 This legal situation had become public knowledge long before Claimants filed their Request for Arbitration on 30 April 2021 by ways of the European Commission's Communication "*Protection of intra-EU investment*" of July 2018, the Council of the European Union's Decision regarding Negotiations on the Modernization of the ECT dated 2 July 2019 and the EU's May 2020 EU Proposal regarding the ECT Modernization as well as the EU Member States' May 2020 Termination Agreement.

2.2 The European Commission is likely to initiate proceedings for infringement of the TFEU and the TEU against any EU Member State that complies or intends to comply with an intra-EU investor-state award, one of the reasons for such an investigation being that the arbitral award constitutes State aid.

c. based on its international law interpretation:

3. There is no valid arbitration agreement pursuant to Art. 26 under public international law:

3.1 EU law (i.e. the TFEU and the TEU) forms part of international law and is applicable to jurisdictional issues. The ECT does not enjoy primacy *vis-à-vis* EU law.

3.2 Pursuant to Art. 5 VCLT, this Tribunal lacks jurisdiction due to the primacy of EU Primary Law over general international law.

3.3 Even the interpretation of the ECT in accordance with Arts. 31 and 32 VCLT confirms this Tribunal's lack of jurisdiction:

(a) No jurisdiction by interpretation of the wording of the ECT as an interpretation of the term "*Contracting Party*" in Art. 1(2) ECT in the light of Arts. 1(3) and 1(10) ECT shows that Claimants and Respondent form part of the same "*Contracting Party*".

(b) No jurisdiction by interpretation of the context, object and purpose of the ECT as the preparatory work of the ECT, in particular the European Communities' 1997 Statement, and the circumstances of its conclusion confirm the inapplicability in intra-EU Investor-State relationships.

(c) No jurisdiction by supplementary means of interpretation as EU law as the "*relevant rules of international law applicable in the relations between the parties*" pursuant to Art. 31 (3)(c) VCLT

leads to the interpretation that there is no valid offer to arbitrate. In particular, pursuant to Art. 351 TFEU, EU law prevails.

3.4 Art. 26 ECT is based on the concept of bilateral relationships, as opposed to a multilateral obligation. The EU parties to the ECT all agree on the understanding of Art. 26 ECT. Such understanding does not cause a loss of rights for other parties to the ECT or their nationals.

3.5 Pursuant to Art. 30(4)(a) VCLT, the relations between the Republic of Ireland and Respondent are governed by the most recent treaties, which are the TEU and the TFEU and not the ECT.

3.6 Pursuant to Art. 41 (1)(b) ECT[182] [*sic*], the EU Member States effectively modified the ECT by adhering to the Lisbon Treaty.

3.7 Pursuant to Art. 30(3) VCLT, the later treaty, here the TEU and the TFEU, prevail. This is in particular confirmed by Art. 351 TFEU. The primacy of EU law in the relations between EU Member States is a matter of *lex superior*, as found by the tribunal in *Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain*. This submission is filed electronically only.

222. The Respondent's three arguments are concurrent, not in the alternative, giving rise to some internal inconsistency (as discussed below). The Tribunal sets out in more detail below the Respondent's position in relation to each of its three jurisdictional *ratione voluntatis* arguments, followed by the Claimants' responses, then the European Commission's intervention points, and thereafter sets out its reasoning and decision on this first objection to jurisdiction. Before doing so, the Tribunal sets out the factual basis upon which the Respondent relies.

i. Intra-EU Objection: Factual Basis

223. The Respondent relies primarily on the following facts:[183]

a. the adoption of the Lisbon Treaty in 2009 (i.e., that it "*marked an important milestone in the elaboration of international investment treaty provisions within (and outside) the EU*";[184] and "[b]*y virtue of Art. 207 TFEU, foreign direct*

[182] The Tribunal notes that this should read "*Art. 41 (1)(b) VCLT*".

[183] Resp. Rule 41(5) Application, paras. 25 *et seq.*; Resp. Mem. on Juris., paras. 33-81.

[184] Resp. Rule 41(5) Application, para. 25.

investment became an exclusive EU competence as part of the EU's common commercial policy",[185] including transferring the power to conclude bilateral and multilateral investment treaties from the EU Member States to the EU), referring also to TEU Article 19(1) second sentence, TFEU Articles 26.7 and 344 and Declaration 17 annexed to the Lisbon Treaty;[186]

b. the June 2015 European Commission press release on infringement proceedings against EU Member States;[187]

c. the April 2016 non-paper from Germany *et al.* concerning "*Intra-EU Investment Treaties*";[188]

d. the March 2018 *Achmea* Judgment;[189]

e. EU Member State court decisions relating to intra-EU arbitration following the *Achmea* Judgment including, in particular:[190]

   i. the 18 January 2022 Decision of the Lithuania Supreme Court;[191]

   ii. the 11 February 2021 Svea Court of Appeal request for preliminary ruling;[192]

   iii. the 17 November 2021 Decision of the German Federal Court of Justice;[193]

   iv. the 1 February 2022 *Kammergericht* interim letter;[194]

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[185] Resp. Rule 41(5) Application, para. 25.

[186] Resp. Rule 41(5) Application, paras. 25-33; Resp. Mem. on Juris., paras. 34-42.

[187] Resp. Rule 41(5) Application, paras. 34-35, referring to **RL-0095**, European Commission Press Release, "*Commission asks Members States to terminate their intra-EU bilateral investment treaties*", 18 June 2015.

[188] Resp. Rule 41(5) Application, paras. 36-37, referring to Non-paper of Austria, Finland, France, Germany and the Netherlands, "*Intra-EU Investment Treaties*", 7 April 2016 (available at: https://www.bmwk.de/Redaktion/EN/Downloads/intra-eu-investment-treaties.pdf?__blob=publicationFile&v=2).

[189] Resp. Rule 41(5) Application, paras. 38-46.

[190] Resp. Rule 41(5) Application, paras. 47-50; Resp. Mem. on Juris., paras. 57-65.

[191] Resp. Mem. on Juris., paras. 66-69; **RL-0015**, *Veolia v. Lithuania*.

[192] Resp. Mem. on Juris., paras. 70-74; **RL-0026**, *Italy v. Greentech*.

[193] Resp. Mem. on Juris., paras. 75, 77-80; **RL-0028**, 17 November 2021 BGH Decision.

[194] Resp. Mem. on Juris., para. 81; **RL-0029**, 1 February 2022 *Kammergericht* Berlin Letter.

v. the 27 July 2023 Decision of the German Federal Court of Justice;[195]

vi. the 6 November 2023 Decision of the Higher Regional Court Berlin;[196]

vii. the 27 March 2024 Decision of the Svea Court;[197]

viii. the 28 June 2024 Decision of the Svea Court;[198]

ix. the 23 July 2024 Decisions of the German Federal Constitutional Court;[199]

x. the 13 September 2024 Decision of the Bavarian Supreme Court;[200] and

xi. the 31 July 2025 Decision of the German Federal Constitutional Court;[201]

f. the July 2018 European Commission communication on the "*Protection of intra-EU investment*" (the "**July 2018 Communication**");[202]

g. the January 2019 Declaration by the EU Member States on the "*Legal Consequences of the Judgment of the Court of Justice in* Achmea *and on Investment Protection in the European Union*";[203]

h. the Council of the European Union's July 2019 decision regarding negotiations on the modernization of the ECT;[204]

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[195] Resp. Rej., para. 39; **RL-0275**, 27 July 2023 BGH Decision.

[196] **RL-0383**, L. Riedner, German Arbitration Digest, No. 7, 2024 (report on *Kammergericht* Berlin, Case No. 12 SchH 9/22, Decision, 6 November 2023).

[197] **RL-0384**, *Kingdom of Spain v. TRIODOS SICAV II*, Svea Court of Appeal, Case No. T 15200-22, Decision, 27 March 2024.

[198] **RL-0385**, *Kingdom of Spain v. Foresight Luxembourg Solar 1 S.à.r.l. and others*, Svea Court of Appeal, Case No. T 1626-19, Decision, 28 June 2024.

[199] Letter from the Respondent to the Tribunal, 14 November 2024; **RL-0380**, German Federal Constitutional Court, Case No. 2 BvR 557/19, Decision, 23 July 2024 ("**BVerfG Decision 557/19**"); **RL-0381**, German Federal Constitutional Court, Case No. 2 BvR 141/22, Decision, 23 July 2024 ("**BVerfG Decision 141/22**").

[200] **RL-0382**, Bavarian Supreme Court, Case No. 101 Sch 146/23e, Decision, 13 September 2024.

[201] **RL-0387**, German Federal Constitutional Court, Case No. 2 BvR 1277/23, Decision, 31 July 2025 ("**BVerfG Decision 1277/23**").

[202] Resp. Rule 41(5) Application, paras. 51-55; **RL-0005**, Communication from the Commission to the European Parliament and Council, "*Protection of intra-EU investment*", COM(2018) 547, 19 July 2018 ("**July 2018 European Commission Communication**").

[203] Resp. Rule 41(5) Application, paras. 56-63; **RL-0006**, 2019 Declaration.

[204] Resp. Rule 41(5) Application, paras. 64-70; **CL-0016**, Council of the European Union, "*Negotiating Directives for the Modernisation of the Energy Charter Treaty*", Doc. 10745/19 ADD 1, 2 July 2019 ("**EU Negotiating Directives**").

i. the May 2020 EU proposal regarding the ECT modernization;[205]

j. the May 2020 EU Member States' Termination Agreement regarding intra-EU BITs;[206] and

k. subsequent CJEU judgments including:

i. the September 2021 *Komstroy* Judgment;[207]

ii. the October 2021 *PL Holdings* Judgment;[208] and

iii. the January 2022 *European Food* Judgment.[209]

224. The occurrence of each event (including rendering of decisions or judgments) is undisputed, as is the Respondent's broad factual characterisation of them, as generally echoed by the European Commission in its intervention. The legal effect of these events, if any, on the jurisdiction of this Tribunal lies at the heart of the dispute between the Respondent (and European Commission) and the Claimants.

225. Having set out that brief summary of the Respondent's factual bases for its intra-EU objection, to be read together with the table at paragraph 210 above, the Tribunal now turns to the first of the Respondent's legal arguments.

ii. Application of the German Federal Court of Justice Decision

226. *First*, based on the Respondent's 6 October 2023 list of issues, it appears that it independently relies on the German Federal Court of Justice's decision dated 27 July 2023, which declared that three intra-EU ICSID arbitrations (including these arbitration proceedings) are "*inadmissible on the grounds that Art. 26 (2)(c) ECT violates EU law and*

[205] Resp. Rule 41(5) Application, paras. 71-73.

[206] Resp. Rule 41(5) Application, paras. 74-80.

[207] Resp. Rule 41(5) Application, paras. 81-92; Resp. Mem. on Juris., paras. 43-47; **RL-0007**, *Komstroy* Judgment.

[208] Resp. Mem. on Juris., paras. 48-49; **RL-0014**, *PL Holdings* Judgment.

[209] Resp. Mem. on Juris., paras. 50-56; **RL-0019**, *European Food* Judgment.

thus does not provide for a valid offer for an arbitration agreement for intra-EU investor-State arbitration".[210]

227. According to the Respondent, the German Federal Court of Justice:

a. "*overruled the decision of the Higher Regional Court Berlin dated 28 April 2022*";[211]

b. "*confirmed two decisions obtained by the Kingdom of the Netherlands before the Higher Regional Court Cologne, similarly finding that two ICSID arbitrations initiated by German investors against the Kingdom of the Netherlands are inadmissible*";[212]

c. determined that:

i. "*the Parties did not conclude an effective arbitration agreement because the arbitration clause in Art. 26 (2)(c) ECT is not applicable to intra-EU investor-State disputes*";[213] and

ii. "*[r]elying on Art. 26 (2)(c) ECT in an intra-EU context violates the principles of autonomy of EU law, mutual trust and the necessity of a uniform interpretation of EU law, as enshrined in Art. 267, 344 TFEU*";[214]

d. held that:[215]

> According to these principles, in intra-EU investor-State-arbitration such as the present matter, the dispute resolution mechanism in Art. 26 para. 2 lit. c ECT violates EU law. Due to its incompatibility in particular with Articles

[210] Resp. Rej., para. 39, referring to **RL-0275**, 27 July 2023 BGH Decision.

[211] Resp. Rej., para. 40, referring to **C-0166 / RL-0090**, *Federal Republic of Germany v. Mainstream Renewable Power Limited and others*, Higher Regional Court Berlin, Case No. 12 SchH 6/21, Decision, 28 April 2022 ("***Kammergericht* Berlin Decision**").

[212] Resp. Rej., para. 40, referring to **RL-0260**, *Uniper SE and others v. Kingdom of the Netherlands*, Higher Regional Court Cologne, Case No. 19 SchH 14/21, Decision, 1 September 2022; **RL-0261**, *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, Higher Regional Court Cologne, Case No. 19 SchH 15/21, Decision, 1 September 2022.

[213] Resp. Rej., para. 41; **RL-0275**, 27 July 2023 BGH Decision, para. 100.

[214] Resp. Rej., para. 41; **RL-0275**, 27 July 2023 BGH Decision, paras. 98 *et seq*.

[215] Resp. Rej., para. 41; **RL-0275**, 27 July 2023 BGH Decision, para. 100.

267 and 344 TFEU, there is a lack of effective consent, and thus of an offer by the applicant EU Member States to conclude an arbitration agreement.

e. "*referred to the interpretation of Art. 267, 344 TFEU given by the CJEU*",[216] considering CJEU jurisprudence to be "*an* acte clair*, which does not require any further application for a preliminary ruling by the CJEU*";[217]

f. "*expects this decision to have a signaling* [*sic*] *effect for domestic courts of both other EU Member States as well as non-EU Member States, such as U.S. courts, deciding on recognition and enforcement of ICSID awards*";[218]

g. "*considers the doctrine of comity as basis for the non-applicability of Art. 53, 54 ICSID Convention and reason to deny recognition and enforcement of an intra-EU ICSID award*";[219]

h. "*considered the independence of the ICSID Convention*" and "*noted that the CJEU found in* European Commission v. European Food SA and Others *and* DA vs Romanian Air Traffic Services Administration (Romatsa) et al. *and* FC et al. vs Romanian Air Traffic Services Administration (Romatsa) et al.",[220] that the ICSID Convention:

   i. "*does not exclude the competence of the CJEU to render decisions in this context*";[221] and that

   ii. "*domestic courts have to consider this despite Art. 41 ICSID*";[222] and

[216] Resp. Rej., para. 42; **RL-0275**, 27 July 2023 BGH Decision, paras. 97-98, 101 *et seq*.

[217] Resp. Rej., para. 42; **RL-0275**, 27 July 2023 BGH Decision, para. 111.

[218] Resp. Rej., para. 43; **RL-0275**, 27 July 2023 BGH Decision, para. 91.

[219] Resp. Rej., para. 43; **RL-0275**, 27 July 2023 BGH Decision, para. 91.

[220] Resp. Rej., para. 44; **RL-0019**, *European Food* Judgment; **RL-0257**, *DA v. Romanian Air Traffic Services Administration (Romatsa) and others* and *FC and others. v. Romanian Air Traffic Services Administration (Romatsa) and others*, CJEU Case C-33/19, Judgment, 21 September 2022.

[221] Resp. Rej., para. 44; **RL-0275**, 27 July 2023 BGH Decision, para. 73.

[222] Resp. Rej., para. 44.

i. "*referred to the arbitral award rendered in* Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain *as an example that arbitral tribunals are willing to accept the invalidity of arbitration agreements under EU law*":[223]

> It cannot be argued that there could not be a de facto, indirect impact on intra-EU-investor-State-arbitration because arbitral tribunals were per se opposed to finding invalidity of arbitration agreements based on EU law. In the arbitration Green Power Partners vs. Spain a tribunal constituted under the arbitration rules of the arbitration institute of the Stockholm Chamber of Commerce (SCC) unanimously considered the consent of a Member State to the arbitration agreement under Art. 26 ECT in an intra-EU-dispute as invalid because of the violation of EU law and, therefore, denied its jurisdiction.

228. Therefore, according to the Respondent, the German Federal Court of Justice "*did not only confirm the established jurisprudence of the CJEU but also the position of the European Commission set forth in the EU* Amicus Curie *and, last but not least,* [its own] *objection that Claimants cannot rely on a valid arbitration agreement*".[224]

229. Although the German Federal Court of Justice, as well as the German Federal Constitutional Court in its Decisions dated 23 July 2024, considered the issue of jurisdiction in relation to the current arbitration (finding the ECT Article 26 agreement to arbitrate to be incompatible with TFEU Articles 267 and 344 and therefore a lack of effective consent by Germany to offer to conclude an arbitration agreement under the ECT), they made that determination on the basis of an application and interpretation of EU law. Accordingly, that determination is directly relevant to the Respondent's EU law interpretation, as discussed below, but is not a stand-alone ground for its *ratione voluntatis* objection. Therefore, the German Federal Courts' decisions are dealt with in Section 3) below.

[223] Resp. Rej., para. 44; **RL-0275**, 27 July 2023 BGH Decision, para. 94.

[224] Resp. Rej., para. 45.

iii. EU Law Interpretation

230. The Respondent approaches EU law interpretation based on: (i) European Commission and Member State measures; (ii) the CJEU judgments; (iii) decisions by other EU Member State courts and tribunals; and (iv) alleged lack of loss of rights by EU based investors.

231. According to the Respondent, based on EU law, the Tribunal "*must* ex officio *take account of the inapplicability ECT arbitration clause and dismiss the claims because it has no jurisdiction to hear the case*", and its "*lack of jurisdiction is obvious since the Tribunal cannot have any higher confirmation as from the CJEU*".[225]

1) EU Measures

232. The Respondent first argues that the lack of jurisdiction of this Tribunal is affirmed by recent developments of EU law and subsequent EU Member State practice.[226] In this regard it assumes the primacy of EU law as an essential principle under EU law.[227]

233. In its Rule 41(5) Application, the Respondent maintains that "*expansion of EU law to new EU Member States and the progressive enlargement of the EU, the EU as well as the European Commission*" have "*developed and confirmed the position that intra-EU BITs as well as comparable instruments were incompatible with EU law*", which was "*a constant issue raised*" even before the *Achmea* Judgment.[228]

234. The Respondent's position on EU measures in its Memorial on Jurisdiction centres on the TEU and TFEU, including the Lisbon Treaty and Declaration 17 annexed thereto.[229] In order to ensure that it captures all of the Respondent's submissions, the Tribunal follows

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[225] Resp. Rule 41(5) Application, para. 93.

[226] Resp. Mem. on Juris., paras. 33-42.

[227] Resp. Mem. on Juris., para. 33.

[228] Resp. Rule 41(5) Application, para. 144; **CL-0263**, *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 ("***Eastern Sugar v. Czech Republic***"); *Rupert Joseph Binder v. Czech Republic*, UNCITRAL, Final Award, 15 July 2011 (available at: https://www.italaw.com/sites/default/files/case-documents/italaw4179.pdf) ("***Binder v. Czech Republic***"); **RL-0188**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Award, 23 April 2012; *European American Investment Bank AG v. Slovak Republic*, PCA Case. No. 2010-17 (available at: https://www.italaw.com/cases/1706); *U.S. Steel Global Holdings I B.V. v. Slovak Republic*, UNCITRAL/PCA Case No. 2013-6, (available at https://www.italaw.com/cases/1903).

[229] Resp. Mem. on Juris., paras. 33-42.

the 6 October 2023 list of issues, as well as the EU law arguments from the Rule 41(5) Application and Memorial on Jurisdiction, as set out below. These are that:[230]

a. the TEU and TFEU (together the "**EU Treaties**") establish the principles upon which EU law is based, and the 2009 Lisbon Treaty was "*significant for the development in EU law in this regard*";[231]

b. the EU Treaties have a "*dual nature*" in international law, as (i) the basis for EU law under international law and (ii) the international treaties between the EU Member States underpinning the establishment under international law of the supranational union, meaning the substance agreed in the Lisbon Treaty includes the judicial system;[232]

c. "*categorization of EU law solely as domestic law does not adequately reflect the dual nature of EU law*" because it ignores:

   i. its status as international law under VCLT Article 2(1)(a); and

   ii. its status as national law because "*once implemented in the national legal orders of the EU Member States, it is part of their internal legal order*",

   hence its "*dual character*" (as a treaty according to VCLT Article 2(1)(a) and national law);[233]

d. under the Lisbon Treaty, "*matters of direct foreign investment were added to the exclusive competence of the EU*", so EU Member States "*cannot undertake* inter se *agreements in those matters which only EU law can regulate*", giving the EU "*exclusive competence to conclude agreements on foreign direct investment and EU law comprehensively governs and protects all steps of such investment*";[234]

[230] Resp. Rule 41(5) Application, paras. 142-171; Resp. Mem. on Juris., paras. 33-42.

[231] Resp. Rule 41(5) Application, para. 143.

[232] Resp. Rule 41(5) Application, para. 149. *See* **CL-0009**, TFEU, Art. 344; TEU, Art. 19(1), second sentence.

[233] Resp. Rule 41(5) Application, para. 155.

[234] Resp. Rule 41(5) Application, para. 145.

e. the Lisbon Treaty gave the EU full legal personality in TEU Article 47 and reinforced the CJEU role and legal understanding of the EU in TEU Article 19;[235]

f. one of the key elements of the renewed EU judicial system was dialogue between the CJEU and Member State national courts under TFEU Article 344, safeguarding the autonomy of EU legal order;[236]

g. TFEU Article 344 and TEU Article 19(1) (second sentence) "*establish an exclusive obligation of EU Member States to submit disputes concerning the interpretation or application of the EU Treaties to the judicial system of the EU*";[237]

h. Declaration 17 annexed to the Lisbon Treaty establishes that "*the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law*",[238] and the Opinion of the Council Legal Service "*results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law*" and "*inherent to the specific nature of the European Community*";[239]

i. the EU judicial system includes European courts and domestic courts and tribunals of EU Member States, which is "*of a final and binding nature within the EU*" and "*binding on EU Member States and, by extension, on companies that are based within the EU*", as confirmed by TFEU Article 351(2);[240]

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[235] Resp. Mem. on Juris., para. 34, citing **RL-0001**, B. Wegener, "*Titel III. Bestimmungen fiber die organe*" in C. Callies and M. Ruffert, *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta, Kommentar*, 2016 (excerpt).

[236] Resp. Rule 41(5) Application, paras. 29 *et seq.*; Resp. Mem. on Juris., para. 35.

[237] Resp. Rule 41(5) Application, para. 156.

[238] Resp. Mem. on Juris., para. 36, quoting **RL-0018**, Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, 13 December 2007, Declaration 17.

[239] Resp. Mem. on Juris., para. 37, quoting **RL-0018**, Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, 13 December 2007, Declaration 17.

[240] Resp. Rule 41(5) Application, paras. 149-151. *See* **CL-0009**, TFEU, Art. 351, which reads:

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

j. "[t]*his applies* a fortiori *in cases where agreements concluded between EU Member States are incompatible with EU law*", with the EU able to launch "*infringement proceedings to ensure that both parties to the relevant treaty are in conformity with EU law*";[241]

k. "*development of EU law supports Respondent's position that Art. 26 ECT is not applicable*" (pursuant to EU law), both "*based on the changes to EU law following the adoption of the Lisbon Treaty*" and because "*there is no reason why the ECT should take precedence over EU law*";[242] and

l. therefore, "*the necessary adjustment has to be made by ensuring that Art. 26 ECT is interpreted in a restrictive way where intra-EU disputes are concerned*".[243]

235. As to its position that the TFEU prevails over any inconsistency between the ECT and EU law, the Respondent's EU law argument proceeds on the basis that EU law conflicts rules prevail and that:

a. in relation to the scope of application of the conflict rule in TFEU Article 351(1):[244]

i. only where an EU Member State (before accession to the EU) enters into an agreement with one or more non-members, "*such agreements shall not be affected by EU law*";[245]

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

[241] Resp. Rule 41(5) Application, para. 152.

[242] Resp. Rule 41(5) Application, para. 146.

[243] Resp. Rule 41(5) Application, para. 152.

[244] Resp. Rule 41(5) Application, paras. 166 *et seq*.

[245] Resp. Rule 41(5) Application, para. 167. Tribunal note: or before the establishment of the EU.

ii. if two Member States are both parties to a pre-accession treaty and the EU Treaties, in the case of incompatibility then the later applies (in accordance with VCLT Article 30(3));[246]

b. applying that to the relationship between EU law and the ECT:

i. the ECT prevails between EU Member States and third countries;

ii. EU law prevails between two EU Member States, and any conflicting rules in the ECT, including ECT Article 16(2) (the ECT conflicts rule) remain inapplicable;[247]

c. primacy of EU law over the ECT also applies between an investor of one EU Member State and another EU Member State "*because the rights of individual investors are necessarily linked to the rights of their home* [EU] *states*";[248] and

d. the ECT Article 16 conflicts rule is inapplicable because "*intra-EU disputes are not within its scope of application*" (but even if applicable "*would not lead to a precedence of the ECT over EU law*" because "*the EU Treaties represent a more favorable developed legal system which offers more forms of protection than the ECT*", within the terms of ECT Article 16(2)).[249]

236. Based on the aforementioned EU law principles centring on primacy of EU law within and between Member States, the Respondent proceeds to set out its interpretation of EU law on the matter of consent to intra-EU arbitration.

[246] Resp. Rule 41(5) Application, para. 167, citing **CL-0151**, *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 ("***Electrabel v. Hungary*, Jurisdiction**"), para. 4.182. The Respondent notes, "*This (implied) meaning of Art. 351 TFEU (and its predecessor Art. 307 EC) has been settled case-law of the CJEU since 1962,* Commission of the European Economic Community v. Government of the Italian Republic".

[247] Resp. Rule 41(5) Application, para. 168, citing **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, para. 4.189 ("*Subject to the several assumptions above […] the Tribunal concludes that Article 307 EC [now Article 351 TFEU] precludes inconsistent pre-existing treaty rights of EU Member States and their own nationals against other EU Member States; and it follows […] that EU law would prevail over the ECT's substantive protections and that the ECT could not apply inconsistently with EU law to such a national's claim against an EU Member State*").

[248] Resp. Rule 41(5) Application, para. 169, citing **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, para. 4.188.

[249] Resp. Rule 41(5) Application, para. 170.

2) CJEU Judgments

237. The Respondent relies on four primary CJEU judgments to support its position that EU law has been definitively interpreted by the sole arbiter of EU law – the CJEU – and that it has finally determined that there is no consent by EU Member States to any intra-EU arbitration pursuant to bilateral investment treaties, the ECT and/or the ICSID Convention.

(i) *Achmea* Judgment

238. The first CJEU decision is the 2008 *Achmea* Judgment. According to the Respondent, this was the CJEU's "*first opportunity to rule on the compatibility of an intra-EU investor-State arbitration clause with EU law and to establish arbitration clauses in BITs are indeed incompatible with EU law*".[250]

239. The Respondent submits that "[t]*he legal analysis of the CJEU in the* Achmea *Judgment could not have been any clearer*", and sets out its finding as follows:[251]

> Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the [applicable] BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has taken to accept.

(ii) *Komstroy* Judgment

240. The second CJEU decision is the 2021 *Komstroy* Judgment, which the Respondent states confirms the applicability of the *Achmea* Judgment to intra-EU arbitration specifically under the ECT.[252]

241. According to the Respondent, the *Komstroy* Judgment and *Achmea* Judgment "*sealed the debate that ECT arbitration is not available for an EU investor to sue a host EU Member*

[250] Resp. Mem. on Juris., para. 38; **RL-0004**, *Achmea* Judgment.

[251] Resp. Mem. on Juris., para. 39, quoting **RL-0004**, *Achmea* Judgment, para. 60.

[252] Resp. Rule 41(5) Application, paras. 172-177; **RL-0007**, *Komstroy* Judgment.

State", as the Tribunal "*is not part of the judicial system of either EU Member State*" and the arbitration "*is contrary to EU law*".[253] In particular, the Respondent submits that:

a. prior to the *Achmea* Judgment, the German Federal Constitutional Court had said:[254]

> From an international-law point of view, the specific feature of the arbitration of disputes before the International Centre for Settlement of Investment Disputes is that private individuals are able to complain as claimants of the violation of an international agreement concluded between states. In terms of content, therefore, the violation of an obligation is complained, which is owed not directly to the private applicant, but to his or her home state, although the protective purpose of the agreement targets the interests of private investors.

b. the *Achmea* Judgment confirmed that mandatory EU law, which "*may not be bypassed bilaterally by the EU Member States, prevents the application of arbitration agreements concluded between EU Member States in an investment treaty*";[255] and

c. the *Komstroy* Judgment confirmed that the "*principles set out by the CJEU in the* Achmea *Judgment are applicable to arbitrations under the ECT*" and the "*arbitral mechanisms under Art. 26 ECT are inapplicable between Member States*".[256]

242. On the basis of both the *Achmea* and *Komstroy* Judgments, the Respondent submits that:[257]

> As EU law takes precedence over the EU Member States' legal order, all EU institutions and EU Member States as well as all EU law subjects must now comply with the legal principle established in the *Achmea* Judgment and *Komstroy* Judgment by leaving any provisions of national law unapplied that would otherwise contradict this principle. In this way, the *Achmea* Judgment and the *Komstroy* Judgment are binding on all EU Member States and other EU law subjects. This means that the CJEU, in its preliminary ruling, has prescribed a binding interpretation of EU law

[253] Resp. Mem. on Juris., para. 43; Resp. Rule 41(5) Application, para. 172.

[254] Resp. Rule 41(5) Application, para. 174, quoting German Federal Constitutional Court, Case No. 2 BvM 1-5/03, Judgment, 8 May 2007, para. 51 (available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2007/05/ms20070508_2bvm000103.html).

[255] Resp. Rule 41(5) Application, para. 173.

[256] Resp. Rule 41(5) Application, para. 176, citing **RL-0007**, *Komstroy* Judgment, para. 66.

[257] Resp. Rule 41(5) Application, para. 175.

> and that this binding interpretation applies to all EU Member States and their national courts, as well as to Respondent as EU Member State.

243. The Respondent further summarises its position on the *Komstroy* Judgment in its Memorial on Jurisdiction by emphasising that the *Komstroy* Judgment:

a. follows the reasoning in the *Achmea* Judgment;[258]

b. recalls "*the autonomy of the EU legal system and the necessity to preserve it, notably by putting in place a judicial system to ensure consistency and uniformity in the interpretation of EU law*";[259]

c. states that the ECT is an act of EU law;[260]

d. puts emphasis on the risk that any ECT Article 26 (investor-State arbitration) tribunal could be required to interpret EU law ("[i]*t follows that an arbitral tribunal such as that referred to in Article 26(6) ECT is required to interpret, and even apply, EU law*");[261] and

e. concludes that "*because of this risk*":[262]

> it must be ascertained, as the CJEU states in para. 51 of the *Komstroy* Judgment, that such arbitral tribunal is situated within the judicial system of the EU and subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU.

244. The Respondent submits that for intra-EU arbitration proceedings based on the ECT, as the Tribunal is "*not part of the judicial system of any EU Member State*", the *Komstroy* Judgment "*confirmed that EU law may not be bypassed by the EU Member States by resorting to arbitration under the ECT*".[263]

[258] Resp. Mem. on Juris., para. 44.
[259] Resp. Mem. on Juris., para. 44.
[260] Resp. Mem. on Juris., para. 45, citing **RL-0007**, *Komstroy* Judgment, para. 49.
[261] Resp. Mem. on Juris., para. 46, citing **RL-0007**, *Komstroy* Judgment, para. 50.
[262] Resp. Mem. on Juris., para. 47.
[263] Resp. Mem. on Juris., para. 47.

245. On that basis, the Respondent posits that the development of CJEU judgments further supports its argument that the Tribunal cannot base its jurisdiction on ECT Article 26 (investor-State arbitration).

(iii) *PL Holdings* Judgment

246. The third CJEU decision is the 2021 *PL Holdings* Judgment, which the Respondent relies on further to confirm that the *Achmea* Judgment applies to intra-EU arbitration.[264]

247. According to the Respondent, "[a]*s was to be expected in view of the fact that Art. 344 TFEU and Art. 267 TEU are mandatory for all EU law subjects*", the conclusion in the *Komstroy* Judgment "*was upheld again by the CJEU in the* PL Holdings *Judgment*", where the CJEU "*again fully upheld its reasoning set out in the* Achmea *Judgment and the* Komstroy *Judgment, extending the reasoning explicitly to ad hoc arbitration as well*" finding that the relevant arbitration clause:[265]

> is, therefore, incompatible with the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU and has an adverse effect on the autonomy of EU law enshrined, inter alia, in Article 344 TFEU.

248. The Respondent submits that *PL Holdings* "*illustrates once more the importance to ensure consistency and uniformity in the interpretation of EU law, rendering all intra-EU investor- State arbitration outside the EU legal system inadmissible*".[266]

(iv) *European Food* Judgment

249. The fourth CJEU decision on is the 2022 *European Food* Judgment, which the Respondent states confirms that the *Achmea* Judgment applies to the ICSID Convention.[267]

[264] Resp. Mem. on Juris., para. 48; **RL-0014**, *PL Holdings* Judgment.

[265] Resp. Mem. on Juris., para. 48, citing **RL-0014**, *PL Holdings* Judgment, para. 46.

[266] Resp. Mem. on Juris., para. 48.

[267] Resp. Mem. on Juris., paras. 50-56; **RL-0019**, *European Food* Judgment.

250. The decision involved enforcement proceedings arising out of a 2013 ICSID award that found Romania to be liable for breach of the Romania-Sweden bilateral investment treaty for revoking a number of investment incentives, where:[268]

a. the European Commission "*enjoined Romania from complying with the award, invoking its incompatibility with EU state aid rules and ordered Romania to recover any compensation that had already been paid by the state under the award*";

b. the EU General Court "*annulled that European Commission's decision, holding that the underlying dispute predated Romania's accession to the EU and therefore did not involve the broader intra-EU and state aid issues*"; and

c. the European Commission appealed to the CJEU.

251. On appeal, the CJEU held that the General Court "*erred in law in finding the* Achmea *Judgment to be irrelevant to the present case*".[269] According to the Respondent, "[i]*t was undisputed between the parties that the arbitral tribunal did not form part of the EU's judicial system, the creation of which is required by Art. 19 (1) second subparagraph of the TEU of the Member States in the areas covered by EU law*".[270] The Respondent relies on the CJEU finding that:[271]

> It is common ground that the arbitral tribunal before which that dispute was brought does not form part of the EU judicial system which the second subparagraph of Article 19(1) TEU requires the Member States to establish in fields covered by EU law which, with effect from Romania's accession to the European Union, replaced the mechanism for resolving disputes that might concern the interpretation or application of EU law.
>
> First, that arbitral tribunal is not a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU and, second, the arbitral award delivered by that court is not subject, in accordance with Articles 53 and 54 of the ICSID Convention, to any review by a court of a Member State as to its compliance with EU law.

[268] Resp. Mem. on Juris., paras. 50-52.

[269] Resp. Mem. on Juris., para. 53.

[270] Resp. Mem. on Juris., para. 53.

[271] Resp. Mem. on Juris., para. 54, quoting **RL-0019**, *European Food* Judgment, paras. 141-142.

252. The Respondent further submits that:

a. Romania's "*accession to the European Union, the system of judicial remedies provided for by the EU and the EU Treaties replaced the arbitration procedure of the BIT, and that the consent given to that effect by Romania lacked any force from the time of accession*";[272]

b. this "*more explicitly confirmed the principles established in the* Achmea *Judgment and affirmed again in the* Komstroy *as well as* PL Holdings *Judgments*";[273] and

c. in the *European Food* Judgment, together with the *Komstroy* Judgment, "*the CJEU made it clear that an intra-EU investor-State dispute may not be resolved pursuant to the provisions of the ECT together with the provisions of the ICSID Convention*".

253. According to the Respondent, the CJEU *European Food* Judgment finally settled the issue of consent to intra-EU arbitration under ICSID proceedings (as the *Komstroy* Judgment had done for ECT proceedings).

3) EU Member State Court and Tribunal Decisions

254. The Respondent further relies on developments in EU Member State courts and tribunals to support its reliance on the *Achmea*, *Komstroy*, *PL Holdings* and *European Food* Judgments in ECT arbitration, as well as annulment and stay decisions by non-EU Member State national courts and tribunals.[274] This is where the German Federal Courts' decisions referred to above are also relevant (see paragraphs 256.c(c) and (e)–(f) below).

255. The Respondent submits that the response by EU Member State courts "*has been unanimous*" and that:[275]

> All EU Member States' courts dealing with questions of intra-EU Investor-State arbitration confirmed that intra-EU arbitration clauses are incompatible with EU law

[272] Resp. Mem. on Juris., para. 55; **RL-0019**, *European Food* Judgment, para. 143.

[273] Resp. Mem. on Juris., para. 56.

[274] *See* Resp. Mem. on Juris., paras. 57-63 and the cases cited therein.

[275] Resp. Mem. on Juris., para. 64.

and hence invalid or inapplicable to Intra-EU investor-State disputes, accepting the CJEU's jurisprudence in this matter as *acte clair*.

256. The Respondent ultimately focuses on six EU Member State national court decisions, in particular:

a. the Lithuanian Supreme Court Decision dated 18 January 2022, which held that pending intra-EU investor-State arbitration before an ICSID arbitration tribunal did not bar national court proceedings on the same subject-matter as the underlying arbitration clause was invalid, based on the following sequence:[276]

i. a French investor initiated ICSID arbitration against Lithuania pursuant to the France-Lithuania BIT, arising out of investment in heating supply lease contracts in 2016, in which proceedings Lithuania filed a counterclaim;[277]

ii. following the *Achmea* Judgment, Lithuania also brought its counterclaim before the Lithuanian courts, which the Regional Court of Vilnius found to be inadmissible due to the pending ICSID arbitration;

iii. the Lithuanian Appeal Court overturned the Regional Court of Vilnius decision in March 2021; and

iv. on 18 January 2022, the Lithuanian Supreme Court held that the Lithuanian court proceedings were valid because the arbitration clause was invalid, i.e., the arbitration agreement "*had been executed in 1992 and entered into force in 1995, had become invalid with Lithuania's accession to the EU in May 2004 and the ensuing mandatory application of EU law, as interpreted by the CJEU*", following the reasoning of the CJEU in the *Achmea* Judgment;

b. the Svea Court of Appeal decision dated 11 February 2021, which, in the Respondent's view, determined "*that there was no longer a need for a preliminary ruling regarding the question whether Arts. 19 and 4 (3) TEU and Arts. 267 and*

[276] **RL-0015**, *Veolia v. Lithuania*.

[277] Resp. Mem. on Juris., paras. 65-69; **RL-0015**, *Veolia v. Lithuania*, para. 42.

344 TFEU have to be interpreted as precluding the arbitration clause in Art. 26 ECT in intra-EU disputes",[278] as follows:[279]

i. the Svea Court of Appeal granted Italy's request to seek a preliminary ruling from the CJEU in the enforcement proceedings regarding the SCC *Greentech v. Italy* arbitration on the grounds that the tribunal had denied Italy's intra-EU objection and wrongly concluded that the *Achmea* Judgment was irrelevant for ECT arbitrations;[280]

ii. the Svea Court of Appeal stayed the enforcement of the award but found referral to the CJEU necessary, requesting a preliminary ruling on the question "*whether the ECT which is part of the EU legal system, must be understood in such a way that Art. 26 also covers a dispute between an EU member state on the one hand and an investor from another EU member state on the other hand, provided that the latter has made an investment in the territory of the former*";[281] and

iii. the CJEU did not decide this request, as the Svea Court of Appeal withdrew it following the *Komstroy* Judgment;[282]

c. the German Federal Court of Justice decision dated 17 November 2021, which upheld the principles in the *Achmea* and *Komstroy* Judgments, implementing CJEU jurisprudence as follows:[283]

i. the decision was pursuant to Sec. 1032(2) German Code of Civil Procedure based on the Austria-Croatia BIT concerning a claim by two Austrian banks against Croatia;

[278] Resp. Mem. on Juris., para. 65; **RL-0026**, *Italy v. Greentech*.

[279] Resp. Mem. on Juris., paras. 70-74.

[280] Resp. Mem. on Juris., para. 70; **RL-0026**, *Italy v. Greentech*; **RL-0020 / CL-0091**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. 2015/095, Final Award, 23 December 2018 ("***Greentech v. Italy***").

[281] Resp. Mem. on Juris., para. 72, citing **RL-0026**, *Italy v. Greentech*, p. 4.

[282] Resp. Mem. on Juris., paras. 73-74.

[283] Resp. Mem. on Juris., paras. 75-80.

ii. on 11 February 2021, the Frankfurt Appeal Court had found that the referral of investment disputes to an arbitral tribunal under a bilateral investment treaty violated EU law and that arbitration was inadmissible, confirming that the *Achmea* Judgment is a "*landmark decision*", applicable to all arbitration clauses contained in BITs, and emphasising the "*autonomy of EU law*";[284]

iii. in this 17 November 2021 decision, the German Federal Court of Justice confirmed the Frankfurt Appeal Court decision:[285]

1. upholding the "*principle that an arbitration clause in an international treaty between Members States referring intra-EU investor-State disputes to arbitration was incompatible with Articles 267 and 344 TFEU*",

2. referring to CJEU reasoning that "*an international agreement may affect neither the jurisdiction of EU Member States courts or of the CJEU nor the autonomy of EU law as set forth in the EU Treaties*",[286]

3. confirming "*that the EU Treaties established a judicial system, in which pursuant to Art. 19 TEU, the national courts and the CJEU shall ensure the full application of EU law*", to "*ensure the uniform application of EU law by introducing a dialogue between the CJEU and the courts of the EU Member States*";[287] and

iv. the German Federal Court of Justice referred to the *Achmea*, *Komstroy* and *PL Holdings* Judgments in that "*an arbitration clause in an international investment agreement between Member States must be considered invalid if it is apt to remove disputes involving the application and interpretation*

[284] **RL-0027**, Appeal Court Frankfurt am Main, Case No. 26 SchH 2/20, Decision, 11 February 2021.
[285] Resp. Mem. on Juris., paras. 78-79; **RL-0028**, 17 November 2021 BGH Decision, paras. 10, 20-21.
[286] Resp. Mem. on Juris., para. 78; **RL-0028**, 17 November 2021 BGH Decision, para. 20.
[287] Resp. Mem. on Juris., para. 79; **RL-0028**, 17 November 2021 BGH Decision, para. 10.

of EU law from the Member States' courts in a way that does not guarantee the full force of EU law";[288]

d. the "***Kammergericht* Berlin**" (Appeal Court for the Land of Berlin, i.e., the highest state court for the Land of Berlin) has also referenced CJEU jurisprudence:[289]

   i. previously, the Respondent filed an application pursuant to Sec. 1032 (2) German Code of Civil Procedure with the *Kammergericht* Berlin to determine the admissibility of these arbitration proceedings;

   ii. by letter dated 1 February 2022, the *Kammergericht* Berlin informed the Parties that it will decide at the end of April 2022;

   iii. ultimately, on 28 April 2022, the *Kammergericht* Berlin rejected Germany's request and found that Section 1032(2) of the ZPO does not apply to ICSID arbitration proceedings (stating that "[i]*t follows from these rules that the procedural rules of the Convention are a closed legal system alongside which no other procedural rules can validly apply; rather, an arbitral tribunal constituted under the ICSID Convention itself conclusively decides on its own jurisdiction and the validity of an arbitration agreement*");

e. on 23 July 2024, the German Federal Constitutional Court issued its decisions in Case Nos. 2 BvR 557/19 and 2 BvR 141/22, which the Respondent submits:[290]

   i. "*confirm that the Tribunal does not have jurisdiction* ratione voluntatis";

   ii. found that "*the German Federal Court of Justice's decision which set aside the Achmea award did not violate the German constitution since it was bound by EU law as interpreted by the* [CJEU]", and

[288] Resp. Mem. on Juris., para. 80; **RL-0028**, 17 November 2021 BGH Decision, para. 21.

[289] Resp. Mem. on Juris., para. 81; **RL-0029**, 1 February 2022 *Kammergericht* Berlin Letter; **C-0166 / RL-0090**, *Kammergericht* Berlin Decision, p. 8.

[290] Letter from the Respondent to the Tribunal, 14 November 2024; **RL-0380**, BVerfG Decision 557/19; **RL-0381**, BVerfG Decision 141/22.

iii. further found that Germany's ratification of the EU Termination Agreement of 5 May 2020 "*does not violate the fundamental rights of Achmea B.V.*"; and

f. on 31 July 2025, the German Federal Constitutional Court issued its decision in Case No. 2 BvR 1277/23, which the Respondent submits:[291]

i. found that "*the Federal Court of Justice's Decision of 23 July 2023, declaring this arbitration inadmissible on the grounds that Art. 26 (2)(c) ECT is inapplicable to intra-EU investor-State disputes and thus does not provide for a valid offer for an arbitration agreement*"; and

ii. therefore, the 23 July 2023 Decision "*does not violate the German Constitution*" as the Claimants "*failed to substantiate*" their claims that there was:

1. "*a violation of the constitutional rights*", as the Federal Court of Justice had not "*violated the principle of respect for international law as well as acted* ultra vires *particularly by taking into account the CJEU's* Achmea *jurisprudence, resulting in a violation of their fundamental right under Art. 2 (1) in conjunction with Art. 20 (3) Basic Law*"; or

2. "*a need for constitutional protection*", as the Constitutional Court "*refused to accept Claimants' constitutional complaint for decision because Claimants had failed to explain how they were burdened by the decision of the Federal Court of Justice*", as the "*Federal Court of Justice's decision did not affect the ongoing arbitration proceedings*", (albeit voicing an "*expectation that other courts and tribunals will draw appropriate conclusions from its judgment*"); and

[291] Letter from the Respondent to the Tribunal, 10 October 2025; **RL-0387**, BVerfG Decision 1277/23.

iii. the Constitutional Court, therefore, confirms the lack of jurisdiction *ratione voluntatis* and poor chances of recognition and enforcement of ICSID awards, and reaffirms its previous jurisprudence.

257. In its Rule 41(5) Application, the Respondent expressly relies on various additional political developments since 2018.[292] It maintains that "[a]*lready after the* Achmea *Judgment, EU Member States are obligated not to start or to abandon any actions that have been declared to be in contradiction to EU law*", which "*prohibit*[s] *EU Member States from perpetuating situations that are contrary to EU law by continuing intra-EU investor-State arbitration proceedings*" as it "*would violate the principle of mutual trust between the EU Member States in the functioning of their respective judicial systems and have adverse effects on the autonomy of the EU legal order*".[293] The Respondent refers to the following non-judicial subsequent developments:

a. the 15 January 2019 Declaration signed by 22 Member States (including Germany and Ireland), providing that:[294]

> For the Energy Charter Treaty, its systemic interpretation in conformity with the Treaties precludes intra-EU Investor-State arbitration.

b. the Respondent describes the 2019 Declaration as "*confirmation by Respondent"* and Ireland "*that there is no standing offer to arbitrate under Art. 26 ECT*",[295] and "*a binding instrument originating from sovereign States*", which:[296]

i. contains "*explicit statements as to the nature of the ECT and its systemic interpretation precluding intra-EU investor-State arbitration*";

ii. confirms "*reciprocally* [Ireland and Germany's] *interpretation of the ECT's dispute settlement clause*";

[292] Resp. Rule 41(5) Application, paras. 178-182.
[293] Resp. Rule 41(5) Application, para. 178.
[294] Resp. Mem. on Juris., paras. 40-42, citing **RL-0006**, 2019 Declaration, fn. 2.
[295] Resp. Mem. on Juris., para. 42.
[296] Resp. Rule 41(5) Application, para. 179.

iii. "*demonstrates the shared understanding of the signatories regarding the interpretation of the ECT*"; and

iv. "*also confirms that the ECT should have always been interpreted according to this understanding*"; and

c. the May 2020 Termination Agreement, a further communication by the EU Member States and the European Commission "*confirming their wish to end intra-EU arbitration and to advance this development*",[297] which:

i. confirms "*that all intra-EU arbitration clauses contained in intra-EU BITs are inapplicable for non-compliance with EU law*":[298]

> The Contracting Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings.

ii. establishes rules for claims made under the BITs, providing for different rules regarding terminated, pending and new arbitration proceedings to deal with the consequences of such declaration of inapplicability;[299]

iii. according to which, "*new arbitration proceedings are those initiated after 6 March 2018, the day of the* Achmea *Judgment*";[300]

iv. Article 7 of the Termination Agreement "*obliges the parties to a new arbitration agreement to inform the tribunal about the consequences of the* Achmea *Judgment*";[301] and

[297] Resp. Rule 41(5) Application, para. 180.

[298] Resp. Rule 41(5) Application, para. 78, quoting Termination Treaty, Art. 4(1).

[299] Resp. Rule 41(5) Application, para. 79.

[300] Resp. Rule 41(5) Application, para. 79.

[301] Resp. Rule 41(5) Application, para. 79.

v. "*currently is subject to ratification and will enter into force for each signatory EU Member State 30 days after it delivers its instrument of ratification to the secretary-general of the Council of the European Union*".[302]

258. The Respondent submits that the effect of the Declaration and Termination Agreement instruments is as follows:[303]

> According to the May 2020 Termination Agreement, new arbitration proceedings are those initiated after 6 March 2018, the day of the *Achmea* Judgment. The present arbitration would therefore qualify as a new arbitration within the meaning of the May 2020 Termination Agreement. It was registered with ICSID on 13 May 2021. Art. 7 May 2020 Termination Agreement obliges the parties to a new arbitration agreement to inform the Tribunal about the consequences of the *Achmea* Judgment.

259. On the basis of those instruments, the Respondent posits that "*it is no longer a discussion on how to interpret the* Achmea *Judgment but rather a duty of this Tribunal to acknowledge that the EU Member States' joint interpretation ECT [sic] must result in prohibiting any pending or future arbitration proceeding under the ECT*", as confirmed by the *Komstroy* Judgment,[304] which the Respondent further submits supports its argument that the Tribunal cannot base its jurisdiction on ECT Article 26.

260. The Respondent notes in its Rule 41(5) Application that this approach accords with VCLT Article 27, where "*[a] party may not invoke the provisions of its internal law as justification for its failure to perform*".[305]

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[302] Resp. Rule 41(5) Application, para. 80. The Federal Republic of Germany delivered its instrument of ratification to the Secretary-General on 10 May 2021. Accordingly, the May 2020 Termination Agreement entered into force for the Federal Republic of Germany on 9 June 2021: *see* https://www.consilium.europa.eu/en/documents/treaties-agreements/agreement/?id=2019049&DocLanguage=en.

[303] Resp. Rule 41(5) Application, para. 181.

[304] Resp. Rule 41(5) Application, para. 182.

[305] Resp. Rule 41(5) Application, para. 154. The Tribunal notes that this legal basis was not relied on in any of the EU law CJEU decisions, Member State Court decisions or additional instruments. The sources of EU law instead relied solely on EU law arguments.

4) No Loss of Rights

261. Further, the Respondent submits that there is no loss of rights for EU-based investors.[306] In this regard, it states:[307]

> As EU Member States and the citizens of the EU, including companies incorporated in the EU, are the only ones concerned by this interpretation under EU law, there is no loss of rights for any other contracting state to the ECT: *Pacta tertiis nec nocent nec prosunt*.

262. The Respondent elaborates that there is no loss of rights because "*no such right was conferred to* [citizens of the EU] *in the first place, due to the mandatory character of EU law, with which they have to comply*", and that as the Claimants "*made use of rights conferred to them under EU law, they also must accept the limitations under the same legal order*". It states further that:[308]

> Citizens of EU Member States, including corporations, cannot invoke public international law treaties to prevent the application of EU law.

263. According to the Respondent, a decision by the Tribunal otherwise, "*would amount to perpetuating a breach of EU law by Claimants*", and that the Tribunal "*should bear in mind the very real practical consequences of any award under the ECT that would require Respondent to take further steps, including a request for annulment*".[309]

iv. International Law Interpretation

264. The Respondent firmly maintains that the question of jurisdiction *ratione voluntatis* in intra-EU arbitrations is governed by EU law. Nevertheless, it separately submits that the Tribunal also lacks jurisdiction *ratione voluntatis* on the application of general rules of international law. It argues that there is also no jurisdiction based on a proper interpretation of ECT Article 26 pursuant to international law based on: [310]

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[306] Resp. Mem. on Juris., paras. 82-85.

[307] Resp. Mem. on Juris., para. 83.

[308] Resp. Mem. on Juris., para. 84, citing **RL-0030**, *José Crujeiras Tome and Anton Yurrita v. Procurer de la République*, CJEU Cases 180/80 and 266/80, Judgment, 8 December 1981, para. 20.

[309] Resp. Mem. on Juris., para. 85.

[310] Resp. Rule 41(5) Application, paras. 147 *et seq.*; Resp. Mem. on Juris., paras. 91 *et seq.*

a. modification by the Lisbon Treaty as a subsequent treaty of the same subject-matter pursuant to VCLT Article 30;

b. the wording of the ECT, pursuant to VCLT Article 31;

c. the context, object and purpose of the ECT, pursuant to VCLT Article 31;

d. supplementary means of interpretation, pursuant to VCLT Article 32;

e. primacy of EU law, including pursuant to VCLT Article 5; and

f. other international agreements showing that ECT Article 26(4) is inapplicable intra-EU.

265. Given their basis in international law, these arguments all involve the application of the VCLT, which expressly deals with applicable law and interpretation of treaties. Germany was an EU Member State at the time it ratified the ECT. Based on international law, the extent of its commitment to arbitration under Article 26 ECT when signing the ECT, would be determined by an interpretation of the ECT in accordance with VCLT Articles 30, 31 and 32.

1) Successive Treaties (VCLT Article 30)

266. The VCLT, Article 30, applies to successive treaties relating to the same subject matter. Over the course of its submissions, the Respondent appears to raise arguments pursuant to Articles 30, Article 41(1)(b) and 59, respectively.

267. First, the Respondent submits that Article 30 applies to the TEU and TFEU and ECT on the basis that:[311]

[311] Resp. Rule 41(5) Application, paras. 161-162.

a. the International Law Commission has concluded that VCLT Article 30 "*applies to all situations where there is a conflict between the earlier and the later treaty*";[312]

b. the ECT and the EU Treaties relate to the same subject matter;[313]

c. "*the primacy of EU law in the relations between EU Member States […] is not a matter of* lex specialis *or of* lex posterior*, but one of* lex superior", as found by the tribunal in *Green Power v. Spain*;[314] and

d. the ECT "*only applies to the extent that its provisions are compatible with those of the later treaties*", and that the dispute settlement provisions in Article 26 ECT, "*when applied between two EU Member States, are not compatible with EU law as it results from those later treaties*".[315]

268. Secondly, pursuant to VCLT Article 30(2), according to the Respondent, EU Member States "*effectively modified the ECT by adhering to the Lisbon Treaty*".[316] As to the existence of express provisions in the EU Treaties and/or ECT specifying that one was subject to the other as required by Article 30(2), the Respondent submits that:

a. Article 351 TFEU "*means that between EU Member States and third countries, the ECT prevails*";[317]

b. Article 351 TFEU is a "*special conflict rule*", which "*has been recognized by the international legal community, for instance in the report of Martti Koskenniemi for the International Law Commission on fragmentation, where it is stated: 'The EC*

[312] Resp. Rule 41(5) Application, para. 163, referring to International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 2006 (available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf), p. 181, paras. 24 *et seq*.

[313] Resp. Rule 41(5) Application, para. 163.

[314] Resp. C-Mem., para. 72, quoting **RL-0077**, *Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. 2016/135, Award, 16 June 2022 ("***Green Power v. Spain***"), para. 469.

[315] Resp. Rule 41(5) Application, para. 164.

[316] Resp. Rule 41(5) Application, para. 158.

[317] Resp. Rule 41(5) Application, para. 168.

Treaty takes absolute precedence over agreements that Member States have concluded"";[318]

c. consequently, "*between two EU Member States, … EU law prevails and any conflicting rules in the ECT, including Art. 16 (2) ECT, must remain inapplicable*";[319] and

d. the conflict rule in Article 16 ECT "*is not applicable since intra-EU disputes are not within its scope of application*", but "*even if it were to be applied, it would not lead to a precedence of the ECT over EU law since the EU Treaties represent a more favorable developed legal system which offers more forms of protection than the ECT does*". [320]

269. Thirdly, pursuant to the VCLT Article 30(4)(a), "[t]*he relations between the Republic of Ireland and Respondent, which are both parties to the ECT and to the EU Treaties, are governed by the more recent treaties*".[321] The Respondent submits in this regard that:

a. Article 30(4)(a) VCLT applies rather than the ECT because, "[e]*ven though, the EU provisions on internal market technically do not address promotion and protection of investments, they share the same efforts of integration*";[322]

b. "*EU Member States effectively modified the ECT by adhering to the Lisbon Treaty*", as "*supported by Art. 30 (2) VCLT*"; [323] and

c. "[t]*he* inter se *obligations between EU Member States such as Respondent and the Republic of Ireland would have been superseded on the basis of either Arts. 41 (1)(b) VCLT or 30 (4)(a) VCLT*". [324]

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[318] Resp. Rule 41(5) Application, para. 153, referring to M. Koskenniemi, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, 2006 (available at: https://documents.un.org/doc/undoc/ltd/g06/610/77/pdf/g0661077.pdf), para. 283.

[319] Resp. Rule 41(5) Application, para. 168.

[320] Resp. Rule 41(5) Application, para. 170.

[321] Resp. Rule 41(5) Application, para. 148.

[322] Resp. Rule 41(5) Application, para. 157.

[323] Resp. Rule 41(5) Application, para. 158.

[324] Resp. Rule 41(5) Application, para. 158.

270. Fourthly, in relation to VCLT Article 41(1)(b), the Respondent submits that the EU Member States "*effectively modified the ECT by adhering to the Lisbon Treaty*".[325] In particular, the Respondent argues:

a. VCLT Article 41(1)(b) concerns amendment by later treaty only between parties;[326]

b. the VCLT Article 41(1)(b) requirements are met because "*the possibility of investor-State arbitration between investors from non-EU Member States and either the EU or EU Member States remains untouched*";[327] and

c. EU investment protection rules, and principles concerning the competences and system of judicial protection, including the general principle of autonomy of EU law (TEU Articles 4(3) and 19, TFEU Articles 267 and 344), were re-affirmed by the Respondent and Ireland subsequent to ECT ratification, which "*should be interpreted as a valid amendment pursuant to Art. 41 (1)(b) VCLT*".[328]

271. Fifthly, pursuant to VCLT Article 30(3), according to the Respondent this applies "*when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Art. 59 VCLT*", and the earlier treaty "*applies only to the extent that its provisions are compatible with those of the later treaty*".[329] Pursuant to Article 30(2), according to the Respondent, EU Member States "*effectively modified the ECT by adhering to the Lisbon Treaty*".[330]

2) General Interpretation (VCLT Article 31(1))

272. The Respondent's position on the ordinary meaning of the text of the ECT and its instruments, interpreted in line with VCLT Article 31(1), is as follows:

[325] Resp. Rule 41(5) Application, paras. 158 *et seq*.
[326] Resp. Rule 41(5) Application, para. 159.
[327] Resp. Rule 41(5) Application, para. 160.
[328] Resp. Rule 41(5) Application, para. 161.
[329] Resp. Rule 41(5) Application, para. 162.
[330] Resp. Rule 41(5) Application, para. 158.

a. ECT Articles 26(1) and 26(3) only include consent to arbitrate disputes with investors of "*another ECT Contracting Party*", and as the EU is a Contracting Party and Germany and Ireland "*are part of the greater unit of the EU*", they are "*treated in the ECT as a single territory, the one of the EU*";[331]

b. ECT Article 1(2) defines "*Contracting Party*" as a "*State or Regional Economic Integration Organization which has consented to be bound by the ECT and for which that treaty is in force*", which the Respondent says "*caters for the possibility that a Contracting Party is bound only for parts of the ECT, namely for the parts for which it enjoys international competence*";[332]

c. ECT Article 1(3) defines "*Regional Economic Integration Organization*" ("**REIO**") as an "*organization constituted by states to which they have transferred competence over certain matters a number of which are governed by the ECT, including the authority to take decisions binding on them in respect of those matters*", and REIO competencies are dealt with in Article 36(7);[333]

d. ECT Article 36(7) provides that "[a] *Regional Economic Integration Organization shall, when voting, have a number of votes equal to the number of its member states which are Contracting Parties to this Treaty; provided that such an Organization shall not exercise its right to vote if its member states exercise theirs, and vice versa*", which the Respondent says "*reflects the division of competences and foresees that the EU votes on matters falling in its competence, and the EU Member States on matters falling in their competence, and that the EU, when voting, shall have a number of votes equal to the number of its Member States*";[334]

e. the UN Handbook defines the term REIO and specifically refers to the EU;[335]

[331] Resp. Mem. on Juris., paras. 100-101.

[332] Resp. Rule 41(5) Application, paras. 102-103; Resp. Mem. on Juris., para. 102.

[333] Resp. Rule 41(5) Application, paras. 104-105; Resp. Mem. on Juris., para. 103.

[334] Resp. Rule 41(5) Application, para. 105.

[335] Resp. Mem. on Juris., paras. 104-105, referring to **RL-0031**, United Nations, *Handbook on Final Clauses of Multilateral Treaties*, 2003, p. 22.

f. the Convention for the Unification of Certain Rules for International Carriage by Air 1999 also considers the EU as a REIO;[336]

g. on 2 May 2019, the European Communities submitted a statement to the Energy Charter Secretariat pursuant to ECT Article 26(3)(b)(ii) to replace the statement of 17 November 1997, declaring the European Communities to be a REIO ("*The European Union and Euratom are regional economic integration organisations within the meaning of the Energy Charter Treaty*");[337]

h. ECT Article 1(10) defines "*Area*" to include "[w]*ith respect to a Regional Economic Integration Organization which is a Contracting Party*" as meaning "*the Areas of the member states of such Organization, under the provisions contained in the agreement establishing that Organization*";[338] and

i. ECT Article 10 provides that each Contracting Party guarantees favourable treatment to investors of other Contracting Parties, but as the EU "*itself is a Contracting Party, 'other contracting parties' can only be third countries*".[339]

273. Based on the language of those provisions, the Respondent interprets the ECT as follows:

a. it recognises that "*EU Member States have transferred competence over matters governed by the ECT to the EU, including the authority to take binding decisions for the EU Member States in respect of those matters*";[340]

b. its signatories "*acknowledge that the competence for concluding the ECT is shared between the EU and the EU Member States*", and recognise that:[341]

[336] Resp. Mem. on Juris., para. 106, referring to **RL-0032**, Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999.

[337] Resp. Mem. on Juris., para. 107, referring to **RL-0033**, Statement submitted to the ECT Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing statement made on 17 November 1997 on behalf of the European Communities, 2 May 2019.

[338] Resp. Rule 41(5) Application, para. 107; Resp. Mem. on Juris., paras. 109-110.

[339] Resp. Rule 41(5) Application, para. 97; Resp. Mem. on Juris., paras. 111-112.

[340] Resp. Rule 41(5) Application, para. 106.

[341] Resp. Rule 41(5) Application, para. 106.

i. the EU "*corresponds to its parts (because it has a number of votes equal to its parts)*",

ii. each part "*acts only in the matters falling under its competence*"; and

iii. "[f]*or the EU, EU Member States and the EU are therefore not bound for the entirety ECT, but each for its respective competences*";

c. the ECT's express references to the agreement establishing the REIO "*recognizes that the relationships between the Contracting Parties that are members of the REIO are governed by the provisions contained in the agreement establishing the REIO*";[342]

d. accordingly, "*the agreement establishing the EU, i.e. the EU Treaties, confer the competence for the common commercial policy, including investment protection, on the EU*";[343]

e. as the "*Area*" of the EU in fact "*comprises the entirety of the areas of the EU Member States*",[344] an intra-EU investment "*is not an investment in the area of another Contracting Party, but in the area of the same Contracting Party*", (the EU "*being a single investment area for its Member States*");[345]

f. accordingly, the EU offer to arbitrate is "*only made to investors from Contracting Parties that are not EU Member States*";[346]

g. this conclusion is evident from Advocate General Bot's statement on the Comprehensive Economic Trade Agreement between Canada and the EU ("**CETA**"), that "[a]*s the German Government rightly observed at the hearing, the situation of Canadian investors who invest in the European Union is not*

[342] Resp. Rule 41(5) Application, para. 108.

[343] Resp. Rule 41(5) Application, para. 108.

[344] Resp. Rule 41(5) Application, para. 109, citing TEU, Art. 52; **CL-0009**, TFEU, Art. 355.

[345] Resp. Rule 41(5) Application, para. 109; Resp. Mem. on Juris., paras. 110-111.

[346] Resp. Rule 41(5) Application, para. 109; Resp. Mem. on Juris., para. 112.

comparable with the situation of European investors who invest in their own economic area";[347]

h. any other interpretation "*Area*" would lead to "*absurd results*";[348]

i. by way of example, the ECT Article 7(10)(a) reference to "*transit*" can "*only apply to the EU*", being (i) the entity having "*substantive competence under the TFEU*" and (ii) a "*fully-fledged customs union as a whole*", and cannot apply "*to transportation between the EU Member States*";[349]

j. the chapter application of ECT Articles 1(3) and 1(10) is not relevant,[350] as Article 1(3) and 1(10) are not limited to certain chapters and "[a]*n explicit disconnection clause is simply not necessary and superfluous due to the use of the REIO clause in Art 1 (3) and (10) ECT*", as "*confirmed by literature*";[351]

k. ECT Article 25 recognises certain trade and investment liberalization between Contracting States by virtue of the Economic Integration Agreement ("**EIA**"), and provides that most favoured nation treatment of the IEA shall not extent to non-EIA Contracting States of the ECT (i.e., EIA members "*are not required by the ECT to extend the same benefits to non-EIA States*");[352] and

l. nothing in ECT Part III, "*Investment Promotion and Protection*", or Part V, "*Dispute Settlement*", "*may be understood to derogate from provisions of the EU Treaties as for investment promotion and protection or from any right to dispute resolution*" under the EU Treaties.[353]

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[347] Resp. Mem. on Juris., para. 113, citing **RL-0035**, Opinion of Advocate General Bot, Opinion 1/17, 29 January 2019 ("**Opinion 1/17**"), para. 207.

[348] Resp. Rule 41(5) Application, para. 111.

[349] Resp. Rule 41(5) Application, para. 111, referring to **CL-0009**, TFEU, Arts. 28 *et seq*.

[350] Resp. Rule 41(5) Application, para. 110; Resp. Mem. on Juris., para. 115.

[351] Resp. Mem. on Juris., para. 115; **RL-0036**, M. Smrkoli, *The Use of the "Disconnection Clause" in International Treaties: What does it tell us about the EC/EU as an Actor in the Sphere of Public International Law?*, 14 May 2008 (unpublished paper).

[352] Resp. Rule 41(5) Application, para. 112.

[353] Resp. Rule 41(5) Application, para. 113; Resp. Mem. on Juris., para. 116.

274. According to the Respondent, "[a]*ll of these provisions lead to the conclusion that the Contracting Parties to the ECT signed the ECT in the mutual understanding that it would not apply to an intra-EU situation*".[354]

3) Context, Object and Purpose (VCLT Article 31(1), (2))

275. The Respondent also argues that the same conclusion is reached by interpretation of the context, object and purpose of the ECT,[355] in accordance with VCLT Articles 31(1) and 31(2). In this regard, the Respondent relies on:

a. complementary responsibilities in the case of "*mixed agreements*", as confirmed by the CJEU in a 1978 ruling regarding the Draft Convention of the International Atomic Agency on the Physical Protection of Nuclear Materials, Facilities and Transports (the CJEU stated that relevant provisions "*will form an integral part of Community law*", and "[f]*or the rest, it will be for the Member States to adopt the appropriate implementing provisions*");[356]

b. the preparatory work of the ECT and circumstances of its conclusion, which the Respondent submits "*confirm the goal of integrating the energy sectors of the former Soviet Union and Eastern Europe with those of the 'Western world', including the USA, Canada and Norway*" and that goal was "*not to regulate the EU internal market for energy*";[357]

c. "[t]*he reading of the ECT by the EU itself*" as having "*always been consistent in not extending investor-State arbitration to a pure intra-EU situation*";[358]

d. it being "*the EU's legal order that determines the latter's behavior and actions*" when the EU and the EU Member States both become parties to multilateral

[354] Resp. Rule 41(5) Application, para. 114.

[355] Resp. Rule 41(5) Application, para. 115; Resp. Mem. on Juris., para. 119, citing **RL-0008**, E. Neframi, "*The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations*" in 47 Common Market Law Review, 2010 ("**Neframi, *Duty of Loyalty***"), p. 325.

[356] Resp. Mem. on Juris., para. 120, citing **RL-0037**, CJEU, Ruling 1/78, 14 November 1978, para. 36.

[357] Resp. Rule 41(5) Application, para. 116; Resp. Mem. on Juris., para. 121.

[358] Resp. Rule 41(5) Application, para. 116.

agreements, and the ECT Contracting Parties "*were fully aware of the EU's legal order, its particularities, and of the fact that EU law would be subject to constant political and legal change*", as evidenced by:[359]

i. "*specific references to the transfer of competences to the REIO and the agreement establishing the REIO in Arts. 1 (3) and 1 (10) ECT*"; and

ii. the ECT having been "*initiated by the EU, and that the Charter of Paris and the European Energy Charter, which are incorporated through the preamble of the ECT into the Treaty, refer to the special role and status of the EU*";

e. the fact that, when negotiating and concluding multilateral agreements, "*the EU and the EU Member States are bound by the general principle of EU law of unity in the international representation of the EU*";[360] and

f. the fact that, while in theory EU Member States have capacity to enter into *inter se* obligations in multilateral agreements "*for those areas of the agreement for which they retain competence*", "*they, in practice, never do*".[361]

276. As to the ECT negotiating history, the Respondent posits that:

a. throughout negotiations, the EU and the EU Member States "*acted … as one single block and with one voice*";[362]

[359] Resp. Rule 41(5) Application, para. 117.

[360] Resp. Rule 41(5) Application, para. 118, citing *European Commission v. Kingdom of Sweden*, CJEU Case C-246/07, Judgment, 20 April 2010 (available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62007CJ0246) ("***European Commission v. Sweden***"), para. 73; **RL-0008**, Neframi, *Duty of Loyalty*, p. 335, fn. 45 ("*the European group (EU and Member States) appears as a single contracting party*").

[361] Rule 41(5) Application, para. 119, citing P. Kuijper, "*The Conclusion and Implementation of the Uruguay Round Results by the European Community*" in 6(1) European Journal of International Law, 1995 (available at: http://ejil.org/pdfs/6/1/1292.pdf) ("**Kuijper, *Conclusion and Implementation***"), pp. 228 *et seq.* ("*It is clear as a matter of international law that a mixed Community agreement, concluded simultaneously between the Community, its Member States and third States, is in principle capable of creating rights and obligations between all the parties and hence also between the Member States* inter se*. It is most of the time equally obvious, as a matter of practical intention, that it is the objective of the Community negotiators to create rights and obligations only between the Community and its Member States on the one hand and one or more third States on the other*").

[362] Resp. Rule 41(5) Application, para. 120.

b. the ECT "*was perceived as part of the European Communities' external energy policy*", never intended to "*influence their internal energy policy*", and "*the creation of the European Communities' internal energy market was well under way when the ECT was negotiated*", as "*explicitly mentioned and recognized in the European Energy Charter and hence … known to all Contracting Parties of the ECT*";[363]

c. "*it was necessary for EU Member States to also become Contracting Parties, since it was considered at the time that they retained competence over certain matters covered by the ECT*";[364] and

d. at the Energy Charter Conference, a decision was made to permit "*non-EIA investors to obtain EIA benefits by virtue of certain links to EIA territory*", which "*defined the requirements under which legal entities from non-EU Member States could benefit of the rules internal to the EU*",[365] regarding which the Respondent submits that:

   i. "[t]*o avoid double protection for identical situations, the intent must have been that these investors could solely pursue remedies available under EU law with no additional opportunity to resort to the dispute resolution mechanism in Art. 26 ECT*";

   ii. "[i]*t would be fully redundant to regulate the access to EU law protections in this manner if the ECT's dispute resolution mechanism was equally available to both EU investors and non-EU investors*"; and

[363] Resp. Rule 41(5) Application, para. 120.
[364] Resp. Rule 41(5) Application, para. 121.
[365] Resp. Rule 41(5) Application, para. 122.

iii. "*EU law already contemplates sufficient protection for entities established in the EU*".[366]

277. The Respondent further relies on the July 2018 Communication for content, object and purpose, stating that the EU "*emphasized that EU law protects investors against unjustified restrictions and summarized the legal grounds on which discrimination of investors' rights are in principle prohibited*", and "*the offer to arbitrate in Art. 26 (3) ECT must be interpreted in light of Art. 26 (6) ECT*", the ECT governing law clause providing for the ECT "*and applicable rules and principles of international law*" as the applicable law.[367] The Respondent develops this as follows:[368]

a. ECT Article 26(6) "*applies equally to matters of jurisdiction as to matters of merits*";[369]

b. "*EU law forms part of international law*";

c. "[a]*pplicable rules and principles of international law in this context include those that affect all EU Member States, such as the TFEU and TEU as international treaties*";

[366] Resp. Rule 41(5) Application, para. 122, referring to **RL-0005**, July 2018 European Commission Communication, p. 5:

> In particular, EU law covers and protects investments implying capital movements and establishment. These terms refer to:
>
> - the acts of investing in, acquiring and setting up companies;
> - the right to acquire, use or dispose of immovable property;
> - the repurchase of shares and bonds dealt in and quoted on a stock exchange;
> - the receipt of dividends and interest;
> - the commercial grant of credits (including consumer credits);
> - the acquisition of units of an investment fund; mortgages, legacies and loans, etc. and
> - the acquisition of patents, trademarks and other intellectual property rights.
>
> EU law protects access to the market, operations on the market and retreat from the market.

[367] Resp. Rule 41(5) Application, para. 123; **RL-0005**, July 2018 European Commission Communication; **CL-0001 / RL-0084**, ECT, Art. 26(6) ("*A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*"). *See also* Resp. Mem. on Juris., para. 122.

[368] Resp. Rule 41(5) Application, para. 124; Resp. Mem. on Juris., paras. 121-128.

[369] Resp. Rule 41(5) Application, para. 124; Resp. Mem. on Juris., para. 123, relying on **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, para. 4.192.

d. "[t]*hese treaties contain specific rules governing the relations between EU Member States*";

e. currently, "*these rules as principles of international law and EU law prevent EU Member States from undertaking the obligation to arbitrate claims that could have repercussions on EU law issues*";

f. therefore, "*when assessing its jurisdiction considering Art. 26 (6) ECT, this Tribunal must find that the offer to arbitrate investment disputes has always been inapplicable to intra-EU disputes*"; and

g. the fact that EU law is not mandatory for all signatory states to the ECT "*does not hinder its applicability in an intra-EU setting, where it is mandatory for the EU Member States and the EU law subjects involved*".[370]

278. The Respondent further relies on the Contracting Parties' intentions, arguing that:[371]

a. "*incompatibility with EU law is also in line with the signatories' intention*";

b. neither Germany nor Ireland "*ever meant to enable investors from EU Member States to sue the EU for an EU measure before an arbitral tribunal established on the basis of Art. 26 ECT*";

c. otherwise, "*an investor from an EU Member State could, in the first instance, bring an action against an European Commission decision before the CJEU and the European Court*" and if defeated "*have the option to initiate arbitration proceedings on the basis of Art. 26 ECT against both the European Commission's decision and the judgment of the Court of First Instance and, if necessary, the CJEU, claiming that the EU, including the CJEU, had violated its obligations under Art. 10 ECT*"; and

[370] Resp. Mem. on Juris., para. 129, citing **RL-0039**, *Sørensen and Rasmussen v. Denmark*, ECHR, Application Nos. 52562/99 and 52620/99, Judgment, 11 January 2006; **RL-0040**, *Silidian v. France*, ECHR, Application No. 73316/01, Judgment, 26 October 2005.

[371] Resp. Rule 41(5) Application, para. 125.

d. such approach would permit the arbitral tribunal to "*have the opportunity to interpret Art. 10 ECT, an integral part of EU law, and to apply it to the delegated regulation of the European Commission as derived EU law*", which "*would be contrary to the CJEU's established case-law on the autonomy of EU law and was clearly not the intention of the Contracting Parties to the ECT*".

279. For all of these reasons, the Respondent concludes that the ECT's context, object and purpose, "*as established by reference to prior international agreements referenced in its preamble and the circumstances of its conclusion*", show that "*it was understood by all Contracting Parties that the EU Member States did not intend to create* inter se *obligations between them*" based on VCLT Articles 31(1) and (2).[372]

4) Supplementary Means (VCLT Articles 31(3) and 32)

280. The Respondent further relies on subsequent agreements and/or supplementary means of interpretation, based on EU law as the "*relevant rules of international law applicable in the relations between the parties*" pursuant to VCLT Article 31(3)(c) and/or Article 32.[373] In this regard, it relies on a prior investor-State arbitration decision, commentary, and ICJ and CJEU judgments.

281. First, the Respondent relies on the prior decision on jurisdiction in *Electrabel v. Hungary*, where the tribunal discussed the relationship between the ECT and EU law as follows:[374]

a. as EU law is part of international law, it must be applied on the basis of ECT Article 26 as a matter of law, both to the validity of the arbitration agreement and the merits;

b. this follows from the reference in Article 26 to international law as the law applicable to the dispute, as EU law constitutes international law that applies

[372] Resp. Rule 41(5) Application, para. 126.

[373] Resp. Rule 41(5) Application, para. 127; Resp. Mem. on Juris., paras. 133-139.

[374] Resp. Rule 41(5) Application, paras. 128-130; Resp. Mem. on Juris., paras. 134-135; **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, paras. 4.111-4.199.

between the host State and the home State of the investor in the case of an intra-EU dispute;[375]

c. given its historic genesis and its text, the ECT should be interpreted in harmony with EU law;[376]

d. if harmonious interpretation proves impossible, EU law prevails on the basis of TFEU Article 351, which is the customary rule of international law codified in VCLT Article 30;[377] and

e. the *Electrabel* tribunal thus refuted all arguments to the contrary and relied on the relevant case-law of the CJEU.[378]

282. Secondly, the Respondent relies on commentaries by Thomas Eilmansberger and Hervé Ascencio stating as follows:[379]

a. "*public international law, which governs the law applicable to the arbitration, 'requires arbitral tribunals to interpret intra-EU BITs in the light of other international law obligations applicable to the facts at hand, i.e. in the light of relevant EC law'*";[380]

b. such obligation follows from VCLT Article 31 (3)(c), "*which requires that in the interpretation of a treaty, 'any relevant rules of international law applicable in the relations between the parties'*" be taken into account as context;[381]

[375] Resp. Rule 41(5) Application, para. 129; **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, paras. 4.119-4.126.

[376] Resp. Rule 41(5) Application, para. 129; **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, paras. 4.130-4.142.

[377] Resp. Rule 41(5) Application, para. 130; **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, paras. 4.178-4.191.

[378] Resp. Rule 41(5) Application, para. 131; **CL-0151**, *Electrabel v. Hungary of Hungary*, Jurisdiction, paras. 4.178-4.189 ("*Article 307 EC [now Art. 351 TFEU] precludes inconsistent pre-existing treaty rights of Member States and their own nationals against other Member States; and it follows, if the ECT and EU law remained incompatible notwithstanding all efforts at harmonisation, that EU law would prevail over the ECT's substantive protections and that the ECT could not apply inconsistently with EU law to such a national's claim against an EU Member State*").

[379] Resp. Rule 41(5) Application, paras. 132-134.

[380] Resp. Rule 41(5) Application, para. 132, quoting **RL-0009**, T. Eilmansberger, "*Bilateral Investment Treaties and EU Law*" in 46 Common Market Law Review, 2009 ("**Eilmansberger, *BITs and EU Law***"), p. 421.

[381] Resp. Rule 41(5) Application, para. 133, quoting **RL-0009**, Eilmansberger, *BITs and EU Law*, p. 421.

c. "*the intentions of the parties are expressed in the most authoritative way by conflict rules included in the later treaty, and the EC Treaty (being the later Treaty in this case) does indeed contain such a conflict rule, namely the already mentioned Article 307 EC*";[382] and

d. EU law "*must be taken into account as an element extrinsic*" to the ECT, which "*means that these elements are part of the circumstances also mentioned in Article 32 [VCLT], together with the preparatory works, but put in Article 31 in order to avoid relegation as a secondary means of interpretation*".[383]

283. Thirdly, the Respondent relies on two ICJ judgments "*by way of analogy*" to demonstrate that a contrary conclusion "*would mean that the ECT is to be understood to operate wholly independently from EU law so as to be capable of being successfully invoked even if it were to clearly contradict the former*", which "*has never been the understanding of the EU Member States when they signed the ECT, particularly since nothing indicates that the ECT is intended to apply as a* lex specialis *to EU law*".[384] In particular, the Respondent refers to the ICJ cases:[385]

a. *Oil Platforms (Iran v. United States)*; and

b. *Continental Shelf (Tunisia v. Libya)*;

to support its argument that "*it cannot be lightly presumed that Respondent and Claimants, or their home EU Member State Ireland, would conclude a treaty, such as the ECT, that would impose obligations on them that would place them in breach of obligations owed to the EU and other EU Member States under the EU Treaties*".[386]

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[382] Resp. Rule 41(5) Application, para. 133; **RL-0009**, Eilmansberger, *BITs and EU Law*, p. 425.

[383] Resp. Rule 41(5) Application, para. 134; **RL-0010**, H. Ascencio, "*Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law*" in 31(2) ICSID Review, 2016, p. 371.

[384] Resp. Rule 41(5) Application, para. 135.

[385] Resp. Rule 41(5) Application, para. 135; *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, International Court of Justice, Judgment, 6 November 2003 (available at: https://www.icj-cij.org/public/files/case-related/90/090-20031106-JUD-01-00-EN.pdf) ("***Oil Platforms***"), para. 41; *Case Concerning the Continental Shelf* (*Tunisia v. Libyan Arab Jamahiriya)*, International Court of Justice, Revision and Interpretation – Judgment, 10 December 1985 (available at: https://www.icj-cij.org/public/files/case-related/71/071-19851210-JUD-01-00-EN.pdf) ("***Continental Shelf***"), para. 43.

[386] Resp. Rule 41(5) Application, para. 135.

284. In its Memorial on Jurisdiction, the Respondent refers also to Advocate General Maciej Szpunar's Opinion of 3 March 2021, as confirming that "*the ECT, despite being a multilateral agreement, consists of a series of bilateral relationships between the contracting parties*",[387] an argument that the European Commission also raised in its intervention.[388] The Respondent submits that the ECT obligations "*apply only bilaterally between these two contracting parties*", and "*must be interpreted in a way that respects the bilateral nature of the relationship between two EU law subjects*".[389]

285. As to the ICJ judgment in *Barcelona Traction*, referred to and relied on by Advocate General Szpunar,[390] the Respondent submits that this confirmed the distinction "*between bilateral legal relations and multilateral legal relations under multilateral treaties*", as reflected in VCLT Article 41.[391] The Respondent cites from *Barcelona Traction* as follows:[392]

> In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection.

286. According to the Respondent, the interpretation of bilateral obligations under ECT Article 26 "*must include all further acts of the parties that are relevant for the interpretation of the ECT, such as,* inter alia, *the 15 January 2019 Declaration*".[393]

287. In conclusion on subsequent agreements and/or supplementary means of interpretation, the Respondent submits that:

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[387] Resp. Mem. on Juris., para. 136; **RL-0042**, *Republic of Moldova v. Komstroy LLC*, CJEU Case C-741/19, Opinion of Advocate General Szpunar, 3 March 2021 ("**Szpunar Opinion**"), para. 41.

[388] *See* paragraphs 342 to 365 below.

[389] Resp. Mem. on Juris., para. 136.

[390] **RL-0042**, Szpunar Opinion, para. 41, fn. 22.

[391] Resp. Mem. on Juris., para. 137 (this argument was added following the European Commission Submission); **RL-0043**, G. Fitzmaurice, "*Second Report on the Law of Treaties*" in 2 Yearbook of the International Law Commission, UN Doc. A/CN.4/SER.A/1957/Add.1, 1957, p. 54.

[392] Resp. Mem. on Juris., para. 137, citing **RL-0045**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain*), International Court of Justice, Judgment (Second Phase), 5 February 1970 ("***Barcelona Traction***"), para. 33.

[393] Resp. Mem. on Juris., para. 138.

a. as between EU Member States, "*EU law should be viewed under Art. 31 (3)(c) VCLT as forming an integral part of the task of interpretation ECT by the Tribunal so as to avoid results that diverge from*" EU law;[394]

b. the importance of VCLT Article 31(3)(c) for the interpretation of ECT Article 26 "*in conformity with the general principle of autonomy of EU law, is also underlined in the case-law of the CJEU*";[395]

c. "*it is crucial to recall that in the hierarchy of norms of EU law, international agreements concluded by the EU are above rules of secondary EU law, but below general principles of EU law and the EU Treaties*", as "*the CJEU's exclusive jurisdiction to render a final interpretation of EU Treaties is also not a novelty of the* Achmea *Judgment*";[396]

d. to apply the principle of interpretation in conformity, "*the ECT has to be interpreted so as to comply with primary EU law, and not the other way around*";[397] and

e. therefore, "*any interpretation of the ECT in accordance with the VCLT leads to the conclusion that there is no valid offer to arbitrate from Respondent to Claimants*".[398]

288. In its Memorial on Jurisdiction, the Respondent reiterates these points,[399] emphasising that its interpretation arguments are made pursuant to public international law.[400] It concludes that, "*applying the principles of interpretation of the VCLT, the ECT must be interpreted*

[394] Resp. Rule 41(5) Application, para. 136.

[395] Resp. Rule 41(5) Application, para. 137; *Council of the European Union v. Front Polisario*, CJEU Case C-104/16 P, Judgment, 21 December 2016 (available at: http://curia.europa.eu/juris/document/docu-ment.jsf?text=&docid=186489&doclang=EN), para. 86

[396] Resp. Rule 41(5) Application, paras. 137-138; *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, CJEU Case C-459/03, Judgment, 30 May 2006 (available at: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=57551&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7868936), para. 132; **RL-0046**, CJEU Opinion 2/13, 18 December 2014 ("**CJEU Opinion 2/13**"), paras. 201, 210 (where, according to the Respondent, the CJEU "*confirmed that international agreements cannot affect the exclusive jurisdiction of the CJEU in accordance with Art. 344 TFEU*").

[397] Resp. Rule 41(5) Application, para. 139.

[398] Resp. Rule 41(5) Application, para. 139.

[399] Resp. Mem. on Juris., paras. 91-139.

[400] Resp. Mem. on Juris., para. 91.

to comply with primary EU law", and that "[a]*ny interpretation of Art. 26 ECT must, therefore, lead to the result that there is no valid offer from Respondent to Claimants to arbitrate intra-EU disputes*".[401]

5) EU Law Primacy (VCLT Article 5)

289. By way of new and additional argument in its Memorial on Jurisdiction, the Respondent reiterates that ECT Article 26(3) "*is inapplicable in an intra-EU setting because it is clear to all EU Member States and EU Institutions that the consent expressed in Art. 26 (3) ECT is limited to disputes where one party is not an EU law subject*",[402] but submits further that even if that were not the case, ECT Article 26 would still be "*inapplicable by virtue of yet another conflict rule under public international law that specifically relates to rules of an international organization such as the European Union, i.e. Art. 5 VCLT*".[403]

290. In this regard, the Respondent argues as follows:

a. VCLT Article 5 provides that relevant rules of the organization take precedence over any general rule of public international law relating to the same subject matter;[404]

b. VCLT Article 5 applies "[i]*f and to the extent one of the conflicting international agreements is the constituent treaty of an international organization*";[405]

[401] Resp. Mem. on Juris., para. 139.

[402] Resp. Mem. on Juris., para. 140.

[403] Resp. Mem. on Juris., para. 141.

[404] Resp. Mem. on Juris., para. 142; **RL-0011** M. E. Villiger, "*Article 5*" in *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 2009, para. 7, **RL-0012**; K. Schmalenbach, "*Article 5*" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, 2018 ("**Schmalenbach, *Article 5***"), para. 15.

[405] Resp. Mem. on Juris., para. 142. *See* **CL-0017**, VCLT, Art. 5, which provides: "*The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization*".

c. "*rules of the organization*" includes written rules and rules emanating from established organizational practice,[406] as well as "*any rules of conflict that the constituent instrument of an international organization might contain itself*";[407]

d. as the EU is an international organization pursuant to VCLT Article 2(1)(i), the EU Treaties are "*constituent instruments of an international organization*";[408]

e. the EU's status as a supranational organization and REIO does not change the analysis as "*neither the VCLT nor other relevant instruments of general international law distinguish between different types of international organizations*";[409] and

f. neither the VCLT nor any other relevant instrument of general public international law contain specific rules for "*supranational organizations*" or "*regional economic integration organizations*".[410]

291. The Respondent suggests that EU law primacy is also a conflict rule, according to which "*the EU treaties supersede international treaties concluded by the EU or the Member States*", as embodied TFEU Article 218(11) and the Declaration of Primacy annexed to the Final Act of the Lisbon Conference.[411] According to the Respondent, the effect of EU law primacy:[412]

a. "*differs from the effect of other general rules of conflict, such as Art. 30 VCLT which deals with the interpretation and application of successive treaties relating to the same subject matter*";

[406] Resp. Mem. on Juris., para. 143; **RL-0012**, Schmalenbach, *Article 5*, para. 15; **RL-0013**, United Nations Conference on the Law of Treaties, Official Records, UN Doc. A/CONF.39/11, 1969, p. 44, para. 31 and p. 57, para. 40.

[407] Resp. Mem. on Juris., para. 143; **RL-0012**, Schmalenbach, *Article 5*, para. 16.

[408] Resp. Mem. on Juris., para. 144.

[409] Resp. Mem. on Juris., para. 144.

[410] Resp. Mem. on Juris., para. 144.

[411] Resp. Mem. on Juris., para. 145.

[412] Resp. Mem. on Juris., para. 146.

b. "*enjoys a higher rank in the overall hierarchy of norms, i.e. qualifying as lex superior*"; and

c. applies irrespective of "*whether the other conflicting treaty was concluded before or after the EU treaties*" or "*the other treaty contains any conflict clause of its own*".

292. Consequently, according to the Respondent, pursuant to VCLT Article 5, "*the primacy of EU primary law must be respected by any conflicting international agreement relating to the same subject matter*", and "*takes precedence over the ECT irrespective of when the latter entered into force*" and "*irrespective*" of ECT Article 16.[413] This is achieved, it submits, by VCLT Article 5 "*translat[ing] the pertinent primacy rule of EU primary law to the international level and endow[ing] it with* lex specialis *status* vis-à-vis *other rules of conflict*", such as VCLT Article 30, making it "*erroneous to assume applicability of Art. 26 (3) ECT by relying on an alleged structural dichotomy between EU primary law and international law*".[414]

293. On that basis, the Respondent concludes that international law and "*in particular the application of its conflict of law rule in Art. 5 VCLT, leads to the inapplicability of Art. 26 ECT in an intra-EU context, including in the present case*".[415]

6) Other International Agreements

294. Finally on the topic of international law interpretation, the Respondent also argues in its Memorial on Jurisdiction that incompatibility between ECT Article 26(4) and TFEU Article 344 is evident from the reasoning of the CJEU in its Opinion 2/13 dated 18 December 2014 ("**Opinion 2/13**") concerning the European Convention on Human Rights ("**ECHR**"), which the Respondent submits applies *mutatis mutandis* to the question

[413] Resp. Mem. on Juris., para. 147.
[414] Resp. Mem. on Juris., para. 147.
[415] Resp. Mem. on Juris., para. 148.

of the applicability of ECT Article 26(4) in an intra-EU relationship for the following reasons:[416]

a. the CJEU issued Opinion 2/13 regarding EU accession to the ECHR;

b. the CJEU denied the possibility of accession to the ECHR, "*invoking the principle of mutual trust*", notwithstanding that TEU Article 6(2) envisaged such accession;[417]

c. the CJEU "*took issue with the fact that there was a separate dispute resolution mechanism for matters of the ECHR contained in Art. 33 ECHR*", finding that "*the very existence of the possibility that the dispute resolution mechanism of Art. 33 ECHR could apply to intra-EU disputes, or to disputes between EU Member States and the EU, in circumstances where EU law will be in issue undermines Art. 344 TFEU*";[418]

d. the CJEU confirmed the "*unconditional applicability of Art. 344 TFEU in intra-EU relationships*", so it "*must be observed under all circumstances, by all EU Member States*";[419] and

e. the CJEU confirmed that "*any international agreement that has been concluded by the EU and the EU Member States becomes an integral part of EU law*".[420]

295. According to the Respondent, CJEU Opinion 2/13, "*clarifies the underlying idea that any international agreement, to which the EU is a party, is an integral part of EU law*", including the ECT, which means that "*any dispute resolution mechanism that avoids the*

[416] Resp. Mem. on Juris., paras. 149 *et seq*.; **RL-0046**, CJEU Opinion 2/13.

[417] Resp. Mem. on Juris., para. 150; **RL-0046**, CJEU Opinion 2/13, para. 194 ("*In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law*").

[418] Resp. Mem. on Juris., para. 151; **RL-0046**, CJEU Opinion 2/13, paras. 205 *et seq*.

[419] Resp. Mem. on Juris., para. 151.

[420] Resp. Mem. on Juris., para. 152; **RL-0046**, CJEU Opinion 2/13, para. 180 ("*By contrast, as a result of the EU's accession the ECHR, like any other international agreement concluded by the EU, would, by virtue of Article 216(2) TFEU, be binding upon the institutions of the EU and on its Member States, and would therefore form an integral part of EU law*").

possibility of the CJEU getting involved, as Art. 26 (4) ECT does if held applicable in an intra-EU relationship, violates EU law".[421] The Respondent argues that the same reasoning applies to the ECT because "*both the EU and the EU Member States are parties*" and it "*contains State-State as well as investor-State clauses for resolving any disputes concerning violations of its provisions*", which means "[t]*here is a possibility that EU law will be at stake when deciding an intra-EU dispute*".[422]

296. Therefore, the Respondent submits, "[t]*he principle of mutual trust is of utmost importance here as well and bars any dispute resolution mechanism outside the EU for intra-EU relationships*".[423] In the Respondent's view, CJEU Opinion 2/13 "*confirms that in intra-EU scenarios Art. 26 ECT is incompatible with Art. 344 TFEU, the autonomy of EU law, and the principle of sincere cooperation as set out in Art. 4 (3) TEU*".[424]

v. The Private Law Argument

297. Finally, in relation to jurisdiction *ratione voluntatis*, the Respondent argues that the Parties have not consented to arbitrate on the basis of private law. In particular, it argues that there are no grounds to assume that the Respondent accepted the Tribunal's jurisdiction by not objecting to it in a timely manner, unlike as was found in prior awards such as *PL Holdings v. Poland*.[425]

298. The Respondent submits that, in *PL Holdings v. Poland*, the Svea Court of Appeal found that the arbitration clause included in the Poland-Belgium/Luxembourg BIT was valid because "*Poland's alleged omission to raise the jurisdictional objection in a timely manner had resulted in it having entered into a new, tacit arbitration agreement with the investor*".[426]

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[421] Resp. Mem. on Juris., para. 153.

[422] Resp. Mem. on Juris., para. 154.

[423] Resp. Mem. on Juris., para. 154.

[424] Resp. Mem. on Juris., para. 155; **RL-0047**, A. Stanic, "*Does the Advocate General's Opinion Provide Clarity on the Validity of Intra-EU Investor-State Arbitral Awards?*", Kluwer Arbitration Blog, 11 December 2020.

[425] Resp. Rule 41(5) Application, para. 184.

[426] Resp. Rule 41(5) Application, para. 184.

299. By contrast, in the current case the Respondent submits that:

a. it "*already raised its concerns as to the Tribunal's jurisdiction in its very first submission dated 7 June 2021*";[427]

b. at no point has it "*acknowledged this Tribunal's jurisdiction or failed to raise necessary objections*";[428]

c. in its Rule 41(5) Application, it "*substantiat*[ed] *its jurisdictional objection at the earliest possible point in the proceedings*";[429] and

d. the Tribunal therefore cannot "*base its jurisdiction on the common will of the Parties to this dispute expressed in an arbitration agreement concluded* inter se".[430]

300. In its Memorial on Jurisdiction, the Respondent reiterates these points.[431] It posits that in the current arbitration there is no agreement to arbitrate based on private law, and that the Tribunal cannot base its jurisdiction on ECT Article 26 on that basis.[432]

301. The Respondent further submits that it "*has made it unambiguously clear from the beginning of this dispute that it does not accept this Tribunal's jurisdiction under any circumstances*", that as an EU Member State it "*cannot consent to arbitrate intra-EU disputes*", and that the "*jurisdictional objections, illustrated by the* Achmea *Judgment, are not waivable*".[433] It submits that this was the basis for its Rule 41(5) Application, as the first opportunity to object, and that "*it is clear that Respondent has never and will never waive its objections and consent to arbitrate this intra-EU dispute*".[434] Consequently,

[427] Resp. Rule 41(5) Application, para. 185.
[428] Resp. Rule 41(5) Application, para. 185.
[429] Resp. Rule 41(5) Application, para. 185.
[430] Resp. Rule 41(5) Application, para. 186.
[431] Resp. Mem. on Juris., paras. 156-159.
[432] Resp. Rule 41(5) Application, para. 186; Resp. Mem. on Juris., para. 158.
[433] Resp. Mem. on Juris., para. 156.
[434] Resp. Mem. on Juris., para. 157.

according to the Respondent, "*there is no common will of the Parties on which the Tribunal could base its jurisdiction neither in Art. 26 ECT nor elsewhere*".[435]

b. The Claimants' Position

302. The Claimants submit that the Tribunal has jurisdiction on the following grounds:

a. ECT Article 26 and ICSID Convention Article 25 are determinative of the Tribunal's jurisdiction, not EU law because:

i. EU law is not the applicable law pursuant to ECT Article 26(6) to determine jurisdiction;

ii. there are no rules between the ECT Parties within the meaning of VCLT Article 31(3)(c) to deprive the Tribunal of jurisdiction;

iii. the ECT, including ECT Article 26, has not been superseded by the EU Treaties pursuant to VCLT Article 30(4)(a);

iv. there has been no modification of the ECT within the meaning of VCLT Article 41(1) that could deprive the tribunal of its jurisdiction;

v. TFEU Article 351 does not apply and in any event, cannot deprive the Tribunal of its jurisdiction; and

b. interpretation of ECT Article 26 in accordance with the VCLT establishes that the Tribunal has jurisdiction.

303. The Claimants rebut the Respondent's characterisation of the factual basis for its intra-EU objection to jurisdiction, set out their arguments as to why lack of consent based on EU law is irrelevant, and analyse the ECT Article 26 in accordance with international law. The Tribunal briefly summarises their position in relation to each below.

[435] Resp. Mem. on Juris., para. 158.

i. Intra-EU Objection: Factual Basis

304. First, in response to the Respondent's position on the intra-EU objection, the Claimants submit that the factual basis of the Respondent's position "*contains a number of inaccuracies*", including as follows:[436]

a. the **adoption of the Lisbon Treaty** has no bearing on the Tribunal's jurisdiction (the Claimants state that it is correct but irrelevant that "[b]*y virtue of Art. 207 TFEU, foreign direct investment became an exclusive EU competence as part of the EU's common commercial policy*", "*because the EU's common commercial policy relates to the EU's external competence, i.e. its relations with third States (rather than intra-EU relations)*", as is "*obvious from the text of Article 207(1) TFEU alone*", and the adoption of the Lisbon Treaty, including Article 207 TFEU, "*has no bearing on the Tribunal's jurisdiction and cannot support*" the objection);[437]

b. the **June 2015 European Commission infringement proceedings** against EU Member States have no bearing on the Tribunal's jurisdiction (the "*European Commission did not even follow up with their threat, as they did not even commence proceedings before the CJEU, and consequentially the CJEU could not even rule on the issue – and that is not even mentioning that the present arbitration is based on the ECT under the ICSID Convention rather than a BIT*");[438]

c. the **April 2016 Non-Paper** from Germany *et al*. has no bearing on the Tribunal's jurisdiction (it is "*at best a policy paper as opposed to a legally binding document*");[439]

[436] Cl. Response on Rule 41(5), paras. 12-31.

[437] Cl. Response on Rule 41(5), para. 13, quoting Resp. Rule 41(5) Application, para. 25.

[438] Cl. Response on Rule 41(5), para. 14.

[439] Cl. Response on Rule 41(5), para. 15.

d. the *Achmea* Judgment was not followed in **more than 50 prior awards** and tribunals uniformly and consistently confirmed jurisdiction over respondent States' objections based on the *Achmea* Judgment;[440]

e. the **July 2018 European Commission's Communication** "*Protection of intra-EU investment*" has no bearing on the Tribunal's jurisdiction ("*Germany does not even attempt to explain why a policy paper by the European Commission would deprive the Tribunal of its jurisdiction*" as "[i]*t does not and cannot*");[441]

f. the **January 2019 Declaration** by the EU Member States on the legal consequences of the *Achmea* Judgment and on investment protection in the EU has no bearing on the Tribunal's jurisdiction (it "*is not a legally binding document*", and "*mainly paves the way for the intra-EU BIT Termination Agreement*", with EU Member States undertaking that they "*will discuss [...] whether any additional steps are necessary to draw all the consequences from the* Achmea *judgment in relation to the intra-EU application of the Energy Charter Treaty*");[442]

g. the Council of the European Union's **July 2019 Decision regarding negotiations on the modernisation of the ECT** has no bearing on the Tribunal's jurisdiction and, in any event, supports the Claimants' case ("[w]*hile the EU ECT Negotiating Directives are aspirational, it is not without irony that the Respondent would highlight their content, in particular as far as sustainable investments in the energy*

[440] Cl. Response on Rule 41(5), paras. 16-19. *See* (for intra-EU BIT ICSID cases) **CL-0010**, *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICISD Case No. ARB/14/24, Award, 21 June 2019 ("***Tallinn v. Estonia***"), para. 540; **CL-0011**, *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, Award, 5 April 2019 (excerpt) ("***B3 v. Croatia***"), para. 543; **CL-0012**, *UP and C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018 ("***UP v. Hungary***"), para. 258. *See further* (for intra-EU ECT ICSID Cases) **CL-0013**, *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Intra-EU Jurisdictional Objection, 25 February 2019 ("***Landesbank v. Spain***"), paras. 102, 105; **CL-0014**, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019 ("***Eskosol v. Italy***"), para. 186; **CL-0015**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019 ("***NextEra v. Spain***"), para. 357.

[441] Cl. Response on Rule 41(5), para. 20; **RL-0005**, July 2018 European Commission Communication.

[442] Cl. Response on Rule 41(5), paras. 21-23; **RL-0006**, 2019 Declaration, para. 9; **CL-0014**, *Eskosol v. Italy*, para. 217.

sector, legal certainty, and a high level of investment protection are concerned");[443]

h. the EU Member States' **May 2020 Termination Agreement** regarding intra-EU BITs has no bearing on the Tribunal's jurisdiction ("*Germany itself has to admit that the BIT Termination Agreement 'does not cover intra-EU proceedings on the basis of Article 26 of the Energy Charter Treaty*'", making it unclear "*why Germany would dedicate more than two pages of submissions on that Agreement in its Application in relation to this arbitration, which has been commenced on the basis of Article 26 ECT*");[444] and

i. the ***Komstroy*** **Judgment** cannot deprive the Tribunal of its jurisdiction[445] ("*the CJEU made this finding in a case in which the underlying dispute concerned an investor from Ukraine (a non-EU Member State) against the Republic of Moldova (a non-EU Member State)*",[446] which "*does not add to* [the *Komstroy* Judgment's] *legitimacy*",[447] as the CJEU's reasoning "*effectively simply repeated its reasoning in the* Achmea *Judgment*",[448] and "*not one single international arbitral tribunal (out of more than 50 international arbitral tribunals), and not one single ICSID tribunal, has followed the* Achmea *Judgment*",[449] and "*neither the courts of EU*

[443] Cl. Response on Rule 41(5), paras. 24-26. *See* **CL-0016**, EU Negotiating Directives, pp. 3, 5, stating:

> The objective of the Modernised ECT should be to facilitate investment in the energy sector in a sustainable way between the ECT Contracting Parties by creating a coherent and up-to-date legally binding framework that provides for legal certainty and ensures a high level of investment protection.
>
> …
>
> The Investment Protection standards under the Modernised ECT should continue to aim at a high level of investment protection, with provisions affording legal certainty for investors and investments of Parties in each other's market.
>
> …
>
> The Modernised ECT should include provisions on sustainable development, including on climate change and clean energy transition in line with the Paris Agreement and recently concluded EU agreements and EU positions in ongoing negotiations.

[444] Cl. Response on Rule 41(5), para. 27.

[445] Cl. Response on Rule 41(5), paras. 28-31.

[446] Cl. Response on Rule 41(5), para. 28.

[447] Cl. Response on Rule 41(5), para. 29.

[448] Cl. Response on Rule 41(5), para. 29.

[449] Cl. Response on Rule 41(5), para. 29.

Member States",[450] "*nor the CJEU itself, appear to follow the* Komstroy *Judgment*".[451]

305. The Tribunal notes that therefore, although the Parties (and European Commission) agree that the aforementioned events occurred, they differ as to their legal effect, which inform their respective legal arguments.

ii. German Federal Court of Justice Decision

306. The Claimants do not separately address the Respondent's German Federal Court of Justice Decision, and instead deal with it within their arguments regarding EU Law interpretation.

iii. EU Law Interpretation

307. The Claimants submit in relation to the *Komstroy* Judgment that the CJEU's conclusions regarding the EU legal order:[452]

a. are addressed to EU Member States and EU institutions, which "*may have no choice but to take steps consistent with the CJEU's ruling, including submitting arguments to international tribunals based on the EU legal order*";

b. "*do not alter this Tribunal's mandate to proceed under the legal order on which its jurisdiction is founded, namely the ECT and the ICSID Convention*"; and

c. do not bind "*this Tribunal constituted under the ECT and the ICSID Convention … just as the CJEU is not bound by decisions taken by ECT tribunals*".

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[450] Cl. Response on Rule 41(5), para. 30. *See also* Cl. Response on Rule 41(5), fn. 42 ("*courts of EU Member States are principally obliged, as a matter of EU law, to follow Judgments issued by the CJEU in preliminary rulings proceedings in accordance with Article 267 TFEU*").

[451] Cl. Response on Rule 41(5), para. 30.

[452] Cl. Response on Rule 41(5), para. 68; **CL-0014**, *Eskosol v. Italy*, paras. 184, 186; **CL-0022 / CL-0041**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l., v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017 ("***Eiser v. Spain***"), para. 199; **CL-0018**, *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018 ("***Vattenfall v. Germany***"), para. 131; **CL-0023**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016 ("***RREEF v. Spain*, Jurisdiction**"), para. 87.

308. The Claimants further suggest that the Respondent's objection "*even runs counter to its own conduct in the light of the settlement in the* Vattenfall *case (*venire contra factum proprium*)*"; however, they do not develop this argument.[453]

309. In their Memorial on Jurisdiction, the Claimants submit that there are "*at least two fundamental problems with the Respondent's – main – argument*" that there is "*no consent based on EU law*",[454] as follows:

a. jurisdiction is based on ECT Article 26 and ICSID Convention Article 25 rather than EU law; and

b. EU law "*is not applicable to determine the Tribunal's jurisdiction*".[455]

310. The Claimants further respond to the EU law arguments as follows:

a. the 15 January 2019 Declaration "*is not a legally binding document*",[456] it "*mainly paves the way*" for the BIT Termination Agreement, and, regarding the ECT, in undertaking no. 9 the Member States state that they "*will discuss [...] whether any additional steps are necessary to draw all the consequences from the* Achmea *judgment in relation to the intra-EU application of the Energy Charter Treaty*";[457]

b. "*future tense suggests that the signatories do not consider that their intra-EU BITs have already been terminated for invalidity of the underlying consent, much less that an equivalent result already has been accomplished with respect to the intra-EU application of the ECT*";[458]

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[453] Cl. Response on Rule 41(5), para. 69.

[454] Cl. Mem. on Juris., para. 18, referring to Resp. Mem. on Juris., paras. 30 *et seq*.

[455] Cl. Response on Rule 41(5), Sec. IV.B.1; Cl. Rej. on Rule 41(5), para. 8; Cl. Mem. on Juris., Sec. II.C.

[456] Cl. Response on Rule 41(5), para. 21; Cl. Mem. on Juris., para. 20. *See also* Cl. Response on Rule 41(5), fn. 29, where the Claimants state:

> Contrary to para. 179 of the 41(5) Application, where Germany alleges, without any argument or proof: "*The January 2019 Declaration is a binding instrument originating from sovereign States*". Since this sentence is contained in a section titled "*The Tribunal Must Deny its Jurisdiction Based on the Political Developments since 2018*" (sic! Germany really argues that "Political Developments since 2018" deprive the Tribunal of its jurisdiction), it may be that Germany wants to say that the January 2019 Declaration is somewhat "politically binding" – clearly, a legally irrelevant assertion.

[457] Cl. Mem. on Juris., para. 20; **RL-0006**, 2019, para. 9.

[458] Cl. Mem. on Juris., para. 21; **CL-0014**, *Eskosol v. Italy*, para. 217.

c. the VCLT "*provides specific procedures in this regard, yet there is no assertion in the January 2019 Declaration that these procedures have been commenced, much less completed*";[459]

d. the judgments of the CJEU, including the *Achmea* Judgment,[460] *Komstroy* Judgment,[461] and *PL Holdings* Judgment,[462] do not address the Claimants' arguments and "*at heart suffer from the same fundamental problem: EU law is not applicable law to determine the Tribunal's jurisdiction*";[463]

e. the same applies to the CJEU decisions *European Food* and Opinion 2/13, in that:

   i. the *European Food* Judgment adds nothing to the analysis, as the Claimants explain that it simply states that "*the arbitral award delivered by that court [by 'that court' the CJEU appears to refer to an ICSID tribunal] is not subject, in accordance with Articles 53 and 54 of the ICSID Convention, to any review by a court of a Member State as to its compliance with EU law*", and it cannot deprive the Tribunal as an international tribunal of its jurisdiction under the ECT and the ICSID Convention;[464] and

   ii. CJEU Opinion 2/13[465] stated that accession of the EU to the ECHR would violate EU law and said that as result of the EU's accession to the ECHR the ECHR would form an integral part of EU law, which does not deprive the Tribunal of its jurisdiction, given that the EU and EU Member States are Contracting States to the ECT and "[w]*hether or not, as a matter of EU law, the ECT is part of EU law has no bearing on the Tribunal's jurisdiction*

[459] Cl. Mem. on Juris., para. 22.
[460] **RL-0004**, *Achmea* Judgment, as cited in Resp. Mem. on Juris., para. 39.
[461] **RL-0007**, *Komstroy* Judgment, as cited in Resp. Mem. on Juris., paras. 43-47.
[462] **RL-0014**, *PL Holdings* Judgment, as cited in Resp. Mem. on Juris., para. 48.
[463] Cl. Mem. on Juris., para. 23.
[464] Cl. Mem. on Juris., para. 24(i), citing **RL-0019**, *European Food* Judgment, para. 142.
[465] **RL-0046**, CJEU Opinion 2/13, as cited in Resp. Mem. on Juris., paras. 149-152.

whose jurisdiction is based on Article 26 of the ECT and Article 25 of the ICSID Convention";[466] and

f. the Respondent's "*recent developments*" concerning EU Member States are "*unavailing for the purpose of the Tribunal's jurisdiction*",[467] including:

i. staying of enforcement of certain non-ICSID awards issued against Spain before the US courts;[468]

ii. the position of the European Commission in another set of enforcement proceedings before the US courts;[469]

iii. Italy's annulment proceedings and request to continue stay of enforcement;[470]

iv. the Lithuanian Supreme Court decision finding that a pending intra-EU investor-State arbitration before an ICSID tribunal did not bar national proceedings on the same subject matter;[471]

v. the Svea Court of Appeal decision finding that "*there was no longer a need for a preliminary ruling from the CJEU in accordance with Article 267 TFEU regarding the question whether Articles 19 and 4(3) TFEU and Articles 267 and 344 TFEU have to be interpreted as precluding the arbitration clause in Article 26 ECT*";[472] and

vi. the decisions by the German Federal Court of Justice and the German Federal Constitutional Court upholding the intra-EU Objection.[473]

[466] Cl. Mem. on Juris., para. 24(ii).
[467] Cl. Mem. on Juris., para. 25.
[468] Cl. Mem. on Juris., para. 25(i), referring to Resp. Mem. on Juris., paras. 57-59.
[469] Cl. Mem. on Juris., para. 25(ii), referring to Resp. Mem. on Juris., paras. 60-61.
[470] Cl. Mem. on Juris., para. 25(iii), referring to Resp. Mem. on Juris., para. 62.
[471] Cl. Mem. on Juris., para. 25(iv), referring to Resp. Mem. on Juris., paras. 66-69.
[472] Cl. Mem. on Juris., para. 25(v), referring to Resp. Mem. on Juris., paras. 70-74.
[473] Cl. Mem. on Juris., para. 25(vi), Resp. Mem. on Juris., paras. 75-80.

311. The Claimants point out that the Respondent "*bemoans*" that the intra-EU jurisdiction objection had been rejected by more than 60 international arbitral tribunals, but the Respondent does not argue their impact on this Tribunal's jurisdiction.[474] The Claimants maintain that the Tribunal is not bound by decisions by other international arbitral tribunals, but that as noted in the prior decision in *Saipem v. Bangladesh*:[475]

> [The Tribunal] is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.

vi. International Law Interpretation

312. The Claimants argue that the Tribunal's jurisdiction is properly based on ECT Article 26 and ICSID Convention Article 25, in particular ECT Articles 26(1) and Article 26(3)(a), providing that:[476]

> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> …
>
> (3)(a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

1) Applicable Law (ECT Article 26(6))

313. As to the law determinative of the Tribunal's jurisdiction, the Claimants identify and rebut five primary arguments put forward by the Respondent seeking to use EU law to deprive

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[474] Cl. Mem. on Juris., para. 26, referring to Resp. Mem. on Juris., para. 9.

[475] Cl. Mem. on Juris., para. 26; **CL-0140**, *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, 21 March 2007 ("***Saipem v. Bangladesh***"), para. 67. *See also* **CL-0024**, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 ("***Duke Energy v. Ecuador***"), para. 117; **CL-0013**, *Landesbank v. Spain*, para. 106.

[476] Cl. Response on Rule 41(5), para. 32; **CL-0001 / RL-0084**, ECT, Arts. 26(1), 26(3)(a).

the Tribunal of its jurisdiction, including arguments regarding:[477] (i) the applicable law clause in Article 26(6) of the ECT; (ii) the rule of treaty interpretation in Article 31(3)(c) VCLT; (iii) the *lex posterior* rule in Article 30(4)(a) VCLT; (iv) the treaty modification rule in Article 41(1)(b) VCLT; and (v) Article 351 TFEU.

314. The Claimants argue that the Respondent is incorrect that:

a. Article 26(3) ECT consent to arbitrate "*must be interpreted in light of Art. 26(6) ECT which states*" that "[a] *tribunal established under paragraph 4 shall decide the* ***issues in dispute*** *in accordance with this Treaty and applicable rules and principles of international law*";[478] and

b. "*EU law is part of international law, and therefore has to be applied by a tribunal established on the basis of Art. 26 ECT as a matter of law, both with regard to the validity of the arbitration agreement and the merits*".[479]

315. They submit that, in order to understand the meaning of "*issues in dispute*", one should consider ECT Article 26(1), which provides insight into a "*dispute*" under the ECT:[480]

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

316. The Claimants argue that references to "*dispute*" in ECT Article 26(1) and "*issues in dispute*" in Article 26(6) concern Part III of the ECT, which "*sets out the substantive standards of treatment and protection to which investments are entitled*" and "*does not include the provisions on dispute settlement, which appear in Part V of the ECT*".[481] Therefore, they submit, "*the provision concerning the applicable law set out in Article 26(6) is not relevant to issues concerning the dispute settlement clause in Article 26*

[477] Cl. Response on Rule 41(5), para. 46.

[478] Cl. Response on Rule 41(5), para. 48, referring to Resp. Rule 41(5) Application, para. 123; **CL-0001 / RL-0084**, ECT, Art. 26(6) (emphasis added by the Claimants).

[479] CL. Response on Rule 41(5), para. 49, referring to Resp. Rule 41(5) Application, para. 129.

[480] CL. Response on Rule 41(5), para. 50; **CL-0001 / RL-0084**, ECT, Art. 26(1). *See also* Cl. Mem. on Juris., para. 38.

[481] Cl. Response on Rule 41(5), para. 51.

ECT"; it only applies to the merits of a dispute and not to issues or questions relating to jurisdiction.[482]

317. In their Memorial on Jurisdiction, the Claimants further refer to the prior decision in *Landesbank v. Spain*, where the tribunal found that:[483]

> The "*issues in dispute*" to which Article 26(6) refers are those issues which are in dispute on the merits of the case; the provision becomes applicable only once the jurisdiction of the Tribunal has been established over a "*dispute*" falling within the provisions of Article 26(1) to (5). The Tribunal does not accept that the difference in wording between this provision and Article 27(3)(g) of the ECT – which directs a tribunal in an inter-State case to "*decide the dispute in accordance with this Treaty and applicable rules and principles of international law*" – indicates a broader scope of application for Article 26(6). The Respondent has not directed the Tribunal to any materials – whether in the *travaux préparatoires*, subsequent practice, case-law or commentary – which would support the inference which it seeks to draw from the slight difference in wording between the two provisions.
>
> Moreover, even if it were applicable, Article 26(6) would not have the effect for which the Respondent contends. That provision does not require the Tribunal to accord primacy to EU law even in an inter-State case. When applicable, Article 26(6) directs a tribunal to "*decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*." It thus requires a tribunal to begin with the provisions of the ECT; it does not direct it to adopt an interpretation of the ECT which goes against the ordinary meaning of the words used on the basis that a rule of international law, applicable only between some of the Contracting Parties to the ECT, may run counter to that ordinary meaning.

318. They submit further that even if Article 26(6) did apply to jurisdiction, "*the effect would not be to incorporate EU law as part of the applicable law*", based on both "*natural and ordinary meaning*" of Article 26(6) and "*context*" in relation to other ECT provisions.[484]

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[482] Cl. Response on Rule 41(5), para. 51, citing **CL-0018**, *Vattenfall v. Germany*, para. 121.

[483] Cl. Mem. on Juris., para. 39; **CL-0013**, *Landesbank v. Spain*, paras. 159-160. *See also* **CL-0018**, *Vattenfall v. Germany*, para. 121; **CL-0139**, *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022 ("***Sevilla Beheer v. Spain***"), para. 620; **CL-0141**, *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34; Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020 ("***Cavalum v. Spain***"), para. 370; **CL-0142**, *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021 ("***Infracapital v. Spain***"), para. 293.

[484] Cl. Response on Rule 41(5), para. 52; Cl. Mem. on Juris., para. 31.

2) Successive Treaties (VCLT Article 30)

319. The Claimants set out their observations on VCLT Article 30 (and its interrelationship with VCLT Articles 41(1) and 16), as set out below.

320. As to VCLT Article 30(4)(a), the Claimants argue that the Respondent is wrong that the EU Treaties are the later treaties as compared to the ECT,[485] because the "*change to the EU's – external – common commercial policy (now enshrined in Article 207 TFEU) is entirely irrelevant for the purposes of determining the Tribunal's jurisdiction*", as demonstrated by the Respondent's (and the CJEU's in the *Achmea* Judgment) reliance on TFEU Article 267 in its predecessor forms (Treaty of Rome Article 177 and EC Treaty Article 234), as well as TFEU Article 344 (Treaty of Rome Article 219 and ECT Treaty Article 292), in force since 1 January 1958.[486]

321. Further, even if the Tribunal considered the EU Treaties to be the later, they do not relate "*to the same subject matter*" within the meaning of VCLT Article 30(1) which is necessary in order for the Respondent's argument to succeed.[487] The Claimants note that:

a. the ILC Report on Fragmentation of International Law explains that "*the notion of a 'regime' points to the institutional arrangements that may have been established to link sets of treaties to each other*", which allows more reasonable inferences in regulating potential overlaps or conflicts;[488]

b. the Report also explains that the "*identification of such 'treaty regimes' aids in application of principles of* lex posterior *or* lex specialis*, since 'the argument from [such principles] seems clearly more powerful between treaties within a regime than between treaties in different regimes'*";[489] and

[485] Cl. Response on Rule 41(5), para. 58, referring to Resp. Rule 41(5) Application, para. 145.

[486] Cl. Response on Rule 41(5), paras. 57-58; **CL-0018**, *Vattenfall v. Germany*, para. 218.

[487] Cl. Response on Rule 41(5), para. 59; **CL-0017**, VCLT, Art. 30(1).

[488] Cl. Response on Rule 41(5), para. 60; **C-0039**, International Law Commission, *Fragmentation of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006 ("**ILC, Fragmentation Report**"), para. 256.

[489] Cl. Response on Rule 41(5), para. 60; **C-0039**, ILC, Fragmentation Report, para. 255.

c. the ECT and the EU Treaties cannot be considered part of the same "*treaty regime*",[490] because the ECT Preamble reflects that:

i. its signatories "*undertook to pursue the objectives and principles*" of an EU document, the European Energy Charter, and "*broaden their cooperation*" multilaterally in support of various specifically stated goals;

ii. such goals included "*the effective implementation of full national treatment and most favoured nation treatment*", the "*progressive liberalization of international trade and [...] avoidance of discrimination in international trade*" in the energy sector and steps towards "*the most efficient exploration, production, conversion, storage, transport, distribution and use of energ*y";

iii. its signatories "*agreed to detailed rules for 'Investment Promotion and Protection' set out in Part III, and to equally detailed rules for 'Dispute Settlement' set out in Part V, to apply on a broad multilateral basis*";

iv. the objective of Part III is "*to provide for specific guarantees, defined in terms of international law rather than domestic law principles, in order to encourage international flows of investment into the energy sectors of at least certain ECT Contracting Parties*";

v. the objective of Part V is "*to provide specific mechanisms, again at an international level and removed from domestic law, for resolving disputes about whether the Part III guarantees had been observed*"; and

vi. numerous ICSID tribunals have confirmed the view that this means they were not the same subject matter as the EU Treaties.[491]

322. Further in relation to VCLT Article 30(1), the Claimants submit that it is moot because ECT Article 16 includes specific provisions dealing with its relationship to other treaties

[490] Cl. Response on Rule 41(5), para. 61 and fn. 81.

[491] Cl. Response on Rule 41(5), para. 61, citing **CL-0014**, *Eskosol v. Italy*, para. 145; **CL-0018**, *Vattenfall v. Germany*, paras. 217-218.

(i.e., its own conflicts rule),[492] making the general rule of *lex posterior* in VCLT Article 30 a subsidiary one, because *lex specialis* prevails.[493] Therefore, even if the EU Treaties and ECT did relate to the same subject matter, Article 16 "*is necessarily applicable*".[494]

323. As to the Respondent's argument that "*the relevant provisions of EU law must be deemed to be a modification* inter se *by the EU Member States of the provisions of the ECT*", according to the Claimants, it too must fail because:

a. it is contrary to ECT Article 16;

b. "*it is completely unclear what modification of the ECT is deemed to have taken place*"; and

c. "*there has been no notice to the other Contracting Parties*" pursuant to VCLT Article 41(2).[495]

324. The Claimants further submit that, nothing in the Lisbon Treaty:

a. "*even purported to be an exercise of powers to 'conclude an agreement to modify' the ECT as among EU Member States*" (the starting point for VCLT Article 41(1));

b. "*refers to the ECT, much less expresses an intent to modify the ECT's reach or application*"; or

c. suggests that the EU followed VCLT Article 41(2) procedures "*for advance notification of other ECT Contracting Parties of their intention to conclude an*

[492] Cl. Response on Rule 41(5), para. 62. **CL-0001 / RL-0084**, ECT, Art. 16 states:

> Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,
>
> (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and
>
> (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,
>
> where any such provision is more favourable to the Investor or Investment.

[493] Cl. Response on Rule 41(5) Application, para. 62; **CL-0018**, *Vattenfall v. Germany*, para. 217.

[494] Cl. Response on Rule 41(5) Application, para. 62; **CL-0013**, *Landesbank v. Spain*, para. 183.

[495] Cl. Response on Rule 41(5) Application, para. 63; **CL-0013**, *Landesbank v. Spain*, para. 186; **CL-0018**, *Vattenfall v. Germany*, para. 221. *See also* Cl. Mem. on Juris., para. 45.

agreement which henceforth would legally modify ECT obligations among EU Member States", and it would be inconsistent "*with that process for States to make no reference in an* inter se *agreement to any intention to formally modify or withdraw from prior commitments made through a multilateral instrument, and then subsequently claim that the* inter se *agreement modified the multilateral treaty without any prior notice to the other Contracting Parties*".[496]

325. As to the Respondent's arguments regarding the conflicts rules in the TFEU and ECT, the Claimants submit that TFEU Article 351 does not apply and, in any event, cannot deprive the Tribunal of its jurisdiction. In particular, they argue that:

a. on a plain reading TFEU Article 351 relates to agreements between EU Member States and "*third states*" (non-EU Member States);

b. the Respondent's argument that ECT Article 16(2) "*must remain inapplicable*",[497] "*is not understood*";

c. ECT Article 16 is *lex specialis*, its application "*confirms the effectiveness of Article 26 ECT and the Claimants' right to dispute resolution, notwithstanding any less favourable terms under the EU Treaties*";

d. if the Parties intended a different result "*it would have been necessary to include explicit wording to that effect in the ECT*";[498] and

e. in this regard the prior decision in *Vattenfall v. Germany* found that "*Article 16 poses an insurmountable obstacle to Respondent's argument that EU law prevails over the ECT*".[499]

[496] Cl. Response on Rule 41(5), para. 64; **CL-0014**, *Eskosol v. Italy*, para. 150.

[497] Cl. Response on Rule 41(5), para. 65, referring to Resp. Rule 41(5) Application, para. 168.

[498] Cl. Response on Rule 41(5), para. 66; Cl. Mem. on Juris., paras. 27-34.

[499] Cl. Response on Rule 41(5), para. 66. Cl. Mem. on Juris., para. 28; **CL-0018**, *Vattenfall v. Germany*, para. 229. *See also* **CL-0013**, *Landesbank v. Spain*, para. 193.

3) General Interpretation (VCLT Article 31(1))

326. According to the Claimants, the Tribunal's jurisdiction is based on Article 26 of the ECT and Article 25 of the ICSID Convention,[500] and ECT Article 26 "*as the primary basis for the Tribunal's jurisdiction, has to be interpreted in accordance with Article 31 VCLT in the first instance*".[501] They submit that the Respondent's argument that:[502]

> [t]he wording of the ECT clearly confirms that it is not meant to be applied to intra-EU disputes' depends on reading the provision in the context of the other provisions of the ECT to see if an intent to exclude intra-EU disputes can be located there and imported back into Article 26 of the ECT, as a significant implied constraint on the otherwise 'unconditional consent' to arbitration contained in Article 26(3)(a) ECT.

327. Regarding the ordinary meaning of ECT Article 26, the Claimants rely on the following points:

a. the opening words of ECT Article 26(1) ("*Disputes between a Contracting Party and an Investor of another Contracting Party*") include Ireland and Germany as Contracting Parties "*at the times relevant to this dispute*";[503] and

b. nothing in the text of ECT Article 26 "*suggests that its scope was intended to be restricted to disputes involving either an investor or a Contracting Party outside of the EU*".[504]

328. Regarding the ordinary meaning of ECT Articles 1(2) and 1(10) – definitions that a Contracting Party may be either an individual State or a REIO, the "*Area*" of an individual State in terms of the physical "*territory under its sovereignty*" and the "*Area*" of a REIO as the collective "*Areas of the member states of such Organization, under the provisions contained in the agreement establishing that Organization*" – the Claimants argue that this language does not support the Respondent's propositions. The Claimants highlight the

[500] Cl. Response on Rule 41(5), para. 32.

[501] Cl. Response on Rule 41(5), para. 33.

[502] Cl. Response on Rule 41(5), para. 35, quoting Resp. Rule 41(5) Application, para. 101.

[503] Cl. Response on Rule 41(5), para. 34; **CL-0001 / RL-0084**, ECT, Art. 26(1).

[504] Cl. Response on Rule 41(5), para. 35.

following arguments from the Respondent, which they submit "*have been tried and tested in many arbitrations*" and "*have always failed*",[505] namely that:

a. "*by using these terms in Article 26, the ECT Contracting Parties demonstrated an intent to eliminate any possibility of an intra-EU claim, or at least any possibility of such a claim relating to a 'matter' for which Member States had 'transferred competence' to the EU*", and

b. "*an EU national's investment in Germany is not a foreign investment as such, i.e., 'not an investment in the area of another Contracting Party, but in the area of the same Contracting Party*"'.[506]

329. As to the Respondent's authorities, the Claimants argue that these do not assist because:[507]

a. the commentary by Geraets and Reins supports "*the uncontroversial point that Article 1(10) of the ECT contains definitions of 'Area' with respect to a State that is a Contracting Party and with respect to a REIO that is a Contracting Party*", whereas the Claimants argue that "*it is not only the EU that is a Contracting Party to the ECT but also, individually and separately, each of Ireland and Germany*";[508]

b. the Advocate General Bot Opinion, which states that the position of Canadian investors investing in the EU is "*not comparable*" with European investors investing in their own economic area, is irrelevant because:

i. the Opinion is non-binding even under EU law;

ii. EU law "*is not applicable to determine the Tribunal's jurisdiction*"; and

[505] Cl. Response on Rule 41(5), para. 37, referring to **CL-0018**, *Vattenfall v. Germany*, paras. 182-183.

[506] Cl. Response on Rule 41(5), para. 36, referring to Resp. Rule 41(5) Application, paras. 101 *et seq*.

[507] Cl. Mem. on Juris., para. 28. *See* Resp. Mem. on Juris., paras. 110-118 and the sources cited therein.

[508] Cl. Mem. on Juris., para. 28(i); **RL-0034**, D. Geraets and L. Reins, "*Article 1: Definitions*" in R. Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty*, 2018 (excerpt), p. 43.

iii. the Opinion does not "*say that an intra-EU ECT ICSID tribunal would, as a matter of EU law, not have jurisdiction*";[509] and

c. the article by Maja Smrkolj is unavailing because, although the Respondent says it confirms its view that "*[a]n explicit disconnection clause is simply not necessary and superfluous due to the use of the REIO clause in Art 1(3) and (10) ECT*", it "*does not even refer to the ECT, much less to the REIO clause in Article 1(3) and (10) of the ECT*".[510]

330. The Claimants refer to the prior decision in *Vattenfall v. Germany*, where the tribunal held:[511]

a. "[i]*f it was intended by Articles 1(2), 1(3) and 1(10) ECT that the offer to arbitrate in Article 26 ECT was only made to Investors from non-EU Member States, it would have been necessary to include explicit language to that effect in the Treaty, which is not there*"; and

b. "[w]*ithout such language, in accordance with these provisions, an EU Member State which is a Contracting Party to the ECT may be a respondent State under Article 26 with respect to an Investment in its Area. Equally, the EU as an REIO under the ECT may be a respondent in a dispute regarding an Investment in its Area*".

[509] Cl. Mem. on Juris., para. 28(ii); **RL-0035**, Opinion 1/17, para. 207.

[510] Cl. Mem. on Juris., para. 28(iii); **RL-0036**, M. Smrkolj, *The Use of the "Disconnection Clause*" in *International Treaties: What does it tell us about the EC/EU as an Actor in the Sphere of Public International Law*, 14 May 2008 (unpublished paper).

[511] Response to Rule 41(5) Application, para. 37; **CL-0018**, *Vattenfall v. Germany*, para. 182. *See also* Cl. Response on Rule 41(5), fn. 54, where the Claimants state:

> As the *Vattenfall* tribunal added at para. 183:
>
> > "This interpretation is consistent with the conclusions reached by other arbitral tribunals. In *Eiser v. Spain*, the tribunal rejected the view that an Investor from one EU Member State has made its Investment in the same 'Area' as a respondent State which is another EU Member State. In *Charanne v. Spain*, the tribunal held that Investments made 'in the territory' of an EU Member State refers to both 'the territory of a national State as well as the territory of the EU'. In *Novenergia v. Spain*, the tribunal found that 'even though the EU itself is a Contracting Party of the ECT, this does not eliminate the EU Member States' individual standing as respondents under the ECT."
>
> Needless to say, there were many other decisions following the decision in *Vattenfall v. Germany*, which have adopted exactly the same position.

331. For natural and ordinary meaning, the Claimants further rely on the prior decision in *Eskosol v. Italy*:[512]

> [T]he phrase "rules and principles in international law" cannot be interpreted as encompassing EU law, which is a regional and not a worldwide system of law. This was well understood by the *Eiser* tribunal, when it rejected the argument that "the treaties creating the EEC and the EU […] constitute 'applicable rules and principles of international law' for purposes of Article 26(6)." The *Vattenfall* tribunal likewise concluded that 'EU law does not constitute principles of international law which may be used to derive meaning from Article 26 ECT, since *it is not general law* applicable as such to the interpretation and application of the arbitration clause in another treaty such as the ECT.' This Tribunal reaches the same conclusion with respect to Article 26(6), based on the "natural and ordinary meaning" of its terms, as they are understood within the broader field of public international law.

4) Context, Object and Purpose (VCLT Article 31(1), (2))

332. In response to the Respondent's additional context, object and purpose arguments pursuant to VCLT Article 31, the Claimants submit that:

a. ECT Article 25 is not relevant to the analysis (i.e., that the ECT "*'shall not be so construed as to oblige a Contracting Party which is party to an Economic Integration Agreement [...] to extend, by means of most favoured nation treatment', any equivalent 'preferential treatment' to other States that are not members of the same Economic Integration Agreement*"), and, if anything, "*demonstrates that the EU had the ability … to incorporate provisions specific to its circumstances, in order to delineate precisely any desired limitations to the reach of particular ECT provisions, such as the MFN provision addressed in Article 25*", but did not do so for Article 26;[513]

b. the ECT negotiating history and "*central role that the EU allegedly played in the creation of the ECT*", does not mean that the object and purpose "*was confined in the way suggested by the Respondent*", and instead the "*best guide to the object and*

[512] Cl. Response on Rule 41(5), para. 53; **CL-0014**, *Eskosol v. Italy*, para. 121 (citing, in turn, **CL-0022 / CL-0041**, *Eiser v. Spain*, paras. 197-198; **CL-0018**, *Vattenfall v. Germany*, para. 133). *See also* Cl. Mem. on Juris., para. 41.

[513] Cl. Response on Rule 41(5), para. 39; **CL-0014**, *Eskosol v. Italy*, para. 95.

purpose" is Article 2 entitled "*Purpose of the Treaty*",[514] which does not support that its provisions "*were intended to apply only to Western investment in Eastern Europe, as Germany would appear to suggest*";[515]

c. the ECT Article 2 reference to "*Charter*" is to the European Energy Charter, a non-binding document adopted by the Hague Conference on the European Energy Charter on 17 December 1991, which refers to the importance of the energy sector in former Communist States, "*but there is nothing in the Charter which suggests that it was intended to apply exclusively to investment in those States*" and instead Title III "*refers to the possibility of special transitional arrangements for those States, implying that other States would be subject to obligations which would not be phased in in this fashion*";[516]

d. if the ECT drafters intended to give Article 26 the meaning the Respondent suggests, "*such that it would not allow for intra-EU investment arbitration, they had a simple tool at their hands: to insert a disconnection clause*", which "*would operate as a carve-out to ensure that the provisions of this mixed agreement would not apply between EU Member States*";[517]

e. the ECT *travaux préparatoires* shows the EU "*proposed the insertion of a disconnection clause*",[518] but it "*was ultimately dropped from the draft treaty*";[519] and

[514] Cl. Response on Rule 41(5), para. 40. **CL-0001 / RL-0084**, ECT, Art. 2 states: "*This Treaty establishes a legal framework in order to promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter*".

[515] Cl. Response on Rule 41(5), para. 41, referring to Resp. Rule 41(5) Application, para. 116.

[516] Cl. Response on Rule 41(5), para. 42; **CL-0001 / RL-0084**, ECT, Art. 1(1); **CL-0019**, The International Energy Charter Consolidated Energy Charter with Related Documents, 15 January 2016, "*European Energy Charter*" ("**European Energy Charter**"), Title III, pp. 34-35; **CL-0013**, *Landesbank v. Spain*, para. 120.

[517] Cl. Response on Rule 41(5), paras. 43-44.

[518] Cl. Response on Rule 41(5), para. 44; **CL-0020**, European Energy Charter Conference Secretariat, Draft Basic Agreement for the European Energy Charter, BA-15, 12 August 1992, p. 84, Item 27.18.

[519] Cl. Response on Rule 41(5), para. 44; **CL-0021**, Ministerial Declaration to the Energy Charter Treaty (attached to the draft Energy Charter Treaty), 17 March 1994, Version 7, p. 6.

f. "*absence of such a clause confirms that the ECT was intended to create obligations between EU Member States, including in respect of potential investor-State dispute settlement*".[520]

5) Supplementary Means (VCLT Articles 31(3) and 32)

333. As to rules between the Contracting Parties of the ECT within the meaning of VCLT Article 31(3)(c), according to the Claimants the body of practice relied upon by the Respondent "*comes nowhere near establishing such rules*".[521] The Claimants argue that the Respondent's position – that "*in a situation between two EU Member States, EU law should be viewed under Art. 31(3)(c) VCLT as forming an integral part of the task of interpretation ECT (sic) by the Tribunal so as to avoid results that diverge from the former*"[522] – is not supported by:

a. the practice of ECT Contracting Parties which are not Members of the EU;[523]

b. their reaction to the positions taken by Germany or the European Commission;[524]

c. steps by EU Member States regarding the ECT, including the Declarations and Termination Agreement, neither of which "*can be said to establish rules between the parties to the ECT regarding its interpretation*":[525]

i. the Declarations show there is no consensus among EU Member States (Hungary expressly rejected the part of the Declaration regarding the ECT and five other States considered that no position on the interpretation of the ECT should be taken);[526]

[520] Cl. Response on Rule 41(5), para. 44; **CL-0018**, *Vattenfall v. Germany*, para. 206; **CL-0013**, *Landesbank v. Spain*, para. 123.

[521] Cl. Response on Rule 41(5), paras. 55-56.

[522] Cl. Response on Rule 41(5), para. 55, referring to Resp. Rule 41(5) Application, para. 136.

[523] Cl. Response on Rule 41(5), para. 56.

[524] Cl. Response on Rule 41(5), para. 56.

[525] Cl. Response on Rule 41(5), para. 56.

[526] Cl. Response on Rule 41(5), para. 57; **C-0037**, Declaration of the Representative of the Government of Hungary, of 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union; **C-0038**, Declaration of the Representatives of the Governments of the Member States, of 16 January on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (signed by five EU Member States: Finland, Luxembourg, Malta, Slovenia and Sweden).

ii. the Respondent shows no practice by ECT Contracting Parties outside the EU to support its view;[527] and

iii. the practice the Respondent relies on "*cannot be the foundation on which to construct an agreement between the ECT Contracting Parties that Article 26 means something radically different from what it appears to say*".[528]

334. For context, the Claimants rely on ECT Article 16 dealing with "*Relation to other Agreements*", which they submit regulates the impact of potentially overlapping treaties and an overbroad reading of Article 26(6) would render Article 16 superfluous and contrary to the accepted notion of *effet utile* (i.e., words of a treaty should be interpreted so as not to deprive them of all independent meaning and effect).[529]

335. As to the Respondent's reliance on the decision in *Electrabel v. Hungary* to support its submission that ECT Article 16 "*would … be inapplicable because the conflict rule of the later treaty would apply, namely Article 307 EC*",[530] the Claimants make two points:

a. EC Article 307 EC (now TFEU Article 351) "*on its face does not even apply in intra-EU relations but explicitly in relations between EU Member States and non-EU Member States only*";[531] and

b. as explained by the tribunal in the prior decision in *Landesbank v. Spain*:[532]

> The Tribunal's view that Article 16 of the ECT is applicable is confirmed by the disconnection provision proposed by the EU during the negotiation of the ECT … That provision would have added to the ECT a statement that "[i]*n their mutual relations, Contracting Parties which are Members of the*

[527] Cl. Response on Rule 41(5), para. 57.

[528] Cl. Response on Rule 41(5), para. 57.

[529] Cl. Response on Rule 41(5), para. 54; **CL-0001 / RL-0084**, ECT, Art. 16; **CL-0014**, *Eskosol v. Italy*, para. 122. *See also* Cl. Mem. on Juris., para. 43(ii).

[530] Cl. Mem. on Juris., para. 43, referring to Resp. Mem. on Juris., para. 135.

[531] Cl. Mem. on Juris., para. 43(i); **CL-0009**, TFEU, Art. 351.

[532] Cl. Mem. on Juris., para. 42(ii); **CL-0013**, *Landesbank v. Spain*, para. 172 (the tribunal added, at para. 173, that: "[t]*he Tribunal is conscious that the* Electrabel *tribunal reached a different conclusion but, for the reasons given above, it prefers the conclusion reached by the* Vattenfall *and* Masdar *tribunals on this point*"). *See also* **CL-0018**, *Vattenfall v. Germany*, paras. 192-196; **CL-0048**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 ("***Masdar v. Spain***"), para. 332.

> *European Communities shall apply Community rules and shall not therefore apply the rules arising from this Agreement except insofar as there is no Community rule governing the particular subject concerned*." Although that provision was not adopted, the fact that it was put forward at all shows that the EU considered that "*Community rules*" concerned the subject matter of the ECT. Moreover, it is not necessary that Article 344 or Article 267 TFEU should concern the same subject matter as Part III or Part V of the ECT. What matters is that the EU Treaties as a whole should contain provisions which concern that subject matter.

336. As to the Respondent's argument that the "*ECT must be interpreted in a way that respects the bilateral nature of the relationship between two EU law subjects*",[533] according to the Claimants this "*cannot succeed*" because the ECT (and the ICSID Convention) "*is a multilateral treaty and, in the absence of any disconnection clause, there is no room for any bilateral relations among the treaty partners*".[534] In this regard, the Claimants again rely on the prior decision in *Vattenfall v. Germany* in that:[535]

> The Tribunal considers that this would be an incoherent and anomalous result and inconsistent with the object and purpose of the ECT and with the rules of international law on treaty interpretation and application. The preamble of the VCLT emphasises the universal recognition of "the principles of free consent and of good faith and the *pacta sunt servanda* rule", also contained in Article 26 VCLT.
>
> When States enter into international legal obligations under a multilateral treaty, *pacta sunt servanda* and good faith require that the terms of that treaty have a single consistent meaning. States parties to a multilateral treaty are entitled to assume that the treaty means what it says, and that all States parties will be bound by the same terms. It cannot be the case that the same words in the same treaty provision have a different meaning depending on the independent legal obligations entered into by one State or another, and depending on the parties to a particular dispute. The need for coherence, and for a single unified interpretation of each treaty provision, is reflected in the priority given to the text of the treaty itself over other contextual elements under Article 31 VCLT.

337. Regarding the Respondent's reliance on the ICJ decision in *Barcelona Traction*, the Claimants characterise this as "*entirely misplaced*", because in the "*passage referenced by the Respondent the ICJ referred to obligations* erga omnes", which "*has no bearing on the*

[533] Cl. Mem. on Juris., para. 44, referring to Resp. Mem. on Juris., para. 136.

[534] Cl. Mem. on Juris., para. 44.

[535] Cl. Mem. on Juris., para. 44, quoting **CL-0018**, *Vattenfall v. Germany*, paras. 155-156.

question whether this Tribunal has jurisdiction under the ECT and the ICSID Convention".[536]

338. Further regarding the Respondent's reliance on European Court of Human Rights decisions to support its position that the ECHR would have taken into account certain legal instruments that were not adopted "*by all signatory states to the European Convention of (sic) Human Rights*", the Claimants do not see "*how these references to jurisprudence of the ECtHR can deprive the Tribunal of its jurisdiction in an ECT ICSID case*", noting that "[i]*t would appear that in the referenced cases the ECtHR applied certain international human rights instruments (other than the ECHR) to the* merits *of the dispute – these cases have nothing to say about the Tribunal's jurisdiction*".[537]

339. In their Memorial on Jurisdiction, the Claimants suggest that the Respondent has failed to "*come up with one single authority, or any credible argument, for its theory why an interpretation of Article 26 of the ECT in the light of the context, object and purpose of the ECT would deprive the Tribunal of its jurisdiction*", and respond to its additional references as follows:[538]

a. the Neframi article, published in 2010, "*is inapposite*" because "*it does not even refer to the ECT much less to an interpretation of Article 26 ECT in the light of its context, object and purpose, as the Respondent seeks to argue*";[539] and

b. the 1978 CJEU ruling on the implementation of mixed agreements "*has nothing to say about an interpretation of Article 26 of the ECT*".[540]

[536] Cl. Mem. on Juris., para. 46, referring to Resp. Mem. on Juris., para. 137; **RL-0045**, *Barcelona Traction*, para. 34 ("*Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination*").

[537] Cl. Mem. on Juris., para. 47, referring to Resp. Mem. on Juris., para. 129.

[538] Cl. Mem. on Juris., para. 31.

[539] Cl. Mem. on Juris., para. 31(i), referring to Resp. Mem. on Juris., para. 119 and fn. 71; **RL-0008**, Neframi, *Duty of Loyalty*.

[540] Cl. Mem. on Juris., para. 31(ii), referring to Resp. Mem. on Juris., para. 120; **RL-0037**, CJEU, Ruling 1/78, 14 November 1978.

6) EU Law Primacy (VCLT Article 5)

340. According to the Claimants, the Respondent's argument based on VCLT Article 5 "*is misplaced and cannot deprive the Tribunal of its jurisdiction*", because:

a. its position "*cannot be grounded in Article 5 VCLT*", none of the Respondent's authorities "*has made this point*", and "*no EU Member State in dozens of intra-EU investment arbitrations has ever sought to argue that an international arbitral tribunal in an intra-EU investment arbitration would not have jurisdiction by virtue of Article 5 VCLT*";[541]

b. VCLT Article 5 establishes that "*international organisations, such as the EU, may have their own rules when it comes to determining issues such as amendment, modification and interpretation of the constituent instrument, such as the EU Treaties, and any treaty adopted within an international organisation*";[542]

c. the CJEU "*does not apply the VCLT when interpreting the constituent instruments of the EU, such as the TEU or the TFEU*";[543] and

d. VCLT Article 5 "*does not have anything to say about the relationship between the EU Treaties and other treaties, such as the ECT*" and "*the rule of the primacy of EU law as a matter of EU law, as interpreted by the CJEU, does not deprive the Tribunal of its jurisdiction*", because:[544]

i. EU law is not applicable law pursuant to ECT Article 26(6) to determine the Tribunal's jurisdiction;[545]

[541] Cl. Mem. on Juris., para. 48(i).

[542] Cl. Mem. on Juris., para. 48(ii); **RL-0012**, Schmalenbach, *Article 5*, para. 1.

[543] Cl. Mem. on Juris., para. 48(ii); **RL-0012**, Schmalenbach, *Article 5*, para. 9.

[544] Cl. Mem. on Juris., para. 49.

[545] Cl. Mem. on Juris., para. 49(a[*sic*]); Cl. Response on Rule 41(5), paras. 48-54.

ii. the absence of a disconnection clause confirms that the ECT was intended to create obligations between EU Member States, including in respect of potential investor-State dispute settlement;[546] and

iii. as stated in the prior decision in *Vattenfall v. Germany*: "*Article 16 [ECT] poses an insurmountable obstacle to Respondent's argument that EU law prevails over the ECT*".[547]

iv. The Private Law Argument

341. The Claimants did not separately address the Respondent's private international law argument, relying on their position with regards to international law as above.

c. European Commission Submission

342. The European Commission's intervening third party submission addresses: (i) essential features of EU legal order; (ii) the *Komstroy* Judgment (content, bilateral nature of legal relations and conformity through interpretation); and (iii) the impact of the *Komstroy* Judgment on this arbitration (binding nature of CJEU interpretation, temporal effect and precedent).

343. Preliminarily, the European Commission reiterates its role:[548]

a. as guardian of the EU Treaties (having a "*central role of ensuring the uniform interpretation and proper application of the rules relating to investment protection within the Union*");

b. as having a "*particular interest in avoiding any conflict between ICSID arbitration awards and EU law*"; and

c. seeking "*to safeguard the interest in ensuring the uniform application of EU law*".

[546] Cl. Mem. on Juris., para. 49(ii); Cl. Response on Rule 41(5), para. 45.

[547] Cl. Mem. on Juris., para. 49(iii), citing **CL-0018**, *Vattenfall v. Germany*, para. 229; *see also* **CL-0013**, *Landesbank v. Spain*, para. 193.

[548] European Commission Submission, paras. 2-4.

344. In accordance with the Tribunal's direction, it focuses its intervention on whether or not, from the European Commission's perspective, ECT Article 26, properly construed, applies intra-EU in general, and in the relationship between the Respondent and Ireland, in particular, so that the Tribunal lacks jurisdiction.[549] In that regard, its summary position is that:

a. the CJEU's *Komstroy* Judgment "*greatly simplifies the legal analysis required for the proper resolution of the present proceedings and will be the focus of the present submission*";[550]

b. prior to the *Komstroy* Judgment, "*there was no final and binding interpretation of* [ECT Article 26] *on the decisive question for the jurisdiction of the Arbitral Tribunal*", i.e., whether Article 26 applies intra-EU, which the CJEU "*ruled that, properly construed*" it does not;[551]

c. the content of the *Komstroy* Judgment explains why it "*gives a final and binding interpretation of Article 26 ECT with the effect that it does not apply intra-EU*";[552]

d. it means that "*there is no arbitration agreement between Claimants and Respondent, and the Arbitral Tribunal lack*[s] *jurisdiction*";[553] and

e. the prior award in *Green Power v. Spain*, rendered on 16 June 2022, declined jurisdiction, accepting *Komstroy* and the primacy of EU law.[554]

345. As to essential features of EU legal order, the European Commission notes that:

a. EU Member States owe one another and the EU "*far-reaching duties of loyal cooperation and mutual trust within the framework of a structured network of*

[549] European Commission Submission, para. 5.
[550] European Commission Submission, para. 6.
[551] European Commission Submission, para. 7.
[552] European Commission Submission, para. 8.
[553] European Commission Submission, para. 9.
[554] European Commission Submission, para. 10; **RL-0077**, *Green Power v. Spain*.

principles, rules and mutually interdependent legal relations that bind the EU and EU Member States reciprocally and EU Member States to each other";[555]

b. TEU Article 19(1) "*obliges EU Member States to provide sufficient remedies to ensure effective legal protection in the fields covered by EU law*", together with TFEU remedies providing "*a complete system of judicial protection*" protecting the "*integrity of the EU legal order*";[556]

c. TFEU Articles 267 and 344 describe the preliminary ruling procedure ("*keystone of uniform interpretation and application of EU law*") and reinforce that objective "*by prohibiting Member States from creating, in relation to any matter implicating EU law, dispute settlement mechanisms other than those set out in the EU Treaties*", respectively thus preserving the "*specific characteristics and the autonomy of the EU legal order*";[557]

d. EU law is "*based on the fundamental premise that each EU Member State shares with all the other Member States, and recognises that it shares with them, a set of common values, set out in Article 2 TEU*";[558]

e. that "*implies and justifies the existence of mutual trust between the EU Member States that those values will be upheld*";[559] and

f. a system of dispute resolution "*introduced in a situation covered by EU law but set up outside the system of effective legal protection established by the EU Treaties, unjustifiably calls, or risks calling into question, that principle of mutual trust*".[560]

346. As to the content of the *Komstroy* Judgment, the European Commission makes the following points:

[555] European Commission Submission, para. 12; **RL-0004**, *Achmea* Judgment, para. 33; **RL-0007**, *Komstroy* Judgment, para. 43.

[556] European Commission Submission, para. 13.

[557] European Commission Submission, para. 14 (emphasis original); **RL-0004**, *Achmea* Judgment, para. 35; **RL-0007**, *Komstroy* Judgment, para. 43.

[558] European Commission Submission, para. 15.

[559] European Commission Submission, para. 15 (emphasis original); **RL-0004**, *Achmea* Judgment, para. 34.

[560] European Commission Submission, para. 15.

a. the CJEU held that "*Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State*";[561] and

b. it bases its conclusion on two findings:

i. intra-EU investment arbitration "*violates the essential features of the EU legal order*";[562] and

ii. the ECT constitutes EU law and a tribunal established pursuant to ECT Article 26(2)(c) operates outside the EU judicial system, which means allowing a Member State to opt out would violate the obligation in TFEU Article 344 to submit all disputes concerning interpretation and application of EU law to the EU judicial system.[563]

347. The CJEU's reasoning built on the Advocate General's Opinion in *Komstroy* and the ICJ judgment in *Barcelona Traction*, and "*means that the interpretation of ECT Article 26 is a matter for the two Contracting Parties concerned by a given investment dispute, and not for the other Contracting Parties*".[564] The intra-EU application of ECT Article 26 "*is a matter internal to the EU legal system, which does not touch upon the rights of third countries that are Contracting Parties to the ECT*", and the CJEU can interpret Article 26 ECT as far as intra-EU proceedings are concerned:[565]

a. "*in a binding and final manner*"; and

[561] European Commission Submission, para. 16; **RL-0007**, *Komstroy* Judgment, para. 66 (emphasis added by the European Commission).

[562] European Commission Submission, para. 18; **RL-0007**, *Komstroy* Judgment, paras. 42-63.

[563] European Commission Submission, paras. 19-20; **RL-0007**, *Komstroy* Judgment, para. 64 ("*despite the multilateral nature of the international agreement of which it forms part, a provision such as Article 26 ECT is intended, in reality, to govern bilateral relations between two of the Contracting Parties, in an analogous way to the provision of the bilateral investment treaty at issue in the case giving rise to the judgment of 6 March 2018, Achmea* ").

[564] European Commission Submission, para. 21.

[565] European Commission Submission, paras. 21-22.

b. "*in conformity with higher-ranking norms of the EU legal order, and in particular with the essential features*".

348. As to the bilateral nature of the legal relations created by ECT Article 26 and the concept of conformity through interpretation, the European Commission submits that according to the CJEU:

a. ECT Article 26(2)(c) must be interpreted as not applying to intra-EU disputes, based on its characterisation of the nature of Article 26 legal relations ("*despite the multilateral nature of the international agreement of which it forms part, a provision such as Article 26 ECT is intended, in reality, to govern bilateral relations between two of the Contracting Parties*");[566]

b. it applies only to EU Member States as between themselves;[567]

c. the CJEU "*requires an interpretation of the ECT that allows the EU Member States to respect the obligations flowing from their membership of the Union, including Article 344 TFEU*";[568] and

d. that "*is possible because Article 26 ECT creates obligations that are bilateral in nature, i.e. between the Contracting Party in which the investment has been made and the Contracting Party to which the investor belongs*".[569]

[566] European Commission Submission, para. 24; **RL-0007**, *Komstroy* Judgment, para. 64.
[567] European Commission Submission, para. 24.
[568] European Commission Submission, para. 25.
[569] European Commission Submission, para. 25.

349. Based on doctrinal writings,[570] discussion in the VCLT preparatory works,[571] and work by the International Law Commission,[572] the European Commission seeks to draw a distinction for international obligations created by multilateral treaties between:[573]

a. bilateral legal relations (reciprocal obligations);

b. *erga omnes partes* legal relations (interdependent obligations); and

c. *erga omnes* legal relations (independent or self-standing obligations).

350. The European Commission relates this to Advocate General Szpunar's Opinion in *Komstroy*, which states in its relevant part as follows:[574]

> The ECT also has certain specific features in two respects, […]
>
> In the first place, the ECT does not establish any court or tribunal responsible for ensuring the uniform interpretation of its provisions, in a manner consistent with the Court's interpretation within its legal order. The ECT is intended to be interpreted only in the course of the settlement of disputes by various arbitral or State tribunals in the Contracting Parties, which therefore cannot avoid divergences in interpretation. …
>
> In the second place, as noted by the German Government in its written observations and by the European Commission at the hearing, the ECT, although a multilateral agreement, consists of a set of bilateral obligations between the Contracting Parties, including the European Union and the Member States. …

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[570] European Commission, para. 27; A. McNair, "*The Functions and Differing Legal Character of Treaties*" in 11 British Yearbook of International Law, 1930, p. 100. *See also* K. Sachariew, "*State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and its Legal Status* " in 35 Netherlands International Law Review, 1988, p. 273; D. N. Hutchinson, "*Solidarity and Breaches of Multilateral Treaties*" in 59 British Yearbook of International Law, 1988, p. 151; B. Simma, "*Bilateralism and Community Interest in the Law of State Responsibility*" in Y. Dinstein and M. Tabory, *International Law in a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, 1989, p. 823; C. Annacker, "*The Legal Regime of Erga Omnes Obligations in International Law*" in 46 Austrian Journal of Public International Law, 1993-1994, p. 136; A. Bleckmann, "*Zur Wandlung der Strukturen der Völker rechtsverträge*" in Archiv des Völkerrechts, 1996, p. 218; J. Pauwelyn, "*A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*" in 14 European Journal of International Law, 2003, p. 907.

[571] *See*, *e.g.*, **RL-0043**, G. Fitzmaurice, "*Second Report on the Law of Treaties*" in 2 Yearbook of the International Law Commission, UN Doc. A/CN.4/SER.A/1957/Add.1, 1957, pp. 60 *et seq*.

[572] *See*, *e.g.*, **C-0039**, ILC, Fragmentation Report.

[573] European Commission Submission, paras. 26-28; **RL-0045**, *Barcelona Traction*: para. 33 ("*an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. […] Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance*").

[574] European Commission Submission, para. 29, citing **RL-0042**, Szpunar Opinion, paras. 39-42 (footnotes omitted) (emphasis added by the European Commission). *See also* **RL-0045**, *Barcelona Traction*, paras. 33, 35.

> The obligations established by the ECT essentially allow the protection of investments made by investors from one Contracting Party in another Contracting Party. … The infringement of one of those obligations therefore does not mean that all the Contracting Parties are always able to claim compensation, as those obligations apply only bilaterally, between two Contracting Parties. …
>
> The ECT thus establishes a set of bilateral obligations intended to govern, in the area which it covers, first, relations between the Contracting Parties and, secondly, relations between investors from a Contracting Party and the Contracting Party in whose area the investments have been made. It follows that, in theory, those obligations could also govern, within the European Union itself, relations between Member States and therefore apply within the EU legal order.

351. Based on Advocate General Szpunar's Opinion, the European Commission argues that:[575]

a. the CJEU, "*as ultimate arbiter of the proper interpretation of EU law, has now confirmed that analysis*",[576] (i.e., that "*there exist, on the one hand, legal relations that are not purely bilateral i.e. are either interdependent or independent*" and on the other "*legal relations that are bilateral in nature*");[577]

b. for not purely bilateral obligations ("*i.e. are either interdependent or independent, classic examples of the latter include ILO conventions or human rights instruments*"), "*all States have a shared interest in the observance, by all other States, of the rules contained in the instrument in question*", as the obligation "*is owed to the international community as a whole such that a State may invoke the responsibility of another State in its capacity as a member of that community i.e. not necessarily in its individual capacity as an injured party*",[578] (e.g., disarmament or environmental protection treaties "*achieving the desired objective is dependent upon the commitment of all parties who signed up to that aim*");[579]

[575] European Commission Submission, paras. 30-37.

[576] European Commission Submission, para. 30.

[577] European Commission Submission, para. 31. The European Commission notes that a similar distinction was made in *The Queen v. Maurice Donald Henn and John Frederick Ernest Darby*, House of Lords, Case 34/79, Opinion of Advocate General Warner, 25 October 1979 (available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61979CC0034), pp. 3833-3835: European Commission Submission, fn. 9.

[578] European Commission Submission, paras. 32-33.

[579] European Commission Submission, para. 33.

c. as *Barcelona Traction* shows "*these types of legal relations differ quite fundamentally from those that are purely bilateral in nature (even if they are contained in a multilateral instrument)*"; and

d. whether in bilateral or multilateral treaties, "[o]*ffers for investor-State arbitration … are a modern and institutionalised form of diplomatic protection*" and "*are reciprocal in nature, i.e. crucially, they remain a matter that can be regulated between the two parties in question*".[580]

352. On that basis, the European Commission argues that ECT Article 26 "*creates a bundle of bilateral relations between Contracting Parties*" and that, "*when both parties in question (i.e. the host State of the investment and the home State of the investor) are EU Member States, must be interpreted as not being applicable*",[581] made possible by the bilateral characterisation of the legal relationship,[582] even "*approached from a pure public international law perspective*".[583]

353. As to conformity through interpretation, according to the European Commission:[584]

a. the EU legal system has a clear hierarchy of norms and EU law has primacy;[585]

b. when international agreements (e.g., the ECT) are an integral part of Union legal order, "*they come below primary law in the hierarchy of EU legal norms and must be interpreted so far as is possible so as to avoid a conflict between the agreement and the rules of primary law*", per the CJEU in the *Komstroy* Judgment;[586]

c. the interpretation reached by the CJEU "*may not be the only possible interpretation of Article 26 ECT*", but "*it is the only interpretation that prevents a conflict with*

[580] European Commission Submission, para. 34.
[581] European Commission Submission, para. 35.
[582] European Commission Submission, para. 36.
[583] European Commission Submission, para. 37.
[584] European Commission Submission, paras. 38-50.
[585] European Commission Submission, para. 38.
[586] European Commission Submission, paras. 39-40; **RL-0007**, *Komstroy* Judgment, paras. 23, 66, 68.

primary law" so is to be "*preferred as an expression of the principle of conformity through interpretation*";[587]

d. interpretation of ECT Article 26 based on VCLT Article 31 leads to the same result (interpreting treaties in good faith in accordance with the ordinary meaning to be given to terms in context and in light of object and purpose, with "*no hierarchy between the elements of interpretation*");[588] and

e. each element "*points in the same direction*" leading to the CJEU interpretation in the *Komstroy* Judgment:[589]

i. "*terms used in the ECT, including the description of its subject matter in the Treaty, must be read in the broader context of the ECT and the status of some of its contracting parties as Member States of the Union (and thus as members of a REIO, recognized as such by the ECT)*";

ii. the circumstances in which the ECT was concluded "*show that it was not intended to bind the Member States to each other*"; and

iii. this also "*follows from the text*", which recognises "*the power of the Union to take decisions binding on its Member States (Article 1(3) ECT) and provide for the Union and its Member States to vote as a block at the Energy Charter Conference (Article 36(7) ECT)*".

354. As to the circumstances in which the ECT was concluded, according to the European Commission:

a. it was a European project from the outset, "*in reaction to the fall of communism in Central and Eastern Europe, rather than an intergovernmental project*";[590]

[587] European Commission Submission, para. 41.
[588] European Commission Submission, para. 42.
[589] European Commission Submission, para. 43.
[590] European Commission Submission, para. 44.

b. in June 1990, Dutch prime minister Ruud Lubbers presented a memorandum to the European Council of Dublin, "*proposing an international framework for cooperation in the energy sector between the European Communities, on the one hand, and Russia, the CIS and the countries of Central and Eastern Europe, on the other hand*";[591]

c. in December 1990, the European Council of Rome "*endorsed ... subsequent proposals made by Lubbers and the Commission*";[592]

d. in 1991, the European Commission presented a draft European Energy Charter;[593]

e. also in 1991, the European Commission convened, funded and provided the secretariat for an international conference;[594]

f. in the European Energy Charter and ECT negotiating instruments, "*the European group (EU and Member States) appears as a single contracting party*";[595]

g. the final European Energy Charter text "*reflects the special role of the EU and its internal energy market*";[596]

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[591] European Commission Submission, para. 44. See also European Commission Submission, fn. 15, which states:

> At that time, shortly after the fall of the Berlin wall, the centrally-planned economies of the Union of Soviet Socialist Republics (and then Russia and the Commonwealth of Independent States) and the countries of Central and Eastern Europe began a process of reform and transition into market economies. They all were short of capital. Therefore, Lubbers' memorandum suggested the creation of a European Energy Community to capitalize on the complementary relationship between the EU, the USSR and the countries of Central and Eastern Europe. The idea was to encourage investment flows from West to East, in order to secure energy flows from East to West.

[592] European Commission Submission, para. 44.

[593] European Commission Submission, para. 44.

[594] European Commission Submission, para. 44.

[595] European Commission Submission, para. 44, quoting **RL-0008**, Neframi, "*The Duty of Loyalty*", p. 335, fn. 45. See also European Commission Submission, fn. 18 referring to J. Basedow, "*The European Union's international investment policy: Explaining intensifying Member State cooperation in international investment regulation*", London School of Economics and Political Science, 2014 (available at: http://etheses.lse.ac.uk/3198/1/Basedow_The_European_Unions_international_investment_policy.pdf), p. 156 ("*What is more, not the individual Member States but the Commission conducted EU-internal and international consultations with the Soviet Union, drew up a draft text for a European Energy Charter and managed the logistics of the upcoming negotiations on the European Energy Charter and ECT*").

[596] European Commission Submission, para. 44. *See* **CL-0019**, European Energy Charter, Preamble, p. 28, which states:

> Assured of support from the European Community, particularly through completion of its internal energy market;

h. therefore "*all signatory states were aware that the EU was exercising its competence for energy*" and the ECT "*implements the policy objectives set out in the European Energy Charter*";[597] and

i. the ECT, like the European Energy Charter, "*was perceived as part of the European Communities' external energy policy*".[598]

355. Based on those circumstances, the European Commission submits that "[i]*t was never intended that the ECT should influence their internal energy policy*", making it "*clear at the time that the European Energy Charter should not apply between EU Member States, at least not where the competence for taking decisions on energy policy had been transferred to EU*".[599]

356. As to the conclusion of the ECT itself, according to the European Commission:[600]

a. while the EU negotiated the European Energy Charter and ECT, EU Member States signed as Contracting Parties alongside the EU "*since it was considered at the time that they retained competence over certain matters covered by the ECT*"; and

b. the ECT text "*specifically recognises the EU as a REIO*", whereby (i) Article 1(2) provides that "*States and REIOs can become Contracting Parties to the ECT*", and (ii) Article 1(3) defines REIO as an organization "*constituted by states to which they have transferred competence over certain matters a number of which are governed by [the ECT], including the authority to take decisions binding on them in respect of those matters*".[601]

> Aware of the obligations under major relevant multilateral agreements, of the wide range of international energy cooperation, and of the extensive activities by existing international organisations in the energy field and willing to take full advantage of the expertise of these organisations in furthering the objectives of the Charter…

[597] European Commission Submission, para. 44. *See* **CL-0001 / RL-0084**, ECT, Art. 2 as quoted at footnote 514 above.

[598] European Commission Submission, para. 44 (emphasis original), citing **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, para. 4.132 (quoting, in turn, Thomas Wälde).

[599] European Commission Submission, para. 44 (emphasis original).

[600] European Commission Submission, para. 45.

[601] European Commission Submission, para. 46 (emphasis added by the European Commission).

357. As to the purpose of the ECT, according to the European Commission it was:

a. "*to create a framework for energy cooperation between, on the one hand, the EU, and on the other, the newly independent countries of Central and Eastern Europe, with a view to facilitating their transition to a market economy and accession to the EU*";[602]

b. as an "*instrument of the EU's external energy policy*",[603] (whereas its internal energy policy was "*an elaborate system of rules designed to create an internal market in energy*");[604]

c. never intended "*to modify or replace those internal rules by an international treaty such as the ECT*" and "*there is no indication that other Contracting Parties understood the situation any differently*";[605]

d. signed by both the EU and the EU Member States because of "*the competence for external energy policy as it existed at the relevant point in time: as a matter of EU law, the EU acting alone was not competent to conclude an agreement such as the ECT*";[606] and

e. the EU Member States are signatories "*not because the intention was to ensure the application of the ECT as between them, but rather because the EU is founded upon the principle of conferral of competence and was, for reasons internal to its own legal order, unable to sign alone*".[607]

[602] European Commission Submission, para. 47.

[603] European Commission Submission, para. 47 (emphasis original); **CL-0001 / RL-0084**, ECT, Art. 1(3). See also European Commission Submission, fn. 24 ("*That same provision also recognises the dynamic nature of that transfer of competence. For instance, as a result of the adoption of the First Renewable Energy Directive, the EU has external competence for renewable energy policy … It is important to note that that was not the case when the ECT was signed; for that reason, as noted in the text, the ECT was signed by both the EU and EU Member States*").

[604] European Commission Submission, para. 47, referring to, *inter alia*, the discussion in **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, paras. 4.131-4.132.

[605] European Commission Submission, para. 48.

[606] European Commission Submission, para. 48.

[607] European Commission Submission, para. 48.

358. The European Commission submits that the consequence of this purpose is that "*the ECT cannot apply at all intra-EU*", as confirmed by the statement submitted by the EU to the Energy Charter Secretariat pursuant to ECT Article 26(3)(b)(ii) (which was "*an instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty*" within the meaning of VCLT Article 31(2)(b)).[608] It argues that this was a "*choice of law provision made by the Parties through a valid instrument under Article 32(2)(b) VCLT*", stating that the "*Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of* ***another*** *Contracting Party*" (emphasis added by the European Commission)).[609] It further argues that the word "*another*" in the statement:[610]

a. "*clearly identifies 'the Communities [now the Union] and the Member States' as a single unit and excludes disputes brought by EU investors against a Member State*";

b. illustrates that "*the Union and the EU Member States consider that only investors from Contracting Parties that are not EU Member States may bring a case against the Union or its Member States*"; and

c. demonstrates that "*the Union and the Member States determine together who the respondent party will be*".

359. Having set out its legal analysis of the *Komstroy* Judgment, the European Commission turns to its impact in the current arbitration in relation to (i) the binding nature of CJEU judgments, (ii) their temporal effect and (iii) the effect of precedent.

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[608] European Commission Submission, para. 49, erroneously referring to ECT Article 26(3)(ii); Energy Charter Secretariat, "*Transparency Document: Policies, Practices and Conditions of Contracting Parties Listed in Annex ID*" (available at: http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/Transparency_Annex_ID.pdf), p. 9 ("*The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of an Investor, the Communities and the Member States concerned will make such a determination within a period of 30 days*").

[609] European Commission Submission, para. 49.

[610] European Commission Submission, para. 50.

360. First, as to the binding nature of the CJEU interpretation of ECT Article 26, according to the European Commission:[611]

a. the CJEU is designated by EU Member States as the competent body to rule on matters of interpretation of Union law (TEU Article 19(1) and TFEU Articles 267 and 344), including for relations *inter se*, "*because the ECT is part of EU law*", and this arbitration is "*a result of the bilateral nature of the obligations*" so "*does not have any impact on a third country that is a Contracting Party to the ECT*";[612]

b. the ECT "*does not entrust any international court with authority to give binding interpretations of it*" (*c.f.*, ECHR or WTO agreements), and "*foresees state-to-state arbitration*", where two EU Member States "*are obliged to rely on the mechanisms provided for by the EU Treaties, i.e. Article 259 TFEU or Article 273 TFEU*";[613]

c. CJEU jurisdiction "*covers not only interpretation and application of the EU Treaties, but extends to international agreements concluded by the EU and the EU Member States, insofar as the application of those international agreements between those two EU Member States is at stake*";[614]

d. CJEU jurisdiction to interpret the ECT is exclusive according to TFEU Article 344 (to preserve EU legal system autonomy, as justified by essential characteristics);[615]

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[611] European Commission Submission, paras. 51-62.

[612] European Commission Submission, para. 52.

[613] European Commission Submission, para. 53. *See* **CL-0009**, TFEU, Article 344 ("*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*").

[614] European Commission Submission, para. 53 and fn. 28; the European Commission here refers to "*disputes concerning UNCLOS, which is, like the ECT, such a mixed agreement*", citing *Commission of the European Communities v. Kingdom of Great Britain and Northern Ireland*, CJEU Case C-459/03, Judgment, 30 May 2006 (available at: https://curia.europa.eu/juris/showPdf.jsf;jsessionid=EC41177EC8F79D600D23141A31A2406C?text=&docid=57551&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=18637252), paras. 80-139.

[615] European Commission Submission, paras. 54-56; **CL-0207**, *BayWa r.e. Renewable Energy and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, para. 280 ("*For just as the European treaties are part of international law, so the CJEU, which exercises jurisdiction as between EU Member States, is an international court whose decisions are binding on those states* inter se. *International law allows the states parties to a regime treaty to establish their own international courts with jurisdiction over and authority to bind the Member States on issues of international law affecting them*"); **CL-0018**, *Vattenfall v. Germany*, para. 148 ("*Since the ECJ is empowered by the EU Treaties to give preliminary rulings on the interpretation of EU law, including the EU Treaties (*see *Article 19 TEU and Article 267 TFEU), the Tribunal considers the ECJ Judgment's interpretation of the EU Treaties*

e. public international law decisions also recognise the binding force of judgments of the CJEU;[616]

f. public international law provides that States, as contracting parties are "*masters of the treaties*", with "*power to interpret, and continue to interpret treaties concluded between them in an authentic, and therefore absolutely binding manner*";[617] and

g. "*teachings of the most highly qualified publicists of the various nations*" confirm this.[618]

361. Consequently, the European Commission concludes that Contracting Parties can exercise the power to interpret treaties themselves, or "*vest it in an international court or tribunal*", and that TEU Article 19 and TFEU Articles 267 and 344 vest in the CJEU "*the authority to give authentic interpretation of Article 26 ECT*".[619]

362. Secondly, as to the temporal effect of the CJEU interpretation, according to the European Commission:

a. interpretation of the law applies *ex tunc* (the rule has the content given by the competent international court);[620] and

b. the same applies for "*authentic interpretation by the contracting parties*".[621]

363. Thirdly, as to the CJEU being in line with precedent, according to the European Commission:

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likewise to constitute a part of the relevant international law"); however, the European Commission notes in its submission, "*For the sake of clarity, the Commission does not share the ultimate conclusion of* [the *BayWa* and *Vattenfall*] *tribunals, in particular with regard to the interpretation of Article 26 ECT and the interpretation of the* Achmea *judgment*": European Commission Submission, fn. 29.

[616] European Commission Submission, paras. 57-58 and the sources cited therein.

[617] European Commission Submission, paras. 59-60. *See: Question of Jaworzina (Polish-Czechoslovakia Frontier)* Advisory Opinion [1923] PCIJ Series B No. 8, 37.

[618] European Commission Submission, para. 61, quoting Statute of the International Court of Justice (available at: https://www.icj-cij.org/statute), Art. 38(1)(5). *See* for example, Judge Crawford, 'A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties', in Nolte (ed), *Treaties and Subsequent Practice*, Oxford Uni Press, 2003, 29 at 30.

[619] European Commission Submission, para. 62.

[620] European Commission Submission, paras. 63-64.

[621] European Commission Submission, paras. 65-67 and the sources cited therein.

a. the ***Komstroy* Judgment** confirmed that the *Achmea* Judgment findings apply to intra-EU application of the ECT, as "*was already evident from the non-specific drafting of the operative part*" (i.e., "*a provision in an international agreement concluded between Member States*"),[622] because:

i. EU law is international law applicable between all EU Member States;[623]

ii. investor-State tribunals are not "*national courts or tribunals*" within the meaning of TFEU Article 267;[624] and

iii. there is no "*full review of the award by a court in a Member State*", as ECT tribunals "*are no more a part of the EU judicial system than are arbitral tribunals convened under an intra-EU BIT*";[625]

b. **Opinion 1/17** "*emphasised that investor-State dispute settlement is only permissible in treaties between the EU and third countries, i.e. where the principle of mutual trust does not apply*",[626] confirming the *Achmea* Judgment "*in very general terms, emphasising that the key problem is the violation of the principle of mutual trust and thus leaving no room for treating the intra-EU application of the ECT differently from an intra-EU BIT*"; and

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[622] European Commission Submission, para. 68, citing **RL-0004**, *Achmea* Judgment, para. 31 (emphasis added by the European Commission).

[623] European Commission Submission, para. 68(a). According to the European Commission, "*International tribunals have consistently accepted the duty to apply EU law as international law applicable between EU Member States*", citing *Ireland v. Kingdom of Great Britain and Northern Ireland*, PCA Case No. 2002-01, Procedural Order No. 3, 24 June 2003 (available at: https://pcacases.com/web/sendAttach/867), paras. 21-28; **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, paras. 4.122, 4.189, 4.195.

[624] European Commission Submission, para. 68(b).

[625] European Commission Submission, para. 68(c); **RL-0014**, *PL Holdings* Judgment, paras. 47-55.

[626] European Commission Submission, para. 69; **RL-0035**, Opinion 1/17, paras. 120-129. According to the European Commission, Opinion 1/17

> clarified that paragraphs 57 and 58 of the *Achmea* judgment (on which arbitration tribunals have previously relied to hold that the *Achmea* judgment does not apply to the ECT), carve out from *Achmea*'s scope only relations with third countries, not a possible intra-EU application. Even then, such dispute settlement is only permissible if the interpretation and application of EU law is expressly excluded from the tribunals' jurisdiction and such jurisdiction is specifically limited to preserve the EU's right to legislate in the public interest without investor-State tribunals interfering with its functions, especially in the field of competition law.

See European Commission Submission, fn. 44 (emphasis original), citing **RL-0035**, Opinion 1/17, paras. 106-161, 184-218.

c. the **Grand Chamber of the CJEU** (in the *Achmea* Judgment) "*has now taken the same view, emphasising, once again, the importance of those specific characteristics*".[627]

364. The European Commission concludes on that basis that the ECT is an integral part of Union law.[628] Therefore, an ECT tribunal "*would be required by the very terms of its constitution, to interpret and apply EU law because that law includes the ECT itself*",[629] and the CJEU (in the context of TFEU Article 267) "*is to give a binding interpretation of EU law, not to decide the case before it*", its ruling applying *ex tunc*[630] and *erga omnes* (i.e., "*binding in the legal order of each EU Member State in all pending and future disputes concerning the interpretation of that provision*").

365. The European Commission concludes on the basis of all the aforementioned arguments that:[631]

a. the *Komstroy* Judgment held that ECT Article 26(2)(c) must be interpreted as not applicable between a Member State and an investor of another Member State;

b. in intra-EU disputes, there is no "*unconditional consent to the submission of a dispute to international arbitration*" pursuant to ECT Article 26(3), and no procedure for the investor to provide consent and to perfect the offer to arbitrate at ECT Article 26(4);

c. any tribunal purporting to be established pursuant to ECT Article 26(4) "*was improperly so and therefore lacked jurisdiction*";

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[627] European Commission Submission, para. 70.

[628] European Commission Submission, para. 71; **CL-0009**, TFEU, Art. 216(2) ("*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*").

[629] European Commission Submission, para. 71.

[630] European Commission Submission, para. 72 and fn. 46. Here the European Commission refers to *Association Vent De Colère! v. Ministre de l'Ecologie and Ministre de l'Economie*, CJEU Case C-262/12, Judgment, 19 December 2013 (available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=145912&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=18649767), para. 39, stating, "*It is possible for the CJEU to limit the application of its judgment in time: despite a request to that effect during the proceedings, the Court declined to do so in* Achmea").

[631] European Commission Submission, paras. 73-78.

d. the CJEU finding in the *Komstroy* Judgment "*constitutes a binding and final interpretation of Article 26 ECT, for the Contracting Parties concerned*";

e. that interpretation applies *ex tunc*; and

f. the Respondent "*did not validly consented [*sic*] to investor-State arbitration in relation to disputes brought by investors from an EU Member State such as Claimants, and the Arbitral Tribunal lacked the competence to hear the case*".

366. The Parties' responses to the European Commission's intervention were limited mostly to the threshold question of third-party jurisdiction to intervene as opposed to the substantive issues. As noted above, several of its substantive points were incorporated by the Respondent into its subsequent submissions.

(4) Tribunal's Reasoning and Analysis

367. The Tribunal has carefully considered the Parties' and the European Commission's arguments regarding the *ratione voluntatis* objection to jurisdiction. It has relied on the entire record before it, including the Parties' written submissions and oral pleadings. To the extent that some arguments are not reproduced in this Award, they must be considered subsumed in the Tribunal's analysis. The Tribunal notes that there is a concurring and dissenting opinion accompanying this Award, the dissenting part of which concerns this section of the Tribunal's reasoning.

368. In its reasoning and analysis, as a logical first step the Tribunal determines the applicable law to the question of its own jurisdiction (i.e., EU law or international law or both). It then proceeds to determine the *ratione voluntatis* objection to its jurisdiction in accordance with its determined applicable law.

a. Determination of Applicable Law

369. The starting point for the Respondent's intra-EU arbitration objection is the applicable law to the question of jurisdiction.

370. Although neither Party (nor the European Commission) took the position that Article 42(1) of the ICSID Convention applies to the question of jurisdiction, the Respondent submits that the governing law provision of the ECT, Article 26(6), applies to disputes as to jurisdiction as well as the substantive merits.[632] It relies on the prior decision on jurisdiction in *Electrabel v. Hungary*, which found that "*under Article 26(6) ECT, these rules comprise the ECT and rules and principles of international law*".[633] The Claimants argue that the decision in *Electrabel* was "*at odds with the text of the ECT*" and "*with a number of decisions by other international tribunals constituted under the ECT*".[634]

371. The Tribunal considers that Article 26(6) of the ECT (and for the avoidance of doubt Article 42(1) of the ICSID Convention), addresses the law applicable to merits and is not relevant for the purpose of the intra-EU jurisdictional objection (or indeed any jurisdictional objection). The reason for this is as clearly set out in the prior decision in *Landesbank v. Spain*:[635]

> The "*issues in dispute*" to which Article 26(6) refers are those issues which are in dispute on the merits of the case; the provision becomes applicable only once the jurisdiction of the Tribunal has been established over a "*dispute*" falling within the provisions of Article 26(1) to (5). The Tribunal does not accept that the difference in wording between this provision and Article 27(3)(g) of the ECT – which directs a tribunal in an inter-State case to "*decide the dispute in accordance with this Treaty and applicable rules and principles of international law*" – indicates a broader scope of application for Article 26(6). The Respondent has not directed the Tribunal to any materials – whether in the *travaux préparatoires*, subsequent practice, case-law or commentary – which would support the inference which it seeks to draw from the slight difference in wording between the two provisions.
>
> Moreover, even if it were applicable, Article 26(6) would not have the effect for which the Respondent contends. That provision does not require the Tribunal to accord primacy to EU law even in an inter-State case. When applicable, Article 26(6) directs a tribunal to "*decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*." It thus requires a tribunal to begin with the provisions of the ECT; it does not direct it to adopt an interpretation of the ECT which goes against the ordinary meaning of the words used on the basis

[632] Resp. Mem. on Juris., paras. 122-123.

[633] **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, para. 4.192.

[634] Cl. Mem. on Juris., paras. 35-39.

[635] **CL-0013**, *Landesbank v. Spain,* paras. 159-160. *See also* **CL-0018**, *Vattenfall v. Germany*, para. 121; **CL-0139**, *Sevilla Beheer v. Spain*, para. 620; **CL-0141**, *Cavalum v. Spain*, para. 370; **CL-0142**, *Infracapital v. Spain*, para. 293.

> that a rule of international law, applicable only between some of the Contracting Parties to the ECT, may run counter to that ordinary meaning.

372. Further in relation to ECT Article 26(6), the Claimants argue that if its effect were directly to incorporate other treaties relevant to the Contracting Parties into the ECT as applicable law, "*then there would be no reason to have a specific article, Article 16, to regulate the impact of potentially overlapping treaties*", i.e., an overbroad reading of Article 26(6) would render Article 16 superfluous.[636] This point is immaterial to the intra-EU jurisdictional objection given the Tribunal's finding above that ECT Article 26(6) does not apply to jurisdiction.

373. The Tribunal sets out in more detail its analysis concerning the Respondent's (and European Commission's) various arguments concerning the applicability of EU law or international law, including primacy of EU law, to the issue of consent.

i. International and EU Law Relationship

374. Starting with the nature of EU law, the Respondent (as summarised above) characterises the EU Treaties as having a "*dual nature*" in international law.[637] By its analysis, the "*dual nature*" includes both (i) the basis for EU law under international law and (ii) the international treaties between the EU Member States underpinning the establishment under international law of the supranational union. To categorise EU law solely as domestic law, in the Respondent's view, "*does not adequately reflect the dual nature of EU law*", i.e., it would ignore that EU law qualifies as international law under the VCLT and that "*once implemented in the national legal orders of the EU Member States, it is part of their internal legal order*".[638]

375. The Claimants do not challenge the Respondent's "*dual nature*" characterisation of the EU Treaties, and this Tribunal accepts and adapts this characterisation going forward.

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[636] Cl. Mem. on Juris., para. 42.

[637] Resp. Rule 41(5) Application, para. 148. *See* **CL-0009**, TFEU, Art. 344; TEU, Art. 19(1), second sentence.

[638] Resp. Rule 41(5) Application, para. 155; **CL-0033**, *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 ("***AES v. Hungary***"), para. 7.6.6.

376. The Claimants do, however, challenge that (including as a consequence of that "*dual nature*") EU law is therefore part of international law. This Tribunal considers that in so far as EU law creates certain legal obligations which take effect within international law, that is part of international law. In that regard, it agrees with the analysis and reasoning in the Decision on the Intra-EU Jurisdiction Objection in *Adria Group v. Croatia*, which incorporates the findings in prior rulings including *Vattenfall v. Germany* and *BayWa v. Spain* as follows (without footnotes):[639]

> The Tribunal considers that EU law possesses a dual character. On the one hand, it creates certain legal obligations which take effect within international law, and on the other, it constitutes a legal order of its own. As the *Vattenfall* tribunal put it:
>
> > *… the corpus of EU law derives from treaties that are themselves a part of, and governed by, international law, and contains other rules that are applicable on the plane of international law, while also containing rules that operate only within the internal legal order of the EU and, at least arguably, are not a part of international law...*

377. This Tribunal accepts that EU law also separately constitutes a legal order of its own and the CJEU, its rulings and their primacy to EU legal order, are an integral part of that. Therefore, within that EU legal order of its own:

a. the Member States entrusted the CJEU with the power to give definitive rulings on the interpretation of the EU Treaties based on the application of EU law; and

b. there is no concept of binding precedent, but judgments of the CJEU on the interpretation of the EU Treaties based on the application of EU law, like the Treaties themselves, form part of international law.

378. Therefore, concerning the EU legal order of its own, including the role of the CJEU, it is not open to the Tribunal to substitute its own views on what the relevant provisions of the EU Treaties mean as a matter of EU law. **A**s it exists outside the EU legal order, the Tribunal is not formally bound by CJEU judgments. However, as the CJEU judgments are

[639] **CL-0373**, *Adria Group B.V. and Adria Group Holding B.V. v. Republic of Croatia*, ICSID Case No. ARB/20/6, Decision on Intra-EU Jurisdictional Objection, 31 October 2023 ("***Adria Group v. Croatia***"), para. 117.

definitive on the interpretation given to the EU Treaties based on the application of EU law, the Tribunal must defer to those decisions as to the meaning and effect of EU law.

379. Having found those elements of the EU Treaties that operate beyond the internal legal order of the EU to be part of international law obligations between Member Staes, the tribunal in the *Adria Group* decision proceeded to examine whether or not any conflict existed between the international law obligations in the EU Treaties and the international law obligations in the applicable BIT and the ICSID Convention as follows:[640]

> In the opinion of the Tribunal, the EU Treaties are part of the international law obligations between the Member States. The Tribunal must therefore consider any conflict between those Treaties and the obligations arising from them for Croatia and the Netherlands and the obligations of those States under the BIT and the ICSID Convention. However, how any such conflict is to be resolved is a matter for the rules of general international law. While the CJEU has taken the view that EU law prevails over obligations of the Member States under international law, at least as between themselves, that principle is part of EU law as a separate legal order. The Claimants are correct in saying that the Tribunal sits outside that order and derives its *compétence de la compétence* from international law, not EU law.

380. Again, this Tribunal accepts and adopts that reasoning. The competence of this Tribunal is derived from international law – here the ECT and the ICSID Convention – not EU law; as such it sits outside that element of EU law which forms a separate legal order. As to the effect of the EU jurisprudence, the *Adria Group* decision rejected the European Commission's view that CJEU judgments form binding precedent for arbitral tribunals as follows:[641]

> That conclusion requires a consideration of how the Tribunal should treat the judgments of the CJEU relied upon by the Respondent, the Netherlands and the European Commission in the present case. The Commission contends:
>
> > *Judgments of the CJEU contain an authoritative and binding interpretation of the relevant provisions of EU law for all Member States and any investor established in those states. Those judgments are also binding, as part of international law applicable to the dispute, upon arbitral tribunals established for the purposes of resolving an intra-EU dispute.*

[640] **CL-0373**, *Adria Group v. Croatia*, para. 118.

[641] **CL-0373**, *Adria Group v. Croatia*, paras. 119-120.

> In support, the Commission cites the 2018 decision of the arbitration tribunal in *Vattenfall* and the 2019 decision of the arbitration tribunal in *BayWa.*
>
> That goes too far. There is no concept of binding precedent in EU law and, more importantly, the Tribunal is not an institution of the EU or one of its Member States. Neither of the arbitral decisions relied upon by the Commission supports its suggestion that judgments of the CJEU are binding upon an ICSID arbitration tribunal.

381. This Tribunal accepts that conclusion: the CJEU judgments do not bind this Tribunal because there is no binding precedent in EU law and, moreover, because this Tribunal is not an institution of the EU or its Member States and therefore not subject to its internal legal order. That said, the Tribunal does accept that it must defer to the interpretation given by the CJEU to the EU Treaties, again for the reasons articulated in the *Adria Group* decision, as follows:[642]

> Nevertheless, the *Vattenfall* and *BayWa* decisions do support the principle that judgments of the CJEU on the interpretation of the EU Treaties, like the Treaties themselves, form part of international law. The point was put in these terms by the *Vattenfall* tribunal:
>
> > *Since the [CJEU] is empowered by the EU Treaties to give preliminary rulings on the interpretation of EU law, including the EU Treaties (see Article 19 TEU and Article 267 TFEU), the Tribunal considers the [CJEU] Judgment's interpretation of the EU Treaties likewise to constitute a part of the relevant international law.*
>
> The Tribunal agrees with the *Vattenfall* tribunal's formulation. While the Tribunal is not formally bound by a judgment of the CJEU, it must defer to the interpretation given by the CJEU to the EU Treaties. Since the States party to those Treaties have entrusted the CJEU with the power to give definitive rulings on the interpretation of those Treaties, it is not open to the Tribunal to substitute its own views on what the relevant provisions of the EU Treaties mean. The Tribunal cannot, therefore, accept the suggestion made by the Claimants at the Hearing, and repeated in their post-hearing brief, that the Tribunal "*could interpret the EU Treaties in a manner different from that of the CJEU in* Achmea".

382. As to the consequence of that deference, it extends to the CJEU interpretation of the EU Treaties. However, as indicated above, the law applicable to this Tribunal's jurisdiction is not limited to EU law; instead, it extends to rules of general international law, which

[642] **CL-0373**, *Adria Group v. Croatia*, paras. 121-122.

includes in the case of conflict of laws the VCLT. Therefore, the CJEU's findings as to primacy of EU law based on EU law and the EU Treaties does not resolve the question of the jurisdiction pursuant to applicable rules of general international law. As the *Adria Group* decision noted regarding deference:[643]

> That does not mean, however, that the Tribunal must accept the CJEU's views about the primacy of EU law over other international law obligations. If a provision of EU law, as interpreted by the CJEU, conflicts with an obligation of an EU Member State under another treaty, that conflict must be resolved by the Tribunal applying the rules of general international law. That is particularly true in relation to obligations arising under a multilateral treaty, such as the ICSID Convention, the parties to which include States which are not members of the EU. Even in the case of a bilateral treaty between two EU Member States, if that treaty creates rights for third parties, the question whether the third parties can be deprived of those rights because of EU law is not one which can be answered by EU law alone.

383. The ECT and the ICSID Convention both create rights for third parties and the extent to which any parties may be deprived of those rights is governed by rules of general international law. The Tribunal deals with the application of governing rules of general international law below, including in relation to the Respondent and European Commission arguments that express conflict of law and governing law provisions contained in the EU Treaties, which are recognised pursuant to international law, apply to render the EU principle of primacy applicable.

384. As a source of general international law, multilateral treaties regulate the relations between signatories. Some of the obligations in the ECT and the ICSID Convention are of a general nature, including but not limited to the nature of obligations arising out of a State's unilateral offer to arbitrate. To permit a State Party to adopt its own interpretation of those obligations of general application, as a consequence of it having formed with a sub-set of other States its own regional treaties and enforcing judicial body, risks undermining the very nature of rules that are applicable on the "*plane of international law*".

385. In order to deal with issues arising as between different treaties, involving different State parties, international law provides the tools to resolve conflict between different treaty

[643] **CL-0373**, *Adria Group v. Croatia*, para. 123.

instruments. State parties, including the EU Member States (including Germany and Ireland) concluded the VCLT to codify those tools of general application. Those are the tools that this Tribunal considers must be applied to resolve any conflict between the EU Treaties and the ECT and/or ICSID Convention as to this Tribunal's jurisdiction, in addition to any specific conflict tools within those treaties themselves.

386. To underscore this approach to legal order, in the VCLT Preamble, the State parties recognised "*the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems*", and state their belief "*that the codification and progressive development of the law of treaties achieved in the* [VCLT] *will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations*".[644]

387. Relatedly as to TFEU Article 351, the Tribunal further confirms its view that this does not deprive the Tribunal of its jurisdiction. As pointed out by the Claimants, it relates to agreements between EU Member States and "*third states*", i.e., non-EU Member States. It does not, in the view of this Tribunal, displace ECT Article 16.

388. In sum, the Tribunal considers that based on general rules of international law (including but not limited to relevant EU law), ECT Article 16 is the *lex specialis* conflict of laws rule in this arbitration. As also noted by the Claimants, if the Contracting Parties to the ECT intended otherwise, and "*in particular if they intended for EU law to prevail over the terms of the ECT for EU Member States, it would have been necessary to include explicit wording to that effect in the ECT*".[645] And as stated in *Vattenfall v. Germany*: "*Article 16 poses an insurmountable obstacle to Respondent's argument that EU law prevails over the ECT*".[646]

389. The Tribunal further notes that this approach, as a matter of general rules of international law and proper application of the VCLT, is followed by a number of EU Members States

[644] **CL-0017**, VCLT, Preamble.

[645] Cl. Response on Rule 41(5), para. 66.

[646] **CL-0018**, *Vattenfall v. Germany*, para. 229; *see also* **CL-0013**, *Landesbank v. Spain*, para. 193.

(including Germany) and recently the European Commission itself, in their formal notification of withdrawal from the ECT in accordance with its terms.

390. The Tribunal majority is unable to accept the Respondent's or European Commission's position that it is required as a matter of applicable international law to substitute the conflict of law rules in the VCLT (and indeed the specific conflict rule in the ECT) for the EU law principle of primacy in interpreting multi-lateral agreements to which non-EU Member States are also party. To do so risks undermining the codification and progressive development of the law of treaties and achievement of cooperation between nations, the very purpose of the VCLT. To permit a sub-group of States to create their own competing and conflicting conflict of laws rules applicable to a multilateral treaty with States beyond that sub-group, which supersede and/or circumvent the effect of the VCLT conflict rules at Articles 30, 31 and 32, or conflict rules in an applicable specific treaty (such as ECT Article 16) would be to undermine the very objectives of the VCLT and progressive development of the law of treaties.

391. Accordingly, if an EU law obligation or principle, as interpreted by the CJEU, conflicts with an obligation of an EU Member State under one or more multilateral treaties with non-EU Member States, the Tribunal is required to resolve that conflict in accordance with rules of general international law and any specific conflict rules within the relevant multilateral treaty.

392. In its intervention in this arbitration, the European Commission introduces an international obligation typography based on the ICJ judgment in *Barcelona Traction*, by reference to a paragraph in Advocate General Szpunar's Opinion in *Komstroy*, which was subsequently adopted by the Respondent in its Memorial on Jurisdiction. This analysis is set out at paragraphs 284 to 285 and paragraphs 350 to 351 above. Both take the position that this typography overcomes the concern expressed above, that a sub-set of States cannot modify obligations of a treaty as between them, outside its terms.

393. In essence, the European Commission and Respondent seek to distinguish between legal relations that are not purely bilateral (i.e., are either interdependent or independent), on the

one hand, and legal relations that are bilateral in nature on the other.[647] The latter would include bilateral legal relations that impose reciprocal obligations, and the former both *erga omnes partes* legal relations (interdependent obligations) and *erga omnes* legal relations (independent or self-standing obligations).[648] As the source of this argument, the European Commission and Respondent rely on Advocate General Szpunar's Opinion, which in turn refers to the ICJ judgment in *Barcelona Traction* (paragraph 33 in particular, as cited below).

394. The reasoning in the *Barcelona Traction* ICJ judgment does not support the proposition that the ECT (or the ICSID Convention) contain bilateral reciprocal obligations that are subject to a different set of rules governing certain parties that are inapplicable to the remaining parties to the multilateral treaty, as postulated by the Respondent (and European Commission). There are several reasons for this.

395. First, *Barcelona Traction* did not involve international law obligations arising out of competing multilateral treaties, or even consider such obligations. It was a diplomatic protection case between States parties, preceding the widespread adoption of bilateral and multilateral investment treaties to protect the investment interests on one State's foreign nations investing in a foreign host state. The parties, Belgium and Spain, were signatories to the 1927 Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration, but in the absence of any treaty on the subject between them in that dispute, the case was decided in the light of general rules of international law.

396. Secondly, the reasoning that the European Commission and Respondent rely upon is much more limited than they suggest, dealing with the narrow question whether or not the diplomatic protection between Belgium and Spain should extend to a corporate registered in Canada (on the basis that its shareholders were Belgian nationals).

397. The claim was brought on behalf of those Belgian nationals, as shareholders in Barcelona Traction, Light and Power Company Limited, which was incorporated in Canada. Spain was alleged to have committed unlawful acts to prejudice both the Belgian nationals and

[647] *See* European Commission Submission, para. 31; Resp. Mem. on Juris., para. 136.

[648] European Commission Submission, paras. 26-27; Resp. Mem. on Juris., paras. 137-139.

the Canadian company. The Belgian government lacked capacity to submit any claim in respect of wrongs done to a Canadian company. Therefore, the ICJ was required to consider disputes "*arising out of a triangular relationship involving the State whose nationals are shareholders in a company incorporated under the laws of another State, in whose territory it has its registered office*".[649]

398. The ICJ specifically considered the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company that was a juristic entity incorporated in Canada. It was in that context that it made the statement relied upon by Advocate General Szpunar in his Opinion, which reads in full (emphasis added):[650]

> When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, ***an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection***. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

399. The *Barcelona Traction* judgment is authority for the existence of a multilateral right to bring a claim based on obligations *erga omnes* outside a specific treaty; it does not separate treaty obligations pursuant to a particular multilateral treaty into bilateral obligations on the one hand, and multilateral obligations on the other.

400. In the subsequent paragraph of the judgment, the ICJ gives examples of obligations *erga omnes* to include "*acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination*", some having entered international law by convention and others "*conferred by international instruments of a universal or quasi-universal*

[649] **RL-0045**, *Barcelona Traction*, para. 31.

[650] **RL-0045**, *Barcelona Traction*, para. 33.

character".[651] It distinguishes obligations regarding diplomatic protection as not being of the same category, making it clear that (emphasis added):[652]

> It cannot be held, when one such obligation in particular is in question, in a specific case, that ***all States have a legal interest in its observance***. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions:
>
> > "The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach."

401. The European Commission and the Respondent's case on *Barcelona Traction* would require the Tribunal to characterise obligations under the ECT and the ICSID Convention essentially as diplomatic protections, i.e., to show whether or not the rights of Ireland were violated on account of its nationals having suffered infringement of their rights in Germany. This, in turn, would require it to ignore the express establishment of investor-State dispute settlement, affording by treaty a new regime to address the types of international law wrongs that were previously only subject to redress through diplomatic protection, specifically entitling foreign investors directly to bring international arbitration proceedings to protect their own economic interests. It is this regime that is in issue in the intra-EU objection: how it functions, its scope and its limitations against competing EU Treaties obligations. In the view of the majority of this Tribunal, all signatory States have a legal interest in its observance.

402. The Tribunal notes that the European Commission does seek to characterise "[o]*ffers for investor-State arbitration in bilateral or multilateral investment treaties* [as] *a modern and institutionalised form of diplomatic protection*".[653] Any institutionalisation of that protection occurs, however, through multilateral ICSID or UNCITRAL instruments and bodies (and where relevant the New York Convention on the Enforcement of Foreign Awards 1958), which establish rules and norms governing the enforceability of international arbitration agreements and awards. Therefore, whilst specific arbitrations and

[651] **RL-0045**, *Barcelona Traction*, para. 34.

[652] **RL-0045**, *Barcelona Traction*, para. 35.

[653] European Commission Submission, para. 34. *See also* Resp. Mem. on Juri., paras. 136-137.

claims for compensation are based on obligations that are "*reciprocal in nature*" (as between the Investor and the host State), the Tribunal does not accept that consent to international arbitration is "*a matter that can be regulated between the two parties in question*", without consideration of rules of general international law, including norms governing international arbitration agreements. Put another way, upon filing/registering a Request for Arbitration, pursuant to a multilateral treaty, a bilateral and reciprocal agreement to arbitrate is formed between the Investor and the host State, meaning no other Contracting State to the underlying treaty is involved. But the interpretation of the underlying treaty remains subject to the same rules that govern all Contracting Parties.

403. This Tribunal concludes therefore that the ability of general rules of international law pertaining to consent to arbitration to operate to "*achiev*[e] *the desired objective is dependent upon the commitment of* ***all parties who signed up to that aim***" (emphasis added).[654] It disagrees with the European Commission that the question of consent to arbitrate in this case involves "*types of legal relations* [that] *differ quite fundamentally*" based on being "*purely bilateral in nature (even if they are contained in a multilateral instrument)*".[655]

404. In the *Barcelona Traction* judgment, the ICJ goes on to consider the international law right in issue, by reference to an earlier ICJ decision:[656]

> This right is necessarily limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged.

[654] European Commission Submission, para. 33.

[655] European Commission Submission, para. 34.

[656] **RL-0045**, *Barcelona Traction*, para. 36, citing *Panevezys-Saldutiskis Railway Case*, Permanent Court of International Justice, Judgment, 28 February 1939 (available at: https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie_AB/AB_76/01_Panevezys-Saldutiskis_Arret.pdf), p. 16.

The reciprocity referred to was between Spain and Belgium by way of diplomatic protection, with responsibility being "*the necessary corollary of a right*", as "*decided in the light of the general rules of diplomatic protection*".[657]

405. Therefore, the European Commission's claim that the CJEU, "*as ultimate arbiter of the proper interpretation of EU law, has now confirmed that analysis*", rests on the basis that "*there exist, on the one hand, legal relations that are not purely bilateral i.e. are either interdependent or independent*" and on the other "*legal relations that are bilateral in nature*".[658] The European Commission reaches that conclusion based on the language of the Advocate General Opinion, by reference to the *Barcelona Traction* ICJ judgment. It does not follow that a finding of bilateral relations affecting two States in a purely diplomatic context, as distinguishable from obligations *erga omnes*, means that a multilateral treaty necessarily contains or constitutes bilateral obligations as between its members as to the consent to arbitrate.

406. Accordingly, this Tribunal rejects the European Commission's (and the Respondent's) argument that ECT Article 26 "*creates a bundle of bilateral relations between Contracting Parties*" and that, "*when both parties in question (i.e. the host State of the investment and the home State of the investor) are EU Member States, must be interpreted as not being applicable*".[659] Any bilateral relations are between the Investor and host State and remain subject to international law (including the specific law of the investment treaty, if any). The Tribunal rejects that such approach is made possible by the bilateral characterisation of the legal relationship,[660] even if "*approached from a pure public international law perspective*".[661]

407. To reiterate, whilst the Tribunal accepts that EU law, as set out in the EU Treaties and CJEU judgments interpreting those Treaties, can form part of the rules applicable on the plane of international law, these are not the only rules that the Tribunal must consider.

[657] **RL-0045**, *Barcelona Traction*, para. 36.

[658] European Commission Submission, paras. 30-31.

[659] European Commission Submission, paras. 34-35; Resp. Mem. on Juris., paras. 136-137.

[660] European Commission Submission, para. 36; Resp. Mem. on Juris., paras. 137-138.

[661] European Commission Submission, para. 37; Resp. Mem. on Juris., para. 137.

Relations between ECT (or ICSID Convention) signatories cannot be characterised as bilateral in the manner proposed by the Respondent and EU; the ICJ judgment in *Barcelona Traction* does not support a different analysis in the context of investment treaty arbitration. International law, pursuant to VCLT Article 41, expressly provides for the circumstances in which two or more of the parties to a multilateral treaty may agree to modify the treaty as between themselves alone. Outside those circumstances (i.e., where the treaty does not expressly permit such modification and, whilst not prohibiting it, the modification affects the enjoyment of other parties of the treaty rights and performance of obligations or concerns the derogation of a provision that would be incompatible with the effective execution of the object and purpose of the treaty as a whole), a sub-set of Contracting States to a multilateral treaty may not alter the nature of and scope of the legal obligations affecting only themselves. Nothing in the *Barcelona Traction* judgment or Advocate General Szpunar's Opinion changes that. To accept otherwise risks opening the door to differing bilateral or regional approaches to objective terms of critical binding international law obligations, including outside the investment protection sphere, undermining the rights and obligations of other parties and the object and purpose of treaties as a matter of international law.

ii. Corpus of Applicable International Law

408. As to the corpus of rules that the Tribunal considers are relevant to the decision on the intra-EU jurisdiction objection in this arbitration, these include:[662]

a. ICSID Convention Article 25(1);

b. ECT Articles 26(1) and (3);

c. ICSID registered arbitration agreement (per the Request for Arbitration);

d. EU law; and

[662] The Tribunal adopts the approach to the elements of general international law followed by the tribunal in the prior award in *Adria Group v. Croatia*.

e. the Termination Treaty (although not directly relevant to the ECT and, therefore, the current arbitration).

409. This section (ii) summarises the source of applicable law and its content. The application and effect is dealt with separately in section (b) below, from paragraph 444.

1) ICSID Convention Article 25(1)

410. First, in relation to the ICSID Convention, this is a multilateral treaty with 158 Member States.[663] Most EU Member States are party to the ICSID Convention, including Ireland and Germany, as well as 132 non-EU Member State parties.

411. The ICSID Convention entered into force in Germany on 18 May 1969 and in Ireland on 7 May 1981, entering into force between the two States on the latter date.

412. ICSID Convention Article 25(1) provides for the jurisdiction of the Centre, and therefore of an ICSID arbitration tribunal, in the following terms, including the consent (as emphasised):

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, ***which the parties to the dispute consent in writing to submit to the Centre***. When the parties have given their consent, no party may withdraw its consent unilaterally.

413. Article 25(1) operates where the Contracting State party to the dispute has concluded a bilateral or multilateral treaty with the State of nationality of the investor and the treaty contains provision for ICSID arbitration. Here the treaty is the ECT. Therefore, the ECT Article 26 offer to arbitrate operates as an offer by each State party to investor nationals of another State party to submit to the jurisdiction of the Centre any dispute covered by the terms of Article 26.

414. When a qualifying investor files its request for arbitration with the Centre (or ICSID registers the claim), the investor accepts that State's offer to arbitrate. An agreement

[663] *See* ICSID Website, "*Database of ICSID Member States*" (available at: https://icsid.worldbank.org/about/member-states/database-of-member-states).

between the investor and the host State comes into being, which satisfies each Party's consent requirements for the purpose of ICSID Convention Article 25(1).

415. In the current arbitration, this occurred either on 30 April 2021, when ICSID received the Claimants' Request for Arbitration, or on 13 May 2021, when it registered the Request in accordance with ICSID Convention Article 36(3). Unlike in some other cases nothing turns on the distinction between receipt date and registration date; the Termination Treaty, if relevant, pre-dates both, but is not applicable to the ECT.

2) ECT Articles 26(1), 26(3) and 16

416. Secondly, the ECT is also a multilateral treaty currently with 49 State parties. The EU and EU Member States are original Contracting Parties, including Ireland and Germany, and 24 other, non-EU Member States. Italy withdrew in 2016, France on 8 December 2023, Germany on 20 December 2023, Poland on 29 December 2023 and Luxembourg on 17 June 2024.

417. The ECT entered into force in Germany on 21 January 2010 and in Ireland on 14 July 1999, entering into force between the two States on 21 January 2010. The ECT remained in force between Ireland and Germany in April and May 2021, the date of the submission/registration of the Request for Arbitration.

418. ECT Articles 26(1) and 26(3)(a) provide for the jurisdiction of an arbitration tribunal, in the following terms, including consent (as emphasised):[664]

> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> …
>
> (3)(a) Subject only to subparagraphs (b) and (c), ***each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or*** conciliation in accordance with the provisions of this Article.

[664] **CL-0001 / RL-0084**, ECT, Arts. 26(1), 26(3)(a). *See also* Cl. Response on Rule 41(5), para. 32; Resp. Mem. on Juris., para. 100.

419. The ECT and the ICSID Convention are both treaties between States and governed by international law (including specific provisions in the ECT), having Contracting Parties that are EU Member States and other Contracting Parties that are not. Germany and Ireland were Contracting Parties to both the ECT and ICSID Convention, as well as EU Member States (and State parties to the EU Treaties) at the relevant time.

420. ECT Article 16 contains the conflicts provision in the ECT. It provides that where two or more Contracting Parties have entered into a prior international agreement (which would include the TFEU and TEU), or a subsequent international agreement (which would include the Lisbon Treaty), and the terms of such agreements concern the subject matter of Part III (investment protection) or Part V (dispute settlement) of the ECT (discussed below), then:

a. nothing in ECT Parts III or V "*shall be construed to derogate from any provision of such terms*" of the TFEU, TEU and/or Lisbon Treaty "*or from any right to dispute resolution with respect thereto*" under them; and

b. nothing in the TFEU, TEU and/or Lisbon Treaty "*shall be construed to derogate from any provision of Part III or V*" of the ECT "*or from any right to dispute resolution with respect thereto*" under the ECT.

421. On its face, ECT Article 16 means that disputes under the TFEU, TEU and/or Lisbon Treaty are to be resolved under the dispute resolution provided for therein (i.e., the CJEU) and disputes under the ECT are to be resolved pursuant to the ECT (i.e., Article 26).

422. As stated in the prior decision in *Vattenfall*: "*Article 16* [ECT] *poses an insurmountable obstacle to Respondent's argument that EU law prevails over the ECT*".[665] This is because EU law is subject to EU law dispute resolution and the ECT is subject to ECT dispute resolution.

423. The Tribunal notes for completeness that Germany notified its withdrawal from the ECT in 2022, which took effect on 20 December 2023. Ireland notified an intention to withdraw

[665] **CL-0018**, *Vattenfall v. Germany*, para. 229; *see also* **CL-0013**, *Landesbank v. Spain*, para. 193.

in 2024 but, to date, has not done so. The EU notified its withdrawal in June 2024, effective June 2025.

3) Request for Arbitration

424. Thirdly, as referred to above, the arbitration agreement was formed when the Claimants filed their Request for Arbitration at ICSID on 30 April 2021, as registered by ICSID on 13 May 2021. Subject to the Tribunal's reasoning below, that constituted the Claimants' acceptance of the Respondent's offer to arbitrate in ECT Article 26 and formed the disputed arbitration agreement between the Claimants and the Respondent.

4) EU Law

425. Fourthly, the provisions of the TFEU and TEU (as interpreted by the CJEU in the *Achmea* and *Komstroy* Judgments (among others)), provide that as a matter of EU law, the offers to arbitrate in the ICSID and ECT provisions above (including the expressly unconditional offer in ECT Article 26(3)), had been withdrawn before they could be accepted by the Claimants.

426. Among other things, the Respondent relies on the EU Member State Declaration of 15 January 2019. The Respondent characterises the Declaration as "*a binding instrument originating from sovereign States*".[666] However, as the Claimants explain, the Declaration cannot "*be said to establish rules between the parties to the ECT regarding its interpretation*".[667] Instead, as this Tribunal accepts, it is a declaration of understanding and intention, which paved the way for EU Member States to enter into the intra-EU BIT Termination Agreement, and to "*discuss [...] whether any additional steps are necessary to draw all the consequences from the Achmea judgment in relation to the intra-EU application of the Energy Charter Treaty*".[668]

427. The Tribunal acknowledges that VCLT Article 2(1) defines a "*treaty*" broadly to include: "*an international agreement concluded between States in written form and governed by*

[666] Resp. Rule 41(5) Application, para. 179.
[667] Cl. Response on Rule 41(5), para. 56.
[668] Cl. Response on Rule 41(5), para. 21.

international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". However, the context of the Declaration, including the subsequent 5 May 2020 Declaration Agreement, supports its status as a declaration of understanding and intention. In any event, it is not directly relevant in this dispute as it applies to BITs and not the ECT.

5) Termination Treaty

428. Fifthly, the EU Member State Termination Treaty is a treaty governed by international law. It was signed by 23 EU Member States on 5 May 2020 and entered into force between those States, including Germany, on 29 August 2020. Ireland is not a party to the Termination Treaty, as it had earlier withdrawn from its intra-EU bilateral investment treaties.

429. According to the Respondent, the effect of the May 2020 Termination Agreement on the Claimants' Request for Arbitration (which was registered with ICSID on 13 May 2021), is that new arbitration proceedings initiated after 6 March 2018 (the date of the *Achmea* Judgment) would qualify as a new arbitration within the meaning of the Termination Agreement.

430. The Termination Treaty is not directly relevant in the current arbitration. Ireland is not a signatory and, in any event, it deals with the termination of 130 intra-EU bilateral investment treaties, not the ECT.

431. According to the Respondent, the effect of the Termination Treaty is that "*it is no longer a discussion on how to interpret the* Achmea *Judgment but rather a duty of this Tribunal to acknowledge that the EU Member States' joint interpretation ECT must result in prohibiting any pending or future arbitration proceeding under the ECT*", as confirmed by the *Komstroy* Judgment.[669] This submission does not change the fact that the Termination Treaty itself simply does not apply, on its face and its terms, to the ECT.

[669] Resp. Rule 41(5) Application, para. 182.

6) VCLT Articles 30, 31 and 32

432. Sixthly, the VCLT codifies the international law of treaties conflict rules. The VCLT itself formally applies to treaties that came into force after the VCLT as between the treaty parties. The VCLT entered into force between Ireland and Germany in 2006, only after the ECT entered into force between them in 1999. Nevertheless, as both Parties appear to accept, the relevant parts of the VCLT are considered declaratory of customary international law and applied as such at the date of entry into force of the ECT.

433. The key provisions for current purposes are VCLT Articles 30, 31 and 32:[670]

a. VCLT Article 30 applies to successive treaties relating to the same subject matter; and, among other things

b. VCLT Article 30(3) provides that for successive treaties relating to the same subject matter, "[w]*hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty*";

c. VCLT Article 31 contains the general rule of interpretation; and

d. VCLT Article 32 applies to successive means of interpretation.

434. In addition, as noted above in the context of the discussion of *Barcelona Traction*, VCLT Article 41(1)(b) expressly states when two or more parties to a multilateral treaty may or may not conclude an agreement to modify the treaty as between themselves alone. Among other things, they may not do so if the modification is prohibited by the treaty or affects the enjoyment of other party rights or performance or is incompatible with the effective execution of the object and purpose of the treaty as a whole.

[670] **CL-0017**, VCLT, Arts. 30-32.

7) VCLT Article 5

435. In addition in its Memorial on Jurisdiction, the Respondent further relies on VCLT Article 5.[671] Article 5 addresses treaties constituting international organizations and treaties adopted within an international organization, and provides that the VCLT "*applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization* ***without prejudice to any relevant rules of the organization***" (emphasis added). The Respondent argues that Article 5 means that any conflict rule under general international law (including, presumably, ECT Article 16) is subsidiary to the internal conflict rules in of the international organisation (i.e., here, the EU Treaties).

436. The application of VCLT Article 5 touches upon the "*dual nature*" of the EU Treaties, as discussed above.[672] In so far as the EU Treaties underpin the establishment of that supranational system, VCLT Article 5 applies, i.e., the EU as an international organisation has its own rules when it comes to determining issues such as the amendment, modification and interpretation of its own constituent instrument.[673]

8) Prior Awards and National Court Judgments

437. Seventhly, there is a large body of decisions in prior awards and national courts dealing with intra-EU investment arbitration, including in relation to EU law.

438. In more than 60 prior awards at the date of the Parties' submissions, the *Achmea* Judgment was not followed and tribunals confirmed jurisdiction pursuant to rules of general international law, over respondent States' objections based on the *Achmea* Judgment and the application of EU law.[674] The only exceptions to that are three prior awards: the SCC case *Green Power v. Spain* (rendered on 16 June 2022);[675] and the ICSID cases *Sapec v.*

[671] Resp. Mem. on Juris., paras. 140-148; **CL-0017**, VCLT, Art. 5. *See also* Resp. Reply on Rule 41(5), paras. 40-48.

[672] *See above* paragraphs 374 to 375.

[673] *See* Cl. Rej. on Rule 41(5), para. 19; Cl. Mem. on Juris., para. 48(ii).

[674] *See*, *e.g.*, (for intra-EU BIT ICSID cases) **CL-0010**, *Tallinn v. Estonia*, para. 540; **CL-0011**, *B3 v. Croatia*, para. 543; **CL-0012**, *UP v. Hungary*, para. 258; and (for intra-EU ECT ICSID cases) **CL-0013**, *Landesbank v. Spain*, paras. 102, 105; **CL-0014**, *Eskosol v. Italy*, para. 186; **CL-0015**, *NextEra v. Spain*, para. 357.

[675] **RL-0077**, *Green Power v. Spain*.

Spain (rendered on 11 October 2024) and *European Solar Farms v. Spain* (rendered on 11 October 2024), which both post-date the close of submissions in these proceedings (and neither of which was adduced in this arbitration although a press report was produced).[676] In those three awards only, the tribunals declined jurisdiction on the basis of the intra-EU objection, accepting the CJEU judgments and the primacy of EU law as determinative of the jurisdiction of an international investment tribunal in an intra-EU dispute.[677]

439. There is also no concept of binding precedent of prior arbitral awards (and instead a notion of "*due consideration*" to seek to achieve "*harmonious development of investment law*", as noted in the prior decision in *Saipem v. Bangladesh* (see paragraph 311 above). Therefore, whilst the Tribunal is informed by prior awards dealing with the intra-EU jurisdictional objection, they are not determinative of its decision in this arbitration and therefore it conducts its own analysis.

440. Other EU Member State courts have considered the intra-EU objection as a matter of EU law, including the Lithuania Supreme Court; the Svea Court of Appeal (Request for Preliminary Ruling on the applicability of the *Achmea* Judgment to ECT arbitration, which was subsequently withdrawn in light of the *Komstroy* Judgment); the German Federal Court of Justice (*Bundesgerichtshof*) (affirming the *Achmea* Judgment in its Decision of 17 November 2021); the *Kammergericht* Berlin (reference to CJEU jurisprudence); and the German Federal Constitutional Court (*Bundesverfassungsgericht*) (Decision of 23 July 2024, file number 2 BvR 557/19, regarding the setting aside of the *Achmea* award, and Decision of 23 July 2024, file number 2 BvR 141/22, regarding the Federal Republic of Germany's Act ratifying the EU Termination Agreement of 5 May 2020).[678]

[676] *See* Letter from the Respondent to the Tribunal, 28 November 2025; **RL-0386**, L. Bohmer, "*Revealed: Unpacking the reasons why two ICSID tribunal majorities upheld Spain's intra-EU jurisdictional objection under the Energy Charter Treaty*", IA Reporter, 17 October 2024.

[677] *See* European Commission Submission, para. 10, referring to **RL-0077**, *Green Power v. Spain*.

[678] **RL-0015**, *Veolia v. Lithuania*; **RL-0026**, *Italy v. Greentech*; **RL-0028**, 17 November 2021 BGH Decision; **RL-0029**, 1 February 2022 *Kammergericht* Berlin Letter; **RL-0380**, BVerfG Decision 557/19; **RL-0381**, BVerfG Decision 141/22.

441. The CJEU judgments are part of EU law, as discussed above, and national court judgments in EU Member States are subject to the principle of primacy in EU law, as set out in the CJEU judgments.

442. National court judgments outside the EU Member States are not so bound by that internal EU order; non-EU Member State municipal courts apply public policy of the enforcing State to the validity or enforceability of prior awards dealing with the intra-EU jurisdictional objection. These inform this Tribunal's decision, but do not bind it.

443. Accordingly, the Tribunal proceeds to apply the rules of general international law as set out above, including but are not limited to EU law (in the EU Treaties as interpreted by the CJEU), to the extent it exists on "*plane of international law*".

b. Determination of the Issue of Consent, Pursuant to Applicable Law

i. German Federal Court of Justice Decision

444. The Respondent in its list of issues following the Hearing indicates that the existence of the German Federal Court of Justice decision in relation to the dispute in this arbitration is determinative. The Tribunal considers that the findings in the German Federal Court of Justice decision necessarily align with EU law more broadly. Accordingly, it falls within the scope of the broader EU law interpretation discussion. The same applies to the German Federal Constitutional Court decision of 18 September 2025.

ii. EU law

445. The Respondent primarily bases its intra-EU jurisdiction objection solely and exclusively on the application of EU law. In this regard it argues that there was no consent to arbitrate under the ECT Article 26 pursuant to EU law, because:

a. EU measures reaffirm the inadmissibility of intra-EU arbitration;

b. the CJEU repeatedly confirmed the effect of EU law regarding Article 26(3) in:

i. the *Komstroy* Judgment; and

ii. the *PL Holdings* Judgment;

c. the CJEU confirmed the effect of EU law regarding the ICSID Convention in the *European Food* Judgment;

d. CJEU Advocate Szpunar's General Opinion 1/17 supports this position; and

e. current developments in other EU Member State courts and tribunals support this position, including:

i. the Lithuania Supreme Court;

ii. the Svea Court of Appeal;

iii. the German Federal Courts; and

iv. the *Kammergericht*.

446. The Tribunal considers each of these in turn, as they relate to the question of consent.

1) EU Measures

447. The Respondent argues that the European Commission's reading of the ECT has always been consistent in not extending investor-State arbitration to an intra-EU situation. In this regard, it refers to having "*developed and confirmed the position that intra-EU BITs as well as comparable instruments were incompatible with EU law*", which was "*a constant issue raised*" even before the *Achmea* Judgment, citing to, *inter alia*, *Eastern Sugar v. Czech Republic* in support.[679]

448. However, as observed in prior awards, the position of the European Commission has "*undergone a considerable evolution over time*".[680] In its intervention in *Eastern Sugar v.*

[679] Resp. Rule 41(5) Application, para. 144; **CL-0263**, *Eastern Sugar v. Czech Republic*.
[680] **CL-0373**, *Adria Group v. Croatia*, para. 145.

Czech Republic, the European Commission maintained that intra-EU BITs were inconsistent with EU law but further noted that:[681]

> [T]he effective prevalence of the EU acquis does not entail, at the same time, the automatic termination of the concerned BITs or, necessarily, the nonapplication of all their provisions.
>
> Without prejudice to the primacy of Community law, to terminate these agreements, Member States would have to strictly follow the relevant procedure provided for this in regard in the agreements themselves. Such termination cannot have a retroactive effect.

449. It was only following the *Achmea* Judgment that the European Commission took what was described in the prior decision on jurisdiction and liability in *LSG v. Romania* as "*a Copernican turn*",[682] thereafter maintaining that, since the *Achmea* Judgment applied *ex tunc*, arbitration clauses in (bilateral and multilateral) treaties were inapplicable intra-EU with effect from the date at which the relevant EU State Parties to the treaty had become EU Member States.

450. Subsequent measures in EU law have followed, the most recent of which underscore the European Commission's position. These include the EU Member State Declaration of 15 January 2019 and the Termination Treaty of 5 May 2020. As noted above, these do not impact these proceedings (which also pre-date the EU Member State ECT withdrawal).

2) CJEU Judgments

451. The starting point for the CJEU judgments in this arbitration is the *Achmea* Judgment. As prior rulings have done,[683] the Tribunal sets out the principle elements of the *Achmea* Judgment and subsequent CJEU judgments relied on by the Respondent and the European Commission.

[681] **CL-0263**, *Eastern Sugar v. Czech Republic*, para. 199.

[682] **CL-0276**, *LSG Building Solutions GmbH and others v. Romania*, ICSID Case No. ARB/18/19, Decision on Jurisdiction, Liability and Principle of Reparation, 11 July 2022 ("***LSG v. Romania***"), para. 538.

[683] *See*, *e.g.*, **CL-0373**, *Adria Group v. Croatia*, paras. 148-154.

a. *Achmea* Judgment

452. The 2018 *Achmea* Judgment involved a reference from the German Federal Court of Justice (*Bundesgerichtshof*) to the CJEU under TFEU Article 267, concerning an arbitration award rendered pursuant to a bilateral investment treaty – not the ECT and not the ICSID Convention – seated in Germany. The *Bundesgerichtshof* sought a ruling on the following questions:[684]

> (1) Does Article 234 TFEU preclude the application of a provision in a bilateral investment protection agreement between member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?
>
> If Question 1 is answered in the negative:
>
> (2) Does Article 267 TFEU preclude the application of such a provision?

453. The *Achmea* Judgment sets out the three central principles of EU law upon which the Respondent relies in this arbitration: (i) autonomy of EU law, (ii) the primacy of EU law over the law of EU Member States, and (iii) the principle of sincere or loyal co-operation between Member States, as follows (emphasis added):[685]

> [I]t should be recalled that, according to settled case-law of the Court, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, ***the autonomy of the EU legal system***, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU, under which 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 in the Treaties … .
>
> Also according to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its ***primacy over the laws of the Member States***, and by the direct effect of a

[684] **RL-0004**, *Achmea* Judgment, para. 23.

[685] **RL-0004**, *Achmea* Judgment, paras. 32-34.

> whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually independent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other … .
>
> EU law is thus based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason inter alia of the ***principle of sincere co-operation*** set out in the first paragraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU … .

454. The *Achmea* Judgment further describes the judicial system designed by the EU Treaties in order to ensure consistency and uniformity in the interpretation of EU law (i.e., to preserve these characteristics of EU law), including the ability of national courts to seek preliminary rulings from the CJEU under Article 267 TFEU:[686]

> Even if … [a tribunal established under the BIT], despite the very broad wording of Article 8(1) of the BIT, is called on to rule only on possible infringements of the BIT, the fact remains that in order to do so it must, in accordance with Article 8(6) of the BIT, take account in particular of the law in force of the contracting party concerned and other relevant agreements between the contracting parties.
>
> Given the nature and characteristics of EU law …, that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States.
>
> It follows that on that twofold basis the arbitral tribunal referred to in Article 8 of the BIT may be called on to interpret or indeed apply EU law, particularly the provisions concerning the fundamental freedoms, including the freedom of establishment and free movement of capital.

This, as outlined in the applicable law discussion above, falls within the internal order element of EU law, as opposed to elements of EU law existing on the international plane.

[686] **RL-0004**, *Achmea* Judgment, paras. 40-42.

455. Having found that a bilateral investment treaty tribunal might have to interpret and apply EU law, the *Achmea* Judgment went on to determine that such tribunal was not an EU judicial institution, could not request rulings from the CJEU, and could not overcome this issue because the arbitration had its seat in an EU Member State, concluding that the investor-State dispute clause in the relevant bilateral investment treaty therefore had an adverse effect on the autonomy of EU law as follows (emphasis added):[687]

> In the case in the main proceedings, ***the arbitral tribunal is not part of the judicial system of the Netherlands or Slovakia***. Indeed, it is precisely the exceptional nature of the tribunal's jurisdiction compared with that of the courts of those two Member States that is one of the principal reasons for the existence of Article 8 of the BIT.
>
> That characteristic of the arbitral tribunal at issue in the main proceedings means that ***it cannot in any event be classified as a court or tribunal 'of a Member State'*** within the meaning of Article 267 TFEU.
>
> …
>
> However, the arbitral tribunal at issue in the main proceedings is not such a court common to a number of Member States, comparable to the Benelux Court of Justice. Whereas the Benelux Court has the task of ensuring that the legal rules common to the three Benelux States are applied uniformly, and the procedure before it is a step in the proceedings before the national courts leading to definitive interpretations of common Benelux legal rules, ***the arbitral tribunal at issue in the main proceedings does not have any such links with the judicial systems of the Member States*** … .
>
> It follows that **a tribunal such as that referred to in Article 8 of the BIT cannot be regarded as a 'court or tribunal of a Member State'** within the meaning of Article 267 TFEU, and is not therefore entitled to make a reference to the Court for a preliminary ruling.
>
> …
>
> In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT ***may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States***. Article 8 of the BIT is such as to ***call into question not only the principle of mutual trust between the Member States*** but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided

[687] **RL-0004**, *Achmea* Judgment, paras. 45-46, 48-49, 58-59.

> for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above.
>
> In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law.

456. For the aforementioned reasons, the CJEU in the *Achmea* Judgment consequently ruled that:[688]

> Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning the investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

457. As noted in the decision on jurisdiction in *Adria Group v. Croatia*, "[t]*he CJEU in* Achmea *did not, however, make any pronouncement on the compatibility of substantive provisions with EU law*", instead holding only that, "*the fact that an investor-State arbitration tribunal might be called upon to apply EU law and could not refer a question regarding that law to the CJEU was what conflicted with the TFEU*".[689] The *Adria Group* tribunal went on to reason that:[690]

> Although a preliminary ruling by the CJEU is formally binding only on the national court which requested the ruling and there is no doctrine of binding precedent in EU law, the *Achmea* Judgment has to be treated as an authoritative interpretation of the relevant rules of EU law and thus as applicable to the present BIT. Accordingly, the Tribunal will treat the *Achmea* ruling as meaning that EU law precluded Article 9 of the BIT from the date when Croatia acceded to the EU, namely 1 July 2013, fifteen years after the BIT entered into force.

458. This Tribunal agrees with that approach and, accordingly, treats the *Achmea* Judgment as an authoritative interpretation of the relevant rules of EU law and thus applicable to

[688] **RL-0004**, *Achmea* Judgment, para. 62.

[689] **CL-0373**, *Adria Group v. Croatia*, para. 152.

[690] **CL-0373**, *Adria Group v. Croatia*, para. 153.

bilateral investment treaties. Consistent with that, it takes the same approach to the CJEU judgments in *Komstroy*, *PL Holdings* and *European Food*, as below.

b. *Komstroy* Judgment

459. The *Komstroy* Judgment involved a referral to the CJEU by the Paris court in relation to the respondent State's (Moldova's) challenge to a Paris-seated arbitral award pursuant to the ECT and the UNCITRAL Rules of Arbitration (again, not pursuant to the ICSID Convention). The primary basis for challenge arose out of the definition of investment. Moldova is non-EU Member State and, therefore, the *Komstroy* Judgment did not arise out of an intra-EU arbitration.

460. Nevertheless, the CJEU made a series of *obiter dicta* statements regarding the ECT Article 26 governing bilateral relations between two Contracting Parties analogous to a bilateral treaty. It stated that in order that the autonomy of EU law is preserved as between Member States, ECT Article 26(2)(c) must be interpreted as not applicable intra-EU, as follows (emphasis added):[691]

> It is in the light of the foregoing considerations that the question whether a dispute between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State may be subject to arbitration proceedings under Article 26(2)(c) ECT must be examined.
>
> To that end, in the first place, it should be noted that, in accordance with Article 26(6) ECT, the arbitral tribunal provided for in paragraph 4 of that article is to rule on the issues in dispute in accordance with the ECT and with the applicable rules and principles of international law.
>
> As stated in paragraph 23 of this judgment, the ECT itself is an act of EU law.
>
> It follows that an arbitral tribunal such as that referred to in Article 26(6) ECT is required to interpret, and even apply, EU law.
>
> It must therefore be ascertained, in the second place, whether such an arbitral tribunal is situated within the judicial system of the European Union, and in particular whether it can be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU. The consequence of a tribunal set up by Member States being situated within the EU judicial system is that its decisions are subject to

[691] **RL-0007**, *Komstroy* Judgment, paras. 47-52, 60, 64-66.

mechanisms capable of ensuring the full effectiveness of the rules of the European Union ([*Achmea* Judgment, para. 43] …).

In the precisely same way as the arbitral tribunal at issue in the case giving rise to the [*Achmea* Judgment] ([para. 45]), an ad hoc arbitral tribunal, such as that referred to in Article 26(6) ECT, does not constitute a component of the judicial system of a Member State, in this case the French Republic. Indeed it is precisely the exceptional nature of that court's jurisdiction, by comparison with that of the courts of the contracting parties to the ECT, which is one of the main reasons for the existence of Article 26(2)(c) and (4) of that treaty. That is all the more so given that, if the arbitral tribunal concerned were one of the courts of a Contracting Party to that treaty, it would be included amongst the courts referred to in Article 26(2)(a) ECT and thus Article 26(2)(c) ECT would lose any effectiveness.

…

Having regard to all the characteristics of the arbitral tribunal set out in paragraphs 48 to 59 of the present judgment, it must be considered that, if the provisions of Article 26 ECT allowing such a tribunal to be entrusted with the resolution of a dispute were to apply as between an investor of one Member State and another Member State, it would mean that, by concluding the ECT, the European Union and the Member States which are parties to it established a mechanism for settling such a dispute that could exclude the possibility that that dispute, notwithstanding the fact that it concerns the interpretation or application of EU law, would be resolved in a manner that guarantees the full effectiveness of that law (see, by analogy, [*Achmea* Judgment, para. 56]).

…

It should be noted in that regard that, despite the multilateral nature of the international agreement of which it forms part, a provision such as Article 26 ECT is intended, in reality, to govern bilateral relations between two of the Contracting Parties, in an analogous way to the provision of the bilateral investment treaty at issue in the case giving rise to the [*Achmea* Judgment] ([para. 58]).

It follows that, although the ECT may require Member States to comply with the arbitral mechanisms for which it provides in their relations with investors from third States who are also Contracting Parties to that treaty as regards investments made by the latter in those Member States, ***preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves.***

In the light of the foregoing, it must be concluded that **Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State** and an investor of another Member State concerning an investment made by the latter in the first Member State.

461. The *Komstroy* Judgment went on to make findings only in respect of the application of ECT Article 1(6) in relation to the investment (as requested in the reference), making no final finding as to jurisdiction pursuant to ECT Article 26:[692]

> Article 1(6) and Article 26(1) of the [ECT] …, must be interpreted as meaning that the acquisition, by an undertaking of a Contracting Party to that treaty, of a claim arising from a contract for the supply of electricity, which is not connected with an investment, held by an undertaking of a third State against a public undertaking of another Contracting Party to that treaty, does not constitute an 'investment' within the meaning of those provisions.

462. To reiterate, and as also noted in the decision on jurisdiction in *Adria Group v. Croatia*, "*the CJEU, **in an*** **obiter dictum**, *stated that the reasoning in* Achmea *applied to intra-EU arbitrations under the Energy Charter Treaty*" (emphasis added).[693]

c. *PL Holdings* Judgment

463. The Respondent further relies on the *PL Holdings* Judgment, in particular paragraphs 46 and 48, which provide (emphasis added):[694]

> It is common ground that the arbitration clause in Article 9 of the BIT is, …, capable of leading to a situation in which an arbitration body rules in disputes which may concern the application or interpretation of EU law. ***Accordingly, that arbitration clause is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of EU law, ensured by the preliminary ruling procedure provided for in Article 267 TFEU***. That clause is, therefore, incompatible with the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU and has an adverse effect on the autonomy of EU law enshrined, inter alia, in Article 344 TFEU … . Furthermore, as is confirmed by Article 4(1) of the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, from the date of accession of the Republic of Poland to the European Union on 1 May 2004, Article 9 of the BIT could no longer serve as the basis for arbitration proceedings between an investor and that Member State.
>
> …
>
> First of all, such an ad hoc arbitration agreement would produce, with regard to the dispute in the context of which it was concluded, the same effects as those resulting

[692] **RL-0007**, *Komstroy* Judgment, para. 87.

[693] **CL-0373**, *Adria Group v. Croatia*, para. 154.

[694] **RL-0014**, *PL Holdings* Judgment, paras. 46, 48.

> from such a clause. The fundamental reason for that arbitration agreement is precisely to replace the arbitration clause in a provision such as Article 9 of the BIT in order to maintain its effects despite that provision's being invalid.

The *PL Holdings* Judgment involved neither the ECT nor the ICSID Convention, but instead an intra-EU bilateral investment treaty in arbitral proceedings pursuant to the UNCITRAL Rules seated in Sweden. The Tribunal does not consider that this adds to the position of EU law, as previously stated in the *Achmea* Judgment.

d. *European Food* Judgment

464. The *European Food* Judgment, on the other hand, is the first CJEU decision dealing with the intra-EU arbitration objection in a case involving the ICSID Convention (although not the ECT). It sets out the same reasoning as in the *Achmea*, *Komstroy* and *PL Holdings* Judgments, but extends it to the ICSID Convention as follows (emphasis added):[695]

> It is common ground that the arbitral tribunal before which that dispute was brought does not form part of the EU judicial system which the second subparagraph of Article 19(1) TEU requires the Member States to establish in fields covered by EU law, which, with effect from Romania's accession to the European Union, replaced the mechanism for resolving disputes that might concern the interpretation or application of EU law.
>
> First, that arbitral tribunal is not a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU and, second, ***the arbitral award delivered by that court is not subject, in accordance with Articles 53 and 54 of the ICSID Convention, to any review by a court of a Member State as to its compliance with EU law***.

465. Although on its face the *European Food* Judgment does indeed extend to arbitration pursuant to the ICSID Convention, there is no reasoning in the Judgment pursuant to EU law as to how and why EU law applicable only to EU Member States would apply to the interpretation of the meaning of a multilateral treaty involving a large number of non-EU Member States that are not subject to that law. Instead, the CJEU relied on the incompatibility that it identified in the *Achmea* Judgment: the arbitration clause in the BIT, which carves out a whole category of disputes from the jurisdiction of EU Member State courts. From the CJEU perspective, it is therefore immaterial whether or not arbitration is

[695] **RL-0019**, *European Food* Judgment, paras. 141-142.

consented to pursuant to the ICSID Convention, UNCITRAL Rules, or any other arbitration rules. According to the CJEU reasoning across the four Judgments, incompatibility arises out of a BIT arbitration clause that makes arbitration of EU law issues possible – even if no such dispute is ever brought under the BIT. It is not the dispute that is incompatible with the EU Treaties but the BIT's arbitration clause.

466. In this regard, the Tribunal notes that the CJEU in the *European Food* Judgment refers neither to the European Commission's argument based on *Barcelona Traction* (as articulated in Advocate General Szpunar's Opinion) nor to VCLT Article 41 on bilateral modification. It simply restates the *Achmea* Judgment.

467. The Respondent further relies on CJEU Advocate Szpunar's General Opinion 1/17, which, according to the European Commission:[696]

> clarified that paragraphs 57 and 58 of the *Achmea* judgment (on which arbitration tribunals have previously relied to hold that the *Achmea* judgment does not apply to the ECT), carve out from *Achmea*'s scope only relations with third countries, not a possible intra-EU application. Even then, such dispute settlement is only permissible if the interpretation and application of EU law is expressly excluded from the tribunals' jurisdiction and such jurisdiction is specifically limited to preserve the EU's right to legislate in the public interest without investor-State tribunals interfering with its functions, especially in the field of competition law.

468. The Respondent (and the European Commission) raise additional CJEU judgments and opinions, as summarised above, but these four Judgments (and Opinion) are the main decisions upon which it relies as establishing EU law in relation to the intra-EU jurisdictional objection to investment treaty arbitration.

469. Critically, none of the CJEU judgments or opinions considers or applies rules of general international law, including but not limited to the conflict of laws provisions in the multilateral ECT, and/or the VCLT. This is the exercise that this Tribunal conducts below, in accordance with its finding that the applicable law for jurisdiction in ECT disputes is the rules of general international law, which includes (to the extent it exists on the international plane (i.e., outside EU law governing the internal EU order) but is not limited to EU law.

[696] European Commission Submission, fn. 44; **RL-0035**, Opinion 1/17, paras. 106-161, 184-218.

470. The EU developments are discussed above at paragraphs 437 to 443. As set out in those paragraphs, and in the Parties' submissions, EU law national court judgments broadly follow the CJEU judgments' reasoning, as they are required to do under EU law. For the purpose of the Tribunal's analysis, the scope and context of EU law as to the existence of consent to arbitrate is confirmed by these decisions in accordance with the CJEU judgments (i.e., the *Achmea*, *Komstroy*, *PL Holdings*, *European Food* Judgments).

471. This body of EU law applicable to the issue of consent to intra-EU treaty arbitration does not apply rules of general international law, including the VCLT provisions. Therefore, EU law alone is not determinative of the decision to be taken by this Tribunal, which is required to apply those broader international law rules. This decision accordingly proceeds to consider and determine the question of consent to arbitrate in the current arbitration pursuant to rules of general international law, which includes but is not limited to such EU law as exists on the international plane.

iii. VCLT

472. As explained above, the VCLT applies to conflicts between treaties.

1) Successive Treaties (VCLT Article 30)

473. The Respondent makes a number of arguments concerning treaty succession or modification pursuant to the terms of the VCLT Articles 30 and 41. As set out above, its arguments are based on three broad grounds:

a. pursuant to VCLT Article 30(4)(a), relations are governed by the most recent treaties, which the Respondent submits are the EU Treaties and not the ECT;

b. pursuant to VCLT Article 41(1)(b), the EU Member States "*effectively modified*" the ECT by adhering to the Lisbon Treaty; and

c. pursuant to VCLT Article 30(3), the later treaties, which the Respondent submits are the EU Treaties, prevail as confirmed by TFEU Article 351.

474. First, as to application of the ECT based on VCLT Article 30(4)(a), the Respondent argues, "[e]*ven though, the EU provisions on internal market technically do not address promotion and protection of investments, they share the same efforts of integration*" and therefore *"Art. 30(4)(a) VCLT applies and the ECT is not applicable*".[697] In response, the Claimants argue that the ECT, including its Article 26, has not been superseded by the EU Treaties pursuant to VCLT Article 30(4)(a), including because "*it is not correct that the EU Treaties are the later treaties as compared to the ECT for the purposes of Article 30(4)(a) VCLT*".[698]

475. The Tribunal accepts that "*under the Lisbon Treaty, matters of direct foreign investment were added to the exclusive competence of the EU*",[699] as contended by the Respondent. However, it also accepts, as stated by the Claimants, that this was a "*change to the EU's – external – common commercial policy (now enshrined in Article 207 TFEU)*",[700] i.e., the policy between the EU (and its Members) and the rest of the world. As such it is not relevant for the purposes of determining the Tribunal's jurisdiction in this arbitration, which concerns investment protection between EU Member States pursuant to a separate, multilateral treaty, including non-EU Member States parties.

476. The Respondent relies primarily on TFEU Articles 267 and 344 (as did the CJEU in the *Achmea* Judgment). These provisions have been in force since 1 January 1958, in their respective predecessor forms (i.e., TFEU Article 267 in of the Treaty of Rome Article 177 and EC Treaty Article 234 and TFEU Article 344 in the Treaty of Rome Article 291 and EC Treaty Article 292).[701]

477. Therefore, for those reasons, this Tribunal accepts regarding VCLT Article 30(4)(a) that the most recent treaty is indeed the ECT, not the TEU or TFEU.

478. As to the Claimants' further argument that VCLT Article 30 does not in any event apply because the EU Treaties and the ECT do not relate "*to the same subject matter*" within the

[697] Resp. Rule 41(5) Application, para. 157.
[698] Cl. Response on Rule 41(5), para. 58.
[699] Resp. Rule 41(5) Application, para. 145.
[700] Cl. Response on Rule 41(5), para. 58.
[701] As noted in **CL-0018**, *Vattenfall v. Germany*, para. 218.

meaning of Article 30(1) VCLT,[702] the Tribunal is not required to take a decision on this given its finding as to the most recent treaty. It does however note both the Claimants' and the Respondent's reliance on the ILC Report on Fragmentation of International Law, which explains that "*the notion of a 'regime' points to the institutional arrangements that may have been established to link sets of treaties to each other*",[703] and that the identification of such "*treaty regimes*" aids in application of principles of *lex posterior* or *lex specialis*, since "*the argument from* [such principles] *seems clearly more powerful between treaties within a regime than between treaties in different regimes*".[704]

479. Moreover, the Tribunal notes further that ECT Article 16 constitutes a specific provision dealing with the ECT's relationship to other treaties, as *lex specialis* and, therefore, the general rule of *lex posterior* in VCLT Article 30 is a subsidiary one. Therefore, even if the EU Treaties and the ECT did relate to the same subject matter, ECT Article 16 would apply.[705]

480. Secondly, as to modification of the ECT based on VCLT Article 41(1)(b), the Respondent argues that the relevant provisions of EU law must be deemed to be a modification *inter se* by the EU Member States. The Tribunal finds that this argument also fails, on the following grounds:

a. it too is contrary to ECT Article 16;

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[702] Cl. Response on Rule 41(5), para. 59; **CL-0017**, VCLT, Art. 30(1).

[703] **C-0039**, ILC, *Fragmentation Report*, para. 256.

[704] **C-0039**, ILC, Fragmentation Report, para. 255. *See also* the ECT Preamble wherein signatories not only "*undertook to pursue the objectives and principles*" of an EU document, the European Energy Charter, but also to "*broaden their cooperation*" multilaterally in support of various specifically stated goals, including inter alia "*the effective implementation of full national treatment and most favoured nation treatment*", the "*progressive liberalization of international trade and [...] avoidance of discrimination in international trade*" in the energy sector, and more generally encouraging steps towards "*the most efficient exploration, production, conversion, storage, transport, distribution and use of energy*": **CL000-1**, ECT, Preamble. They agreed on detailed rules for "*Investment Promotion and Protection*" set out in Part III, and to equally detailed rules for "*Dispute Settlement*" set out in Part V, to apply on a broad multilateral basis. The objective of Part III of the ECT evidently was to provide for specific guarantees, defined in terms of international law rather than domestic law principles, in order to encourage international flows of investment into the energy sectors of at least certain ECT Contracting Parties. The objective of Part V in turn was to provide specific mechanisms, again at an international level and removed from domestic law, for resolving disputes about whether the Part III guarantees had been observed. *See further* **CL-0014**, *Eskosol v. Italy*, para. 145; **CL-0018**, *Vattenfall v. Germany*, paras. 217-218.

[705] *See* **CL-0001 / RL-0084**, ECT, Art. 16 as quoted at footnote 492 above. *See also* **CL-0018**, *Vattenfall v. Germany*, para. 217; **CL-0013**, *Landesbank v. Spain*, para. 183.

b. it is unclear what modification is deemed to have taken place, i.e., precisely what the scope of application of the ECT was prior to the Lisbon Treaty and what the different, modified provisions applied following the Lisbon Treaty;

c. given that the ECT does not provide for modification as between certain of the parties only, at minimum VCLT Article 41(2) must be complied with, yet:

i. there has been no notice to other Contracting Parties to the ECT as required by VCLT Article 41(2) in so far as nothing in the Lisbon Treaty:[706]

1. purports to be an exercise of powers to "*conclude an agreement to modify*" the ECT as among EU Member States (i.e., there is no reference to the ECT, let alone an expression of intent to modify the ECT's reach or application); or

2. indicates that the EU followed the procedures for advance notification of other ECT Contracting Parties of an intention to conclude an agreement to modify ECT obligations among EU Member States; and

ii. it is not consistent with the VCLT Article 41(2) process for States to make no reference in an *inter se* agreement to any intention to formally modify or withdraw from prior commitments made through a multilateral instrument, and then subsequently claim that the *inter se* agreement modified the multilateral treaty without any prior notice to the other Contracting Parties.[707]

481. Having determined that VCLT Article 41(2) was not complied with, the Tribunal notes further (although nothing in this Award turns on it) that it is not at all clear to it that modification of the ECT in any event would not affect the enjoyment of rights by other parties of their rights under the ECT so as to permit modification in accordance with VCLT

[706] **CL-0013**, *Landesbank v. Spain*, para. 186; **CL-0018**, *Vattenfall v. Germany*, para. 221.
[707] **CL-0014**, *Eskosol v. Italy*, para. 150.

Articles 41(b)(i) and (ii). Given the common goal under the ECT for sustainable energy transition within the ECT area, it seems that permitting a sub-set of Member States to derogate from that effective execution, in so far as it forms the object and purpose of the ECT as a whole, may not meet the requirements of VCLT Article 41(1)(b).

482. Thirdly, as to VCLT Article 31(3)(c), as set out above the Tribunal does not accept that the TEU and TFEU were later in time than the ECT so as to prevail pursuant to the applicable conflict rules under the VCLT.

483. In any event, pursuant to VCLT Article 31(3)(c), when interpreting a treaty "[t]*here shall be taken into account, together with the context: … any relevant rules of international law applicable in the relations between the parties*".[708] The Respondent submits that this means that "*in a situation between two EU Member States, EU law should be viewed under Art. 31(3)(c) VCLT as forming an integral part of the task of interpretation ECT* [*sic*] *by the Tribunal so as to avoid results that diverge from the former*".[709] However, as the Claimants observe, Article 31(3)(c) requires practice that establishes rules "*between the parties*" to the relevant treaty and "[t]*here is no indication of the practice of States who are Contracting Parties to the ECT which are not Members of the EU or of their reaction to the positions taken by Germany or the European Commission, and those EU Member States which have so far taken a position regarding the ECT*", based either on the Declarations or the Termination Agreement.[710]

484. As noted on this same issue by the tribunal in *Vattenfall v. Germany*:[711]

> The Tribunal considers that this would be an incoherent and anomalous result and inconsistent with the object and purpose of the ECT and with the rules of international law on treaty interpretation and application. The preamble of the VCLT

[708] **CL-0017**, VCLT, Art. 31(3)(c).

[709] Resp. Rule 41(5) Application, para. 136.

[710] Cl. Response on Rule 41(5), para. 56. Hungary expressly rejected the part of the Declaration regarding the ECT (*see* **C-0037**, Declaration of the Representative of the Government of Hungary, of 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union) and five States (Finland, Luxembourg, Malta, Slovenia and Sweden) considered that no position on the interpretation of the ECT should be taken (*see* **C-0038**, Declaration of the Representatives of the Governments of the Member States, of 16 January on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union).

[711] **CL-0018**, *Vattenfall v. Germany*, paras. 155-156.

> emphasises the universal recognition of "the principles of free consent and of good faith and the *pacta sunt servanda* rule", also contained in Article 26 VCLT.
>
> When States enter into international legal obligations under a multilateral treaty, *pacta sunt servanda* and good faith require that the terms of that treaty have a single consistent meaning. States parties to a multilateral treaty are entitled to assume that the treaty means what it says, and that all States parties will be bound by the same terms. It cannot be the case that the same words in the same treaty provision have a different meaning depending on the independent legal obligations entered into by one State or another, and depending on the parties to a particular dispute. The need for coherence, and for a single unified interpretation of each treaty provision, is reflected in the priority given to the text of the treaty itself over other contextual elements under Article 31 VCLT.

485. For the interpretation of the ECT absent succession or modification, pursuant to the VCLT, the Tribunal now turns to VCLT rules of general interpretation based the:

a. the language of the ECT;

b. the context, object and purpose of the ECT; and

c. supplementary means of interpretation.

486. The Tribunal takes each of those in turn below.

2) General Interpretation (VCLT Article 31(1))

487. The Parties rely on the application of the VCLT Article 31 as to general rules of interpretation and VCLT Article 32 as to supplementary means of interpretation.

488. VCLT Article 31(1), "*General rule of interpretation*", requires: "*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*".[712]

489. The Respondent seeks to establish that the ordinary meaning of certain provisions of ECT demonstrates that the ECT does not apply to intra-EU arbitration, i.e., that the EU Member

[712] **CL-0017**, VCLT, Art. 31(1).

States did not consent to arbitration at ECT Article 26. The provisions relate primarily to REIO definitions and competencies and include:

a. ECT Article 1(2) defines "*Contracting Party*" as a "*state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force*";[713]

b. ECT Article 1(3) defines REIO as an "*organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters*";[714]

c. ECT Article 36(7) provides in relation to voting rights that an REIO "*shall, when voting, have a number of votes equal to the number of its member states which are Contracting Parties to this Treaty; provided that such an Organization shall not exercise its right to vote if its member states exercise theirs, and vice versa*";[715]

d. ECT Article 1(10) defines "*Area*" to include for an REIO "*the Areas of the member states of such Organization, under the provisions contained in the agreement establishing that Organization*";[716] and

e. ECT Article 10 provides that each Contracting Party guarantees favourable treatment to investors of other Contracting Parties.[717]

490. The Tribunal accepts that the aforementioned provisions, on their ordinary meaning, legally define an REIO and formulate the legal basis upon which an REIO may become a Contracting Party to the ECT and exercise rights pursuant to the ECT on behalf of the member States within the REIO's defined Area. As to purpose, the Tribunal also accepts

[713] **CL-0001**, ECT, Art. 1(2).
[714] **CL-0001**, ECT, Art. 1(3).
[715] **CL-0001**, ECT, Art. 36(7).
[716] **CL-0001**, ECT, Art. 1(1).
[717] **CL-0001**, ECT, Art. 10.

that ECT Article 1(3) recognises that the REIO may have transferred to it competence over certain matters that are also governed by the ECT.

491. Consequently, in accordance with these provisions, the EU is an REIO. By definition, the member States in its Area have transferred competence over certain matters to it. As an REIO, the EU is a Contracting Party in its own right, alongside most EU Member States and a number of other State parties outside the EU.

492. As a Contracting State, an REIO (here the EU) is subject to the same rights and obligations as any other Contracting Party, potentially creating overlap between the REIO and the Contracting Parties within the REIO Area rights or obligations, which could create an imbalance.

493. Article 36(7) of the ECT deals precisely with that overlap in relation to voting rights under the ECT. It expressly stipulates that the REIO may exercise voting rights on behalf of the member states within its Area, provided it complies with vote number equivalence and non-duplication provisions. In other words, the REIO's ability to exercise voting rights over certain matters of transferred competence supersedes the right to vote that Contracting States within the Area of the REIO otherwise would be entitled to exercise under the ECT.

494. In this respect, the ECT explicitly carves out an avenue for the REIO to vote on behalf of member States in its Area in place of the individual member States, presumably in respect of those matters over which the Member States have transferred competence. This effect of the ECT is clear on the face of the language: all Contracting Parties (including non-EU Member States) are able to understand the scope and effect of the REIO's power to act in place of member States in its Area, even though they are also Contracting Parties.

495. The Respondent (and the European Commission) is unable to point to a similarly express provision dealing with REIO powers or rights to supersede the right to offer to arbitrate, which all Contracting States within the Area of the REIO are entitled to exercise under Article 26 of the ECT.

496. The Tribunal majority concludes that it is not within the ordinary meaning of the ECT language at Article 36(7) to conclude that the express transfer competence for voting rights

to the REIO means that the Contracting States within the EU REIO transferred (or otherwise gave up or never had) the right to offer to arbitrate under ECT Article 26. Tellingly, there simply is no equivalent to Article 36(7) to provide that for the settlement of disputes the REIO's internal institutions shall settle disputes within its member States. This would have been a straightforward provision to incorporate in the plain language of the ECT had the Contracting Parties (including but not limited to any REIO and its members) intended it to have that meaning and effect.

497. In this regard, this Tribunal majority agrees with the reasoning in the prior decision in *Vattenfall v. Germany*, as follows:[718]

> If it was intended by Articles 1(2), 1(3) and 1(10) ECT that the offer to arbitrate in Article 26 ECT was only made to Investors from non-EU Member States, it would have been necessary to include explicit language to that effect in the Treaty, which is not there. Without such language, in accordance with these provisions, an EU Member State which is a Contracting Party to the ECT may be a respondent State under Article 26 with respect to an Investment in its Area. Equally, the EU as an REIO under the ECT may be a respondent in a dispute regarding an Investment in its Area.

498. The Tribunal notes further that settlement of disputes conceivably could fall within the transferred competencies of one REIO, but not another. Although not determinative, that may provide a further ordinary meaning explanation as to why it is not explicitly carved out in the same manner as voting in Article 36(7), leaving individual REIO's to decide whether or not they would carve it out.

499. In sum (and for completeness), the Tribunal majority confirms its findings as follow:

a. the EU Member States have transferred competence over certain matters governed by the ECT to the EU, including the authority to vote;

b. the ECT signatories acknowledge that the EU, as an REIO, can and did conclude the ECT alongside the EU Member States and other non-EU Member States;

[718] **CL-0018**, *Vattenfall v. Germany*, para. 182; *see also* para. 183 ("*This interpretation is consistent with the conclusions reached by other arbitral tribunals*" and the cases cited therein).

c. there is no basis on the ordinary meaning of the language of the ECT that the EU Member States, as Contracting Parties to the ECT, were not bound by the Article 26 offer to arbitrate on the basis that competency for intra-EU dispute settlement previously had been transferred to the EU (being a separate REIO Contracting Party to the ECT);

d. the ECT references to agreement establishing the REIO do not expressly refer to the provisions of the agreement establishing the REIO, save to define the "*Area*" of the REIO per Article 1(10);

e. the ECT defines "*Area*" to include both:

   i. with respect to a State that is a Contracting Party (as "*the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea*"), and

   ii. with respect to a Contracting Party REIO (as "*the Areas of the member states of such Organization, under the provisions contained in the agreement establishing that Organization*"),

   and on its ordinary meaning, that language does not provide that the "*Area*" of the REIO in accordance with its establishing agreement eliminates or otherwise supersedes or replaces the separate and continuing sovereign "*Area*" of the Contracting States that are members of the REIO;

f. accordingly, nothing in the ordinary meaning of the ECT language provides that an intra-EU investment is not an investment in the "*Area*" of another Contracting Party, but instead an investment in the area of the same Contracting Party or that the EU is a single investment area for its Member States;

g. similarly, nothing in the ordinary meaning of the ECT language provides that the offer to arbitrate is only made to investors from Contracting Parties that are not EU Member States;

h. the Tribunal does not accept that such interpretation of "*Area*" leads to "*absurd results*" based on Article 7(10)(a) regarding "*transit*", including because Article 7(8) makes clear that "[n]*othing in this Article shall derogate from a Contracting Party's rights and obligations under international law including customary international law, existing bilateral or multilateral agreements*", which would include the EU Treaties' provisions concerning EU Member States as "*fully-fledged customs union as a whole*" and thereby "*to transportation between the EU Member States*";[719]

i. the Tribunal majority does not consider Article 25 to be relevant to the analysis (i.e., that the ECT "'*shall not be so construed as to oblige a Contracting Party which is party to an Economic Integration Agreement ... to extend, by means of most favoured nation treatment, to another Contracting Party which is not a party to that* [Economic Integration Agreement]*, any preferential treatment*"), and, if anything, it "*demonstrates that the EU had the ability ... to incorporate provisions specific to its circumstances, in order to delineate precisely any desired limitations to the reach of particular ECT provisions, such as the MFN provision addressed in Article 25*", but did not do so for Article 26;[720] and

j. the Tribunal majority does not consider that its interpretation of the ordinary meaning of the ECT derogates from international law.

500. In its interpretation argument, the Respondent does not dwell on the ordinary meaning of the language of ECT Article 26 or the fact that it, unlike ECT Article 7 for example, contains no exception or element that would clearly signal to the Contracting Parties that almost half of them (as EU Member States) were exempt from the ECT dispute settlement provisions. It argues that the reference in ECT Articles 26(1) and (3) to "*another ECT Contracting Party*" cannot include the EU Member States as they are part of the EU Contracting Party. But on the ordinary meaning, "*another ECT Contracting Party*" could mean any one of the signatories, which includes most of the EU Member States in their

[719] Resp. Rule 41(5) Application, para. 111; CL-0001, ECT, Arts. 7(8), 7(10); **CL-0009**, TFEU, Arts. 28 *et seq*.

[720] **CL-0001 / RL-0084**, ECT, Art. 25(1); Cl. Response on Rule 41(5), para. 39; **CL-0014**, *Eskosol v. Italy*, para. 95.

own sovereign capacity. Therefore, without more, these three words do not on their ordinary meaning so limit the applicability of the dispute settlement provision in ECT Article 26.

501. Therefore, the Tribunal majority finds that the ordinary meaning of the aforementioned provisions does not lead to the conclusion that the Contracting Parties to the ECT signed the ECT in the mutual understanding that it would not apply to an intra-EU situation.

3) Context, Object and Purpose (VCLT Articles 31(1), (2))

502. The second element also engages the VCLT Article 31(1), "*General rule of interpretation*", requiring the Tribunal to consider words of the treaty "*in their context and in the light of its object and purpose*", and VCLT Article 31(2) *"*[t]*he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes*".[721]

503. In this regard, the Respondent extends its analysis from the ordinary meaning of the terms of the ECT to incorporate also the ECT preparatory work and circumstances of its conclusion and the EU legal order and its practice in entering into treaties, summarising the ECT's context, object and purpose, "*as established by reference to prior international agreements referenced in its preamble and the circumstances of its conclusion*".[722]

504. Regarding the context of the ECT, the Tribunal accepts the evidence and argument from the Respondent and the European Commission that the goal of the ECT was to integrate the former Soviet Union and Eastern Europe energy sectors with those of the 'Western world', including the US, Canada and Norway, as opposed to regulating the EU internal market for energy, or indeed regulating any energy market. The Tribunal further underscores also the sustainable energy purpose and objective of the ECT.

505. As to the existence of an EU legal order to determine EU Member States' actions, including membership of multilateral agreements, the Respondent again seeks to rely on provisions

[721] **CL-0017**, VCLT, Arts. 31(1)-(2).

[722] Resp. Rule 41(5) Application, para. 126.

concerning REIOs, per ECT Articles 1(3) and 1(10) and, subsequently in relation to ordinary meaning, the UN Handbook on Final Clauses of Multilateral Treaties dated 2003 (subsequent to the ECT).[723] This argument only gets the Respondent so far. It supports the proposition that the EU, as an REIO within the meaning of the ECT, may represent the member states in its "*Area*" for certain functions (e.g., for voting). It does not establish, alone or in the broader context at the date of entry into force, that EU Member States despite being Contracting Parties in their own right only consented to the standard ECT dispute settlement obligation in relation to disputes outside the REIO "*Area*".

506. The challenge that the Respondent faces is that such provision easily could have been incorporated expressly in ECT Article 26 if that were the EU Member State Contracting Parties' intent. Express incorporation would have ensured that all ECT Contracting Parties "*were fully aware of the EU's legal order, its particularities, and of the fact that EU law would be subject to constant political and legal change*", and the impact of "*the EU's legal order that determines the latter's behavior and actions*", including and especially in relation to the express dispute settlement provisions in the ECT.[724]

507. The Tribunal majority does not consider that the broader context of the Union and its competency over energy policy is necessarily inconsistent with EU Member State consent to dispute settlement by investor-State arbitration. The Respondent has not established how the ECT, being "*perceived as part of the European Communities' external energy policy*", would have the effect of "*influenc*[ing] *their internal energy policy*", or in any way disrupt "*the creation of the European Communities' internal energy market* [which] *was well under way when the ECT was negotiated*".[725] Substantive protections of the ECT protect investors against arbitrary and unreasonable non-taxation measures by the host State, as well as expropriation of investments without compensation; as the implementation of EU energy policy takes place in and rests with EU Member States, it seems that non-arbitrary

[723] Resp. Mem. on Juris., paras. 104-105, referring to **RL-0031**, United Nations, *Handbook on Final Clauses of Multilateral Treaties*, 2003, p. 22. The Respondent did not submit the 1957 original version of the Handbook or otherwise assert that the REIO language therein pre-dated the ECT.

[724] Resp. Rule 41(5) Application, para. 117.

[725] Resp. Rule 41(5) Application, para. 120.

and reasonable implementation by their organs in relation to investors from without and within the EU ought to be entirely consistent with EU energy policy.

508. It would appear that the only element of inconsistency is, on the Respondent's case in this arbitration, the existence of an agreement to submit to an arbitral process outside the CJEU and EU Member State courts. Yet, an investment agreement (i.e., a contract) between an EU Member State and national of another EU Member State – or even two such nationals from different EU Member States – may also have the effect of *de facto* regulating energy within the EU and, nevertheless, contain an arbitration agreement enforceable pursuant to the New York Convention on the Enforcement of Foreign Awards 1958. Such dispute settlement would not, it seems, offend EU energy policy.

509. The context undermines the Respondent's arguments in this arbitration. Therefore, the Tribunal majority does not accept that "*the general principle of EU law of unity in the international representation of the EU*",[726] automatically and obviously means that EU Member States cannot and did not consent to arbitration for intra-EU disputes. The more logical conclusion against the context of the EU and EU Member States "*act*[ing] *... as one single block and with one voice*" in the ECT negotiations,[727] is that the EU Member States proceeded to sign the ECT individually and the EU as a REIO, suggesting that the dispute settlement consent would apply to both (as surmised in the prior decision in *Vattenfall v. Germany*).

510. This construction is consistent with the Respondent's submission that "*it was necessary for EU Member States to also become Contracting Parties, since it was considered at the time that they retained competence over certain matters covered by the ECT*".[728]

511. The fact that the CJEU confirmed that the 1978 Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports provides for some implementation by the EU and some by EU Member States does not inform the Contracting Parties' knowledge or obligations in the context of the

[726] Resp. Rule 41(5) Application, para. 118.
[727] Resp. Rule 41(5) Application, para. 120.
[728] Rule 41(5) Application, para. 121.

ECT.[729] In so far as it is an example of a "*mixed Community Agreement*",[730] it tends to support the contextual understanding that EU Member States do have capacity to enter into *inter se* obligations in multilateral agreements "*for those areas of the agreement for which they retain competence*", and have done so expressly in past treaties at the time of entering into the treaty. By contrast, they did not do so in or at the time of entering into the ECT.

512. The Respondent's further context argument concerning ECT Articles 24(4)(a) and 25 arises out of the ECT exception to most favoured nations provisions not extending free trade area or customs unions to other Contracting States. According to the Respondent, the Energy Charter Conference decision to permit "*non-EIA investors to obtain EIA benefits by virtue of certain links to EIA territory*", was to "*define*[] *the requirements under which legal entities from non-EU Member States could benefit of the rules internal to the EU*", in order to: (i) avoid double protection remedies through ECT Article 26, (ii) regulate access to EU law protections and (iii) recognise that EU law already contemplates sufficient protection for entities established in the EU.[731]

513. This too puts rather too much contextual weight on the provision in question, here ECT Article 24(4)(a); it is in fact somewhat more limited in at least three respects.[732] First, Article 24(4)(a) relates only to most favoured nations provisions; ECT protections extend well beyond that single category of rights. Secondly, it is far from a universally held view, even in non-binding prior awards, that a most favoured national provision would extend to more favourable dispute resolution clauses. Thirdly, even if it did, the EU Member States within the EU are all already Contracting Parties to the ECT.

514. As to the Respondent's reliance on the July 2018 Communication for content, object and purpose, stating that the EU "*emphasized that EU law protects investors against unjustified*

[729] *See* Resp. Mem. on Juris., paras. 120-121.

[730] Resp. Rule 41(5) Application, para. 119; Kuijper, *Conclusion and Implementation*, pp. 228 *et seq.* ("*It is clear as a matter of international law that a mixed Community agreement, concluded simultaneously between the Community, its Member States and third States, is in principle capable of creating rights and obligations between all the parties and hence also between the Member States* inter se*. It is most of the time equally obvious, as a matter of practical intention, that it is the objective of the Community negotiators to create rights and obligations only between the Community and its Member States on the one hand and one or more third States on the other*").

[731] Resp. Rule 41(5) Application, para. 122.

[732] Incidentally, ECT Article 24(4)(a) contains a decision concerning companies incorporated outside the EIA territory and most favoured nation treatment, overcoming precisely the issue that the Canadian incorporated company in *Barcelona Traction* faced.

restrictions and summarized the legal grounds on which discrimination of investors' rights are in principle prohibited", and "*the offer to arbitrate in Art. 26(3) ECT must be interpreted in light of Art. 26(6) ECT*",[733] the Tribunal has dealt with this above. Moreover, given its timing, the Tribunal considers it to have been more appropriately tendered in the context of the Respondent's VCLT Article 32 argument (as below). In so far as it were relevant at all to context, its issuance 20 years after the ECT was negotiated rather suggests that the assertions it contains were not, or at least not all, clear from the context at the time.

515. Finally, as to the Contracting Parties' intention, the Respondent sets out in its Rule 41(5) Application a series of points including that neither Germany nor Ireland "*ever meant to enable investors from EU Member States to sue the EU for an EU measure before an arbitral tribunal established on the basis of Art. 26 ECT*".[734] These arguments are not developed in its Memorial on Jurisdiction and Bifurcation, which focuses instead on the point that "*EU law … must be respected as international law whenever it is applicable which is always the case when two EU law subjects are in dispute*".[735]

516. In this regard, the Respondent argues that the non-mandatory nature of EU law for non-EU Member State Contracting Parties would not hinder its intra-EU application on the basis that the European Court of Human Rights has "*considered international agreements that had only been concluded between some, but not all Parties to the agreement under which the respective dispute had arisen*".[736] However, the Respondent does not suggest that the obligations under the respective instruments conflicted with one another; both applied to the disputing parties and, therefore, both were treated as applicable law. This does not take the Tribunal any further in resolving the consent issue before it (having already determined above that EU law applies within the corpus of rules of general international law, in so far as it is on the international plane, and it is not bound by the CJEU).

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[733] Rule 41(5) Application, para. 123; **RL-0005**, July 2018 Communication; **CL-0001 / RL-0084**, ECT, Art. 26(6) ("*A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*").

[734] Resp. Rule 41(5) Application, para. 125.

[735] Resp. Mem. on Juris., para. 128.

[736] Resp. Mem. on Juris., para. 129.

517. Therefore, the Tribunal majority is also unable to conclude on the basis of the ECT context, object and purpose, as established by reference to prior international agreements referenced in its Preamble and the circumstances of its conclusion, that it was understood by all Contracting Parties that the EU Member States did not intend to create *inter se* obligations between them. The Tribunal majority therefore rejects the Respondent's arguments in this regard.

4) Supplementary Means (VCLT Articles 31(3) and 32)

518. The third element of the Respondent's interpretation argument engages VCLT Article 31(3), "*General rule of interpretation*", to take into account (together with context): "[a]*ny* ***subsequent agreement between the parties*** *regarding the interpretation of the treaty or the application of its provisions*", "*any* ***subsequent practice in the application*** *of the treaty which establishes the agreement of the parties regarding its interpretation*" and "*any relevant rules of international law applicable in the relations between the parties*", as well as VCLT Article 32, "*Supplementary means of interpretation*", which provides as follows:[737]

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

519. Although the Respondent relies on other prior rulings in investor-State arbitration, commentary, and ICJ and CJEU judgments in support of its supplementary means argument, its primary focus is on the 2012 decision on jurisdiction in *Electrabel v. Hungary*. In particular, the Respondent relies on the following passage:[738]

> Article 307 EC [now Art. 351 TFEU] precludes inconsistent pre-existing treaty rights of Member States and their own nationals against other Member States; and it follows, if the ECT and EU law remained incompatible notwithstanding all efforts at

[737] **CL-0017**, VCLT, Arts. 31(3), 32 (emphasis added).

[738] Rule 41(5) Application, paras. 128-130; **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, para. 4.189.

> harmonisation, that EU law would prevail over the ECT's substantive protections and that the ECT could not apply inconsistently with EU law to such a national's claim against an Member State.

520. *Electrabel v. Hungary* was an intra-EU arbitration pursuant to the ECT. It is striking that the Respondent puts quite so much weight on it, given its position that arbitral tribunals have jurisdiction to determine disputes, including but not limited to disputes as to jurisdiction, under the ECT.[739] Nevertheless, the Respondent relies on *Electrabel* to support the proposition that ECT Article 16 "*would … be inapplicable because the conflict rule of the later treaty would apply, namely Article 307 EC*".[740]

521. However, as the Claimants point out, EC Article 307 (now TFEU Article 351) on its face applies to relations between EU Member States and non-EU Member States only.[741] They refer to a more recent prior decision, *Landesbank v. Spain*, which explains that:[742]

> The Tribunal's view that Article 16 of the ECT is applicable is confirmed by the disconnection provision proposed by the EU during the negotiation of the ECT … That provision would have added to the ECT a statement that "[i]*n their mutual relations, Contracting Parties which are Members of the European Communities shall apply Community rules and shall not therefore apply the rules arising from this Agreement except insofar as there is no Community rule governing the particular subject concerned*." Although that provision was not adopted, the fact that it was put forward at all shows that the EU considered that "*Community rules*" concerned the subject matter of the ECT. Moreover, it is not necessary that Article 344 or Article 267 TFEU should concern the same subject matter as Part III or Part V of the ECT. What matters is that the EU Treaties as a whole should contain provisions which concern that subject matter.

522. As to the Respondent's further argument such that the "*ECT must be interpreted in a way that respects the bilateral nature of the relationship between two EU law subjects*",[743] the Claimants note (as the Tribunal explained above) that the ECT (as well as the ICSID Convention) is a multilateral treaty. They submit that without any disconnection clause,

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[739] In fact, the Respondent has requested that this Tribunal examine its own jurisdiction *ex officio*: *see* Resp. Rule 41(5) Application, paras. 7, 93, 191(2); Resp. Rej. on Rule 41(5), para. 57.

[740] Resp. Mem. on Juris., para. 135, quoting **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, para. 4.178.

[741] **CL-0009**, TFEU, Art. 351.

[742] **CL-0013**, Landesbank *v. Spain*, para. 172 (the tribunal added at para. 173 that: "[t]*he Tribunal is conscious that the* Electrabel *tribunal reached a different conclusion but, for the reasons given above, it prefers the conclusion reached by the* Vattenfall *and* Masdar *tribunals on this point*"); *see* **CL-0018**, *Vattenfall v. Germany*, paras. 192-196; **CL-0048**, *Masdar v. Spain*.

[743] Resp. Mem. on Juris., para. 136.

"*there is no room for any bilateral relations among the treaty partners*"[744] (an argument that the Respondent does not engage with).

523. In that regard, the prior decision in *Vattenfall v. Germany* sets out that tribunal's reasoning on the point as follows:[745]

> When States enter into international legal obligations under a multilateral treaty, *pacta sunt servanda* and good faith require that the terms of that treaty have a single consistent meaning. States parties to a multilateral treaty are entitled to assume that the treaty means what it says, and that all States parties will be bound by the same terms. It cannot be the case that the same words in the same treaty provision have a different meaning depending on the independent legal obligations entered into by one State or another, and depending on the parties to a particular dispute. The need for coherence, and for a single unified interpretation of each treaty provision, is reflected in the priority given to the text of the treaty itself over other contextual elements under Article 31 VCLT.

524. This Tribunal accepts and agrees with the characterisation by the *Vattenfall* tribunal in this regard, at least outside the scope of VCLT Article 41, and underscores the reasoning above concerning the need for coherence and a single unified interpretation of each treaty provision. It is this coherent, single unified interpretation under general rules of international law (absent a disconnection provision or otherwise application of VCLT Article 41) that creates a situation whereby the finding of no consent to arbitrate as a matter of EU law is not necessarily the finding as a matter of rules of general international law more broadly. The inconsistency in legal outcome is an unfortunate state of affairs but could have been avoided by any of the drafting approaches discussed above or, as is now the case, by European Commission and/or EU Member State formal notification of withdrawal from the ECT in accordance with its terms.

525. As to the commentaries by Eilmansberger and Ascencio, relied on by the Respondent to support its VCLT Article 31(3) supplemental means points,[746] the Tribunal agrees with the assertion that public international law "*requires arbitral tribunals to interpret intra-EU BITs in the light of other international law obligations applicable to the facts at hand, i.e.*

[744] Cl. Mem. on Juris., para. 44.

[745] **CL-0018**, *Vattenfall v. Germany*, para. 156.

[746] Resp. Rule 41(5) Application, paras. 132-134; **RL-0009**, Eilmansberger, *BITs and EU Law*; **RL-0010**, H. Ascencio, "*Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law*" in 31(2) ICSID Review, 2016.

in the light of relevant EC law",[747] but the Tribunal does not limit itself only to applicable EU law, and VCLT Article 31(3)(c) requires "*any relevant rules of international law applicable in the relations between the parties*" to be taken into account as context,[748] including the intentions of the parties.

526. These factors do not change the fact that the intentions of the Contracting Parties are set out in the ECT and include the purpose described so eloquently in the prior decision in *Vattenfall v. Germany*.

527. As to the Respondent's further reliance on two further ICJ cases, by way of analogy to support its argument that "*it cannot be lightly presumed that Respondent and Claimants, or their home EU Member State Ireland, would conclude a treaty, such as the ECT, that would impose obligations on them that would place them in breach of obligations owed to the EU and other EU Member States under the EU Treaties*",[749] the Tribunal concludes that there is no evidence that the Contracting Parties who were also EU Member States did conclude the ECT knowing it would put them in breach of the EU Treaties. The consequence of the *Komstroy* Judgment is that as a matter of EU law, performance under the ECT would put them in breach. But that decision came long after the EU Member States had entered into the ECT and long after they could have withdrawn from it. Moreover, the *Komstroy* Judgment was in effect for some years before EU Member States, and the EU itself, did so take formal steps to withdraw.

528. To reiterate, this Tribunal does not consider the ECT to operate wholly outside EU law. Instead, it considers that the question before it is whether or not there was consent to arbitrate pursuant to the terms of the ECT, interpreted and construed in accordance with rules of general international law, including in particular the VCLT and, where applicable, EU law such that it exists on the international plane.

[747] **RL-0009**, Eilmansberger, *BITs and EU Law*, p. 421.

[748] **RL-0009**, Eilmansberger, *BITs and EU Law*, p. 421.

[749] Resp. Rule 41(5) Application, para. 135; *Oil Platforms*, para. 41; *Continental Shelf*, para. 43.

529. This Tribunal majority's conclusion on the basis of general international law (including relevant EU law) pertaining to supplemental means is that there is no consent. This is because:

a. as between EU Member States, whilst EU law should be viewed under VCLT Article 31(3)(c) as informing the interpretation of the ECT, it does not take priority over rules of general international law;

b. the importance of VCLT Article 31(3)(c) for the interpretation of any international treaty is to apply the principle of conformity and pursuant to rules of general international law; and

c. the Tribunal has rejected that as a matter of rules of general international law there is a hierarchy of norms that renders international agreements concluded by the EU secondary to EU law and the EU Treaties.

530. Therefore, the Tribunal finds that on the application of VCLT Article 31(3)(c), supplemental means, the ECT Article 26 consent to arbitrate is valid as a matter of rules of general international law.

5) EU Law Primacy (VCLT Article 5)

531. Finally, the Respondent raises a new VCLT interpretation argument in its Memorial on Jurisdiction, which seeks to advance its primacy of EU law argument through VCLT Article 5. It submits that the effect of VCLT Article 5, which provides for application of the VCLT "*to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization* ***without prejudice to any relevant rules of the organization***",[750] is that any conflict rule under general international law is subsidiary to the internal conflict rules in of the international organisation (i.e., here, the EU Treaties).[751]

[750] **CL-0017**, VCLT, Art. 5 (emphasis added).

[751] Resp. Mem. on Juris., paras. 140-148. *See also* Resp. Rej. on Rule 41(5), paras. 40-48.

532. As indicated above, the Tribunal considers that this too touches upon the "*dual nature*" of the EU Treaties. The EU Treaties are at once (i) the basis for EU law under international law and (ii) the international treaties between the EU Member States underpinning the establishment under international law of the supranational union, meaning the substance agreed in the Lisbon Treaty, which includes the judicial system.[752]

533. It is in the second respect that VCLT Article 5 applies; it recognises that EU law constitutes a legal order of its own (i.e., rules that operate only within the internal legal order of the EU and, at least arguably, are not a part of international law), as recognised in the decisions in *Adria Group v. Croatia* and *Vattenfall v. Germany*. Consequently, if there were a dispute as to the meaning of the EU Treaties as between the members to those Treaties, VCLT Article 5 provides that the VCLT would apply to such dispute.

534. For the intra-EU jurisdiction objection, this Tribunal is called upon to determine jurisdiction pursuant to the ECT Article 26, not to resolve a conflict within the EU Treaties.

535. As set out clearly above (and reiterated repeatedly by the Respondent and the European Commission), the EU Treaties provide that the interpretation and application of the EU Treaties is within the exclusive jurisdiction of the CJEU, and subject to the principle of primacy of EU law. As to the existence of consent to arbitrate intra-EU investor-State arbitration *as matter of EU law*, the CJEU has considered this and made rulings accordingly, as summarised above.

536. Nothing in this Award turns on the CJEU having reached this ruling without any consideration of the VCLT at all (as noted by the Claimants),[753] even if that would appear to contradict VCLT Article 5. The CJEU made its ruling on the basis of EU law, not international law. That is a matter for the CJEU. Therefore, the Tribunal has considered those CJEU decisions but not as binding on it or as the exclusive source of applicable law.

537. Similarly, nothing turns on the fact that none of the Respondent's authorities "*has made this point*", and "*no EU Member State in dozens of intra-EU investment arbitrations has*

[752] Resp. Rule 41(5) Application, para. 148; **CL-0009**, TFEU, Art. 344; TEU, Art. 19(1), second sentence.
[753] Cl. Mem. on Juris., para. 48(ii).

ever sought to argue that an international arbitral tribunal in an intra-EU investment arbitration would not have jurisdiction by virtue of Article 5 VCLT",[754] as submitted by the Claimants. The conflict of law issues concerning the intra-EU jurisdiction objection have evolved over time as the CJEU and investor-State tribunals have issued a number of decisions dealing with it.

538. However, the Tribunal accepts the Claimants' position that VCLT Article 5 has nothing to say about the relationship between the EU Treaties and other treaties, such as the ECT.[755] This Tribunal is required to apply general international law to the issue of its jurisdiction. Whilst it accepts the Claimants' position that EU law alone is not the applicable law to this issue, it does consider elements of EU law to be within the broader plane of applicable international law and, therefore, part of the Tribunal's available law corpus.[756]

539. This Tribunal further does not accept the position in the decision in *Electrabel v. Hungary* that ECT Article 16 "*would … be inapplicable because the conflict rule of the later treaty would apply, namely Article 307 EC*".[757] It considers the better position to be as set out in the more recent prior decision, *Landesbank v. Spain*, which explains:[758]

> The Tribunal's view that Article 16 of the ECT is applicable is confirmed by the disconnection provision proposed by the EU during the negotiation of the ECT … That provision would have added to the ECT a statement that "[i]*n their mutual relations, Contracting Parties which are Members of the European Communities shall apply Community rules and shall not therefore apply the rules arising from this Agreement except insofar as there is no Community rule governing the particular subject concerned*." Although that provision was not adopted, the fact that it was put forward at all shows that the EU considered that "*Community rules*" concerned the subject matter of the ECT. Moreover, it is not necessary that Article 344 or Article 267 TFEU should concern the same subject matter as Part III or Part V of the ECT. What matters is that the EU Treaties as a whole should contain provisions which concern that subject matter.

[754] Cl. Mem. on Juris., para. 48(i).

[755] Cl. Mem. on Juris., para. 49.

[756] Cl. Mem. on Juris., para. 49; Cl. Response on Rule 41(5) Application, paras. 48-54.

[757] **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, para. 4.178.

[758] **CL-0013**, *Landesbank v. Spain*, paras. 172-173. *See also* **CL-0018**, *Vattenfall v. Germany*, paras. 192-196; **CL-0048**, *Masdar v. Spain*, para. 332.

> The Tribunal is conscious that the *Electrabel* tribunal reached a different conclusion but, for the reasons given above, it prefers the conclusion reached by the *Vattenfall* and *Masdar* tribunals on this point.

540. In conclusion therefore, having considered myriad arguments put forward by the Respondent (and the European Commission) this Tribunal majority finds that on the basis of applicable rules of general international law, which include but are not limited to relevant EU law, there is a valid consent to arbitrate intra-EU disputes under the ECT.

iv. Private Law Argument

541. The Tribunal finally turns to the interpretation of the Parties' agreement to arbitrate, in accordance with the principles of applicable law as set out above. As the Tribunal has clearly expressed, it considers these to be rules of general international law, which include but are not limited to relevant EU law (in the EU Treaties and as interpreted by the CJEU).

542. The agreement to arbitrate, again as set out above, is at Article 26 of the ECT and Article 25(1) of the ICSID Convention, and the Claimants' Request for Arbitration as registered by the ICSID Secretariat.

543. Even if EU law alone, as interpreted by the CJEU, were applicable to consent between ECT Contracting States, the agreement to arbitrate between an investor and a host State engages a new party (the investor) who was not subject to the negotiation of the EU Treaties or the ECT or the ICSID Convention. An investor submits its request for arbitration, which is then duly registered. On the basis that according to international law the Contracting Parties to the ECT consented to a valid offer to arbitrate if requested by qualifying investors, nothing in the private law agreement concluded by the investor in accepting that offer changes the Tribunal's finding of consent. Therefore, the Tribunal dismisses the Respondent's private law argument.

B. JURISDICTION *RATIONE MATERIAE*

544. The Respondent's second jurisdictional objection is that the Tribunal lacks jurisdiction *ratione materiae*, in that the dispute does not arise "*directly out of an investment*" pursuant to ICSID Convention Article 25(1) or ECT Article 1(6).

(1) The Respondent's Position

545. According to the Respondent, the Claimants have not made any investment pursuant to the ICSID Convention Article 25(1) or ECT Article 1(6), both of which the Respondent submits the Tribunal must consider.[759]

a. Legal Definition of "*Investment*"

546. The Respondent accepts that the ICSID Convention offers no definition or description of the term "*investment*"; therefore, the Tribunal should refer to the ECT Article 1(6).[760] However, the Respondent goes on to argue as follows:[761]

> Any definition based on an international agreement cannot go beyond what was intended by Art. 25 (1) ICSID Convention. Indeed, Art. 25 (1) ICSID Convention does contain some notions regarding jurisdiction *ratione materiae*, such as the directness of the dispute in relation to the investment. In addition, the overarching purpose of the ICSID Convention must not be forgotten when deciding whether an economic activity qualifies as an investment worthy of protection under the ICSID Convention. For instance, it is well recognized that the term "*investment*" was never meant to cover all types of "*property, rights and interests*". Ordinary commercial transactions were never to be covered by the Convention, either. Thus, the term in Art. 25 (1) ICSID Convention may be wide, but it does have its limits.

547. The Respondent relies on prior rulings to support its "*double keyhole approach*" standard and argues that the Claimants' investment satisfied neither the requirements of ICSID Convention Article 25(1) nor of ECT Article 1(6). In particular, the Respondent refers to:

a. the award in *Joy Mining v. Egypt*: "*there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals*", and that "[t]*he parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not*

[759] Resp. Mem. on Juris., paras. 160 *et seq*.

[760] Resp. Mem. on Juris., para. 164.

[761] Resp. Mem. on Juris., para. 165, referring to **RL-0048**, R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2012 (excerpt) "**Dolzer/Schreuer, *Principles* (2012) (Respondent's excerpt)**"), pp. 60 *et seq*.; **RL-0049**, C. Schreuer, L. Malintoppi, A. Reinisch and A. Sinclair, *The ICSID Convention: A Commentary*, 2009 (excerpt) ("**Schreuer, *Commentary* (first excerpt)**"), p. 117.

satisfy the objective requirements of Article 25 of the Convention" or otherwise Article 25 "*would be turned into a meaningless provision*";[762] and

b. the annulment decision in *Mitchell v. DRC*: "*while Art. 1 (6) ECT may be a starting point for assessing whether certain activities in the host state can be considered an investment, Art. 25 (1) ICSID Convention works as a controlling and corrective element*".[763]

548. The Respondent's two primary arguments concerning the lack of qualifying investment are summarised below.

549. First, regarding ECT Article 1(6), according to the Respondent, the "*Claimants' allegations regarding the notion of 'investment' are unsubstantiated and even contradictory*",[764] and they seemed unable "*to settle on what they themselves consider to be their investment*".[765] The Respondent notes that:

a. the Claimants describe "*taking numerous steps in the development of offshore wind farms in relation to three offshore wind farms on the offshore sites named Horizont, Horizont Ost, and Horizont West (subsequently renamed Horizont I, Horizont II, and Horizont III) (together, the "Projects*")" as an investment;[766]

b. these numerous steps consist of "*geotechnical engineering studies, site investigations, environmental impact assessments, planning and site analysis together with financing and internal costs as well as advisers fees*";[767]

[762] Resp. Mem. on Juris., paras. 166-167; **RL-0050**, *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004 ("***Joy Mining v. Egypt***"), paras. 49-50.

[763] Resp. Mem. on Juris., para. 167 and fn. 103; **RL-0051**, *Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, 1 November 2006 ("***Mitchell v. DRC***"), para. 31 ("*It is thus repeated that, before ICSID arbitral tribunals, the Washington Convention has supremacy over an agreement between the parties or a BIT*").

[764] Resp. Mem. on Juris., para. 169.

[765] Resp. Mem. on Juris., para. 170.

[766] Resp. Mem. on Juris., para. 170, quoting Cl. Mem. on Merits., para. 15.

[767] Resp. Mem. on Juris., para. 170, referring to Cl. Mem. on Merits., paras. 23, 54, 56, 111, 134, 145, 256-258.

c. the Claimants fail to discuss their shareholding in Mainstream "*in detail neither in Claimants' damage presentation in Claimants' Memorial nor in the First Brattle Expert Report*";[768]

d. in any event, "*this type of activity does not amount to investment*", based on ECT Article 1(6) read together with Articles 1(4) and 1(5), because:[769]

i. Article 1(6) ECT defines investment to include "*every kind of asset, owned or controlled directly or indirectly by an Investor*" and lists (a) to (f) including property, companies, debts claims, intellectual property, returns and contractual rights;

ii. Article 1(5) defines "*Economic Activity in the Energy Sector*" as follows:

> "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;

iii. Article 1(4) defines "*Energy Materials and Products*" as follows:

> "Energy Materials and Products", based on the Harmonized System of the Customs Cooperation Council and the Combined Nomenclature of the European Communities, means the items included in Annex EM I and Annex EM II;

e. the effect of ECT Articles 1(4), (5) and (6) is that an investment "*must be connected to an economic activity concerning energy within Annex EM I and EM II*", which "*do not mention offshore wind energy as energy materials or products*" (it is only mentioned in Understanding 2 to Article 1(5): "*construction and operation of power generation facilities, including those powered by wind and other renewable energy sources*");[770]

[768] Resp. Mem. on Juris., para. 170.

[769] Resp. Mem. on Juris., paras. 170-173; **CL-0001**, ECT, Arts. 1(4)-(6).

[770] Resp. Mem. on Juris., paras. 174-175.

f. the Claimants' alleged investments are not:

i. "*tangible and intangible, and movable and immovable, property, or any property rights such as leases, mortgages, liens, and pledges nor to have claims to money or to performance pursuant to a contract having an economic value and associated with an Investment nor to have claims related to intellectual property rights or returns*";[771]

ii. nor are they "*activity in the offshore wind energy sector*" where "*a power generation facility actually is constructed and operated*",[772] as the Claimants were "*'far away from the realization and commissioning' of an offshore wind park*";[773]

iii. the Claimants' activities "*never left the early stages; they were pre-investment activities only*", including "[p]*reparatory measures for an investment, i.e. assessing whether the investment is possible and/ or will be made are an* aliud *to the construction and operation of a power generation facility*";[774]

g. pre-investment is "*excluded from investor-State arbitration under Art. 26 (1) ECT*", which speaks "*of investments already made and not of investments still in the making*";[775]

h. "[d]*eciding otherwise would indeed jeopardize the spirit of the ECT*", as the "*potential liability incurred* [for preparatory work] *would outweigh the benefit of attracting foreign investments*", and "[n]*o host state would ever want to run this risk*";[776] and

[771] Resp. Mem. on Juris., para. 177.

[772] Resp. Mem. on Juris., para. 178.

[773] Resp. Mem. on Juris., para. 179, citing **RL-0017 / C-0021**, German Federal Constitutional Court, Case Nos. 1 BvR 1679/17 and 1 BvR 2190/17, Decision, 30 June 2020 ("**BVerfG June 2020 Decision**"), para. 115.

[774] Resp. Mem. on Juris., para. 179.

[775] Resp. Mem. on Juris., para. 180.

[776] Resp. Mem. on Juris., para. 181.

i. therefore, it is "*imperative to deny the status of 'investment' to mere research and assessment costs, because only then can random lawsuits be dismissed early on, on the jurisdictional level*".[777]

550. The Respondent further submits that "[i]*t is difficult to discern other activities as investment in the present case*", it being "*unclear whether and which Claimant contributed what to the Mainstream Activities (if at all)*", and "*it is not possible to identify a single or precise link between the expenditure of funds by any of the Claimants and the acquisition of a legal right to an investment*".[778] According to the Respondent, it appears that:

a. the First Claimant "*seems to have driven the process*";[779]

b. the Second and Third Claimants "*seem to not have developed any activity at all*" and the Second Claimant "*only holds shares in companies, i.e. Claimants 4), 5) and 6)*"; the "*circumstances and background*" of its "*shareholder status is completely unclear*";[780]

c. the Third Claimant "*simply holds shares in another Irish company, i.e.* [the Second Claimant], *and as it results from Claimants' Memorial, did not do anything of substance or incur any expenditures*";[781]

d. the Second Claimant (and the Third Claimant as its shareholder) "*cannot rely on* [the Fourth, Fifth and Sixth Claimants'] *activities, as there were none during the relevant time*" because they did not exist when activity commenced;[782]

[777] Resp. Mem. on Juris., para. 181.

[778] Resp. Mem. on Juris., para. 183.

[779] Resp. Mem. on Juris., para. 183.

[780] Resp. Mem. on Juris., paras. 183-184.

[781] Resp. Mem. on Juris., para. 183.

[782] Resp. Mem. on Juris., para. 185; **C-0012**, Extract from the German Commercial Register for Horizont III Power GmbH, 15 April 2021. The Respondent states that, according to paragraphs 16-18 of the Request for Arbitration, the Fifth Claimant "*was incorporated on 8 June 2009 only, and* [the Fourth and Sixth Claimants] *even much later, i.e., on 16 October 2012.1.10. Hence* [the Fourth, Fifth and Sixth Claimants] *came into existence long after the Mainstream Activities had started. Claimants do not present any activity undertaken by* [the Fourth, Fifth and Sixth Claimants] *which however were crucial to assume investment*": Resp. Mem. on Juris., para. 185.

e. "*the existence of a company is not enough to find 'investment'*" within the meaning of ECT Articles 1(4) to 1(6);[783] and

f. there were "*no rights 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*" to satisfy ECT Article 1(6)(f):[784]

i. the SeeAnlV did not confer such right;[785]

ii. SeeAnlV Section 3 "*makes it clear that there was no automatic legal right to a permit*";[786]

iii. the SeeAnlV permit "*merely confirms that the project is compatible with the provisions for the protection of the interests jeopardized by the operation of the installation, i.e. that the conditions for approval are met*";[787] and

iv. "*the permit does not confer the right to undertake any economic activity in the energy sector*" and the CJEU in the *Komstroy* Judgment adopted a "*restrictive reading of the term 'investment'*" in ECT Article 1(6).[788]

551. Secondly, regarding ICSID Convention Article 25(1), according to the Respondent, even if the Claimants' activities qualified as investments pursuant to the ECT, those "*activities would never qualify as investment under Art. 25 (1) ICSID Convention*". This is because, although Article 25(1) it does not contain an express definition of investment, its limits "*with regard to what constitutes an investment worthy of protection under the ICSID*

[783] Resp. Mem. on Juris., para. 186; **RL-0052**, *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 ("***Quiborax v. Bolivia***"), para. 233 ("*while shares or other securities or title may be the legal materialization of an investment, mere ownership of a share is, in and of itself, insufficient to prove a contribution of money or assets*").

[784] Resp. Mem. on Juris., para. 187.

[785] Resp. Mem. on Juris., paras. 188-189. The Respondent refutes the Claimants' argument that "*Sec. 3 SeeAnlV only had a catalogue of very limited grounds for refusal*" (referring to Cl. Mem. on Merits, para. 54) and instead contends that the catalogue "*is only illustrative and not conclusive*".

[786] Resp. Mem. on Juris., para. 190.

[787] Resp. Mem. on Juris., para. 191; **RL-0017 / C-0021**, BVerfG June 2020 Decision, para. 76.

[788] Resp. Mem. on Juris., para. 192; **RL-0007**, *Komstroy* Judgment, para. 72.

regime, have indeed been developed by ICSID tribunals and have come to be known as the Salini *Test*", which requires four elements be met:[789]

a. a certain duration,

b. an element of risk,

c. a substantial commitment, and

d. a significant contribution to the host State's development.

552. The Respondent argues that the elements, in particular the fourth, are not met as "*preparatory measures cannot qualify as an investment under the* Salini *Test because such activity does not include any contribution to the economic development of the host state*".[790] In particular, the Respondent argues that:

a. the "*term 'certain duration' under the* Salini *Test designates a period of two to five years*",[791] whereas "*Mainstream made its investments in Germany when it made the Applications on 27 June 2008 and 11 July 2008*";[792]

b. activities "*after the submission of non-binding, indicative and informational letters to Respondent stating that Claimants were interested in developing some sites in June / July 2008, do not change this analysis*";[793]

c. the "*only risk that Claimants had was that of a general commercial nature which each and every project developer has to bear*", starting "*unprompted and without knowing whether the investment itself would be made at all*", and never reaching

[789] Resp. Mem. on Juris., paras. 193-196; **RL-0054**, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 ("***Salini v. Morocco***"). *See also* **RL-0050**, *Joy Mining v. Egypt*, para. 53; **RL-0053**, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999 ("***CSOB v. Slovak Republic***").

[790] Resp. Mem. on Juris., para. 196.

[791] Resp. Mem. on Juris., para. 198; **RL-0055**, C. Schreuer, L. Malintoppi, A. Reinisch and A. Sinclair, *The ICSID Convention: A Commentary*, 2009 (excerpt) ("**Schreuer, *Commentary* (second excerpt)**"), para. 162 (referring to, *inter alia*, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 (available at: https://www.italaw.com/sites/default/files/case-documents/ita0439.pdf), paras. 94-95).

[792] Resp. Mem. on Juris., para. 198, referring to Cl. Mem. on Merits, para. 192.

[793] Resp. Mem. on Juris., para. 198.

financial close for any of the Projects, which risk "*was not different than that associated with any other business activity*";[794] and

d. the Claimants "*fail to submit any specific costs, but present Respondent and the Tribunal with a lumpsum without any proof to substantiate the respective number thrown out there*",[795] which, even if incurred, contrasts with "*an estimated total investment of more than one billion euros per wind farm, which underlines the non-substantial pre-investment character*",[796] and the Claimants omit any deployment of know-how.[797]

553. As to the activity not significantly contributing to the Respondent's development, it submits that this requires differentiation "*between normal commercial activities and protected investment activities*",[798] regarding which:

a. the first recital of the Preamble of the ICSID Convention refers to "*the need for international co-operation for economic development and the role of private international investment therein*",[799]

b. the ICSID signatories did not "*agree to protection by arbitral tribunals for every business set up in their territory*";[800]

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[794] Resp. Mem. on Juris., para. 199.

[795] Resp. Mem. on Juris., para. 200 ("*The amounts mentioned in the Board Paper presented to the Board of* [the First Claimant 1]*, submitted as Exhibit* ***C-0091****, and dated more than a year and a half after the supposed start of the Mainstream Activities, not only are estimates but also contained in an internal document only. The latest Board Paper presented to the Board of* [the First Claimant] *which was submitted as Exhibit* ***C-0121****, is dated 9 September 2014, and only shows amounts and estimates lower than the EUR 10 million, it still remaining unclear whether these amounts have been spent with regard to the Mainstream Activities. Exhibit* ***C-0130*** *is another internal document, showing numbers that neither match Claimants' alleged timeline nor description of activities nor the other numbers mentioned*").

[796] Resp. Mem. on Juris., para. 201; **RL-0017 / C-0021**, BVerfG June 2020 Decision, para. 165.

[797] Resp. Mem. on Juris., para. 201.

[798] Resp. Mem. on Juris., para. 203. *See* **RL-0055**, Schreuer, *Commentary* (second extract), pp. 131 *et seq*.; **RL-0056**, *Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia*, ICSID Case No. ARB 05/10, Award, 17 May 2007 ("***MHS v. Malaysia*****, Award**"), para. 125; **RL-0051**, *Mitchell v. DRC*, para. 29 ("*It is thus quite natural that the parameter of contributing to the economic development of the host State has always been taken into account, explicitly or implicitly, by ICSID arbitral tribunals in the context of their reasoning in applying the Convention, and quite independently from any provisions of agreements between parties or the relevant bilateral treaty*").

[799] Resp. Mem. on Juris., para. 205.

[800] Resp. Mem. on Juris., para. 206.

c. "*setting up a business without contributing to the host state's economic development does not qualify as an investment*";[801]

d. using the ECT to decide otherwise would "*open up investment protection to every company that manufactures products that consume energy or can somehow be utilized in the energy sector*";[802]

e. the Report of the Executive Directors points out that the Convention was "*prompted by the desire to strengthen the partnership between countries in the cause of economic development*";[803]

f. prior rulings by ICSID tribunals show that "*an agreement or consent of the host government to receive or admit the investment in question is required in order to find in favor of a contribution to the host state and consequently to find that an investment had been made*",[804] including:

i. *CMS v. Argentina*:[805]

> It follows that, in this context, questions of general economic policy, not directly related to the investment, as opposed to measures specifically addressed to the operations of the business concerned, will normally fall outside the jurisdiction of the Centre. A direct relationship can, however, be established if those general measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts. What is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments;

[801] Resp. Mem. on Juris., para. 206.

[802] Resp. Mem. on Juris., paras. 207-208; **RL-0050**, *Joy Mining v. Egypt*, para. 58 ("*Otherwise, what difference would there be with the many State contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration*?").

[803] Resp. Mem. on Juris., paras. 209-210; **RL-0049**, Schreuer, *Commentary* (first excerpt), p. 117; **RL-0057**, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 9 November 2000, para. 64 ("[BITs] *are not insurance policies against bad business judgments*").

[804] Resp. Mem. on Juris., para. 211.

[805] Resp. Mem. on Juris., para. 212; **RL-0058**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003 ("***CMS v. Argentina***"), para. 27.

ii. *Alcoa Minerals v. Jamaica*: "*a private company has invested substantial amounts in a foreign State in reliance on an agreement with that state*";[806]

iii. *Mihaly v. Sri Lanka*, involving "*pre-investment and development expenditures in hopes of being able to develop, on an exclusive basis, a 300 MW thermal power station*", where the contract was never concluded and the tribunal found that an agreement would have been necessary to recover: "*The Tribunal is consequently unable to accept as a valid denomination of 'investment', the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment*";[807]

iv. *Zhinvali v. Georgia*: "*In sum, the Tribunal finds no 'investment' within the meaning of the 1996 Georgia Investment Law, first, because the 'development costs' involved in this arbitration have not been shown to satisfy the definition of that term under the governing law of this case and, second, because the Government of Georgia did not otherwise agree or 'consent' to undertake State responsibility for those costs as a qualifying 'investment'*";[808]

v. *F-W Oil v. Trinidad and Tobago:* a tender to develop and explore oil and gas projects where drilling never commenced, the claimant was not entitled to expenditures related to the preparatory works and the tribunal denied jurisdiction for lack for investment;[809] and

[806] Resp. Mem. on Juris., para. 213; **RL-0059**, *Alcoa Minerals of Jamaica, Inc. v. Jamaica*, ICSID Case No. ARB/74/2, Decision on Jurisdiction and Competence, 6 July 1975 (excerpt) ("***Alcoa Minerals v. Jamaica***").

[807] Resp. Mem. on Juris., paras. 214-216; **RL-0060**, *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002 ("***Mihaly v. Sri Lanka***"), para. 61.

[808] Resp. Mem. on Juris., para. 217; **RL-0061**, *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003 ("***Zhinvali v. Georgia***"), para. 415.

[809] Resp. Mem. on Juris., para. 218; **RL-0062**, *F-W Oil Interests, Inc v. Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006 ("***F-W Oil v. Trinidad and Tobago***"), para. 125.

vi. *Blusun v. Italy*: actual construction of plants was necessary to consider an activity as investment;[810] and

g. such prior rulings "*depict and have captured the spirit of the ICSID Convention of furthering international cooperation for economic development*", and for "*preparatory activities and expenditures without a clear commitment on the part of the host state to consider these operations as investment, there is no contribution to the economic development of the host state*".[811]

554. Therefore, in assessing contribution to the Respondent's economic development, the Respondent submits it is necessary to check whether there was a commitment by the host State, or, absence such a commitment, there was an actual significant contribution or a *de facto* significant contribution – in the Respondent's view, the Claimants do not satisfy such criteria.[812]

b. Application to the Facts

555. In this regard, the Respondent concludes that prior rulings show that "*expenditures made by an investor on its own accord, without any promise or consent or other (contractual) commitment on the part of the host state, are never 'investment' within the meaning of Art. 25(1) ICSID Convention*", and the Respondent:

a. "*never gave such consent*";

b. "*never made any other specific commitments or created obligations for itself vis-à-vis Claimants regarding their project development activities*";[813]

c. never provided or entered into any "*written endorsement, contract or legally binding relationship*" with the Claimants; and

[810] Resp. Mem. on Juris., para. 219; **RL-0063**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016 ("***Blusun v. Italy***"), para. 262.

[811] Resp. Mem. on Juris., para. 220.

[812] Resp. Mem. on Juris., paras. 221-222.

[813] Resp. Mem. on Juris., para. 224.

d. gave "*no agreement or consent – neither 'consent (in the form of a permit)' nor otherwise – … to receive or admit*" the Claimants' activity as an investment.[814]

556. According to the Respondent, there is no evidence to the contrary: "*anyone could start with exploration; anyone was free to choose a site that the respective player was interested in developing*", and it "*did not hold a tender, or protect players against one another*" or "*give any guarantees of any sort to any of the interested players*", so the Claimants "*knew their position was not secured, but in a permanent state of competition, and hence that they acted on their own accord*".[815]

557. The Respondent refers to the Claimants' own experience of "*competing players want*[ing] *to develop parts of their chosen sites*", and argues that "[t]*he situation of insecurity continued to the end which Claimants willingly and knowingly accepted when they decided on their own accord to conduct those preparatory studies and analyses*".[816]

558. It explains in particular that "*consent cannot be taken from German legislative provisions, e.g. the* [SeeAnlV]", including because:[817]

a. grounds for refusal in SeeAnlV Section 3 "*is only illustrative and not conclusive*";

b. "*there is no commitment on the part of Respondent as the host state*" to consider the activity to be an investment;

c. "*the need for an offshore grid connection always has to be considered*", per the German Constitutional Court;[818]

[814] Resp. Mem. on Juris., para. 225, quoting Cl. Mem. on Merits, para. 54.

[815] Resp. Mem. on Juris., para. 226.

[816] Resp. Mem. on Juris., para. 226, referring to Cl. Mem. on Merits, fn. 159.

[817] Resp. Mem. on Juris., para. 227.

[818] Resp. Mem. on Juris., para. 227; **RL-0017 / C-0021**, BVerfG June 2020 Decision, para. 115 ("*The grid connection is not an incidental circumstance, but a central requirement for the operation of an offshore wind energy plant. The grid connection requirement considerably relativizes the significance of the permit granted under the old law, because this did not provide certainty with regard to a timely grid connection perspective*").

d. the Claimants "*never even came close to fulfill*[ing] *the requirements for a grid connection for their Projects based on the* [2008 EnWG Extension]";[819]

e. a positive remark by politicians and officials regarding offshore wind energy, "*can hardly be qualified as consent*", and "*cannot be understood as inciting a contribution to Respondent's economic development, especially since they were made to the general public and clearly without the will on the part of Respondent to be bound*";[820]

f. "[p]*olitical statements in general are non-binding general declarations, not specifically aimed at Claimants*", as "*there are too many uncertainties in the political and legislative process for such statements to be binding*" and anything done in response, "*cannot be qualified as a significant contribution to the economic development and thus as an investment*";[821] and therefore,

g. the Claimants' activities "*were of a purely private nature, did not contribute to Respondent's economic development and hence are not investment*".[822]

559. Finally, the Respondent argues that the Claimants did not *de facto* contribute to its economy in a significant way, because:[823]

a. they had very few employees in Germany;

b. their employees were employed by the First Claimant;

c. they did not create great business opportunities for the German workforce or transfer knowledge or other skills;

[819] Resp. Mem. on Juris., para. 229.
[820] Resp. Mem. on Juris., para. 230.
[821] Resp. Mem. on Juris., para. 230.
[822] Resp. Mem. on Juris., para. 231.
[823] Resp. Mem. on Juris., para. 232; Schwenke Witness Statement, paras. 14, 17, 27.

d. they did not create any permanent value, i.e., were not instrumental in developing Germany's wind energy sector;[824]

e. they failed to do anything "*of substance, except for what is vaguely and most generally described as geotechnical engineering studies, site investigations, environmental impact assessments, planning and site analysis together with financing and internal costs as well as advisers' fees*";[825]

f. they produced no proof of these studies or even of the alleged respective financing or internal costs;[826]

g. their activities "*never left the stage of pre-investment*" and the Claimants "*never entered into any of the main contracts to build, operate, maintain and finance a project, such as the turbine supply agreement*"; [827] and

h. "[n]*one of the Projects obtained the necessary public law permit or approval within the relevant time period*".[828]

560. The Respondent concludes that the Claimants' activities "*were not different from activities by other applicants in any other permit process*", and that "[f]*rustrated expenses for project development*" or "*application for permit*" do not "*contribute to the economic development of a state, unless they are indeed and actually used by the tendering body*"; here, the Claimants had not even "*incurred expenses for the acquisition of the project sites due to the special features of the Exclusive Economic Zone*".[829] Instead, it submits, these were "*normal commercial activities, with no positive impact on Respondent's development*", which "*did not promote some form of positive economic development for Respondent as host state*".[830]

[824] Resp. Mem. on Juris., para. 233.
[825] Resp. Mem. on Juris., para. 234.
[826] Resp. Mem. on Juris., para. 234.
[827] Resp. Mem. on Juris., para. 234, referring to Cl. Mem. on Merits, para. 266.
[828] Resp. Mem. on Juris., para. 234.
[829] Resp. Mem. on Juris., para. 235; **RL-0017 / C-0021**, BVerfG June 2020 Decision, para. 165.
[830] Resp. Mem. on Juris., para. 236.

561. As to the Second, Third, Fourth, Fifth and Sixth Claimants, according to the Respondent:

a. these did not contribute at all, with the First Claimant "*initiating, coordinating and financing*" the activity;[831]

b. the Second Claimant merely set up the Fourth, Fifth and Sixth Claimants, after the activity was almost completed;[832]

c. their incorporation made "*no significant contribution to Respondent's economic development at all*" as they developed no activity of their own;[833] and

d. the Third Claimant was completely inactive as it only held shares in the Second Claimant, and neither entity "*employed anybody in Germany nor contributed anything else material, let alone financial*", and, in short, there was no contribution to the Respondent's economy at all.[834]

562. Therefore, according to the Respondent, "*the factors of the* Salini *Test have not been met which means there is no investment on the part of Claimants*".[835]

563. In its Post-Hearing Brief, the Respondent elaborates on its position on the facts relating to Claimants' alleged investment within the meaning of the ECT, submitting that there was no investment based on the following grounds:[836]

a. within the meaning of the ECT Article 1(6) introductory sentence on the following grounds:

i. the Claimants' "*unity of investment*" theory;

ii. the Claimants' "*position in the Approval Procedure*"; or

[831] Resp. Mem. on Juris., para. 237.
[832] Resp. Mem. on Juris., para. 238.
[833] Resp. Mem. on Juris., para. 238.
[834] Resp. Mem. on Juris., para. 239.
[835] Resp. Mem. on Juris., para. 240.
[836] Resp. PHB, paras. 8 *et seq*.

iii. a "*chance*" being an Asset;

b. within ECT Articles 1(6)(a) to (f) (definitions of particular assets);

c. the Claimants' activities being at pre-investment stage; or

d. the German Constitutional Court's approach.

564. First, the Respondent submits that "*investment*" within the meaning of ECT Article 1(6) must *both* satisfy that introductory sentence *and* satisfy "*one of the items (a) to (f)*",[837] and that the Claimants had no investment under ECT Article 1(6), introductory sentence ("*'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor*") for three reasons:

a. the Claimants' "*unity of investment*" argument,[838] that their Projects expenses and position in the Approval Procedure "*were a bundle of rights which together constitute investment*",[839] is wrong because "*unity of investment*":

i. "*is not a self-explanatory concept in international law*" and "*mere reference to an unexplained theory is insufficient to base a case on*";[840]

ii. is unsupported, as advocated by the Claimants, in Professor Schreuer's commentary, which states that "*according to Art. 25 (1) ICSID Convention, the dispute must arise out of an investment, referring to arbitral practice according to which 'an existing investment is a requirement for jurisdiction* ratione materiae*. Steps preparatory for an investment will not by themselves be accepted as an investment'*";[841]

iii. in arbitral practice "*is used to determine whether to permit access to ICSID jurisdiction when investments by several entities in their own right do not*

[837] Resp. PHB, para. 10; **RL-0007**, *Komstroy* Judgment, para. 69. *See also* Tr. Day 9, 139:4-11.

[838] Resp. PHB, paras. 11-16, referring to Tr. Day 1, 147:21–148:7.

[839] Resp. PHB, para. 11, referring to Tr. Day 9, 150:2-17.

[840] Resp. PHB, para. 12.

[841] Resp. PHB, paras. 12-13; **RL-0055**, Schreuer, *Commentary* (second excerpt), para. 175.

constitute investment in the sense of Art. 25 (1) ICSID Convention, but can be seen as part of another existing investment",[842] meaning it is "*is only used in the context of Art. 25 (1) ICSID Convention and not in the context of the definition of investment under the ECT*";[843]

iv. has given rise to "*no arbitral decision on record* [that]*... allow*[s] *for the qualification of the sum of individual preparatory steps as investment under the ECT*", and "*individual steps are only considered investment once they are part of an existing investment*";[844]

v. "*does not mean that various preparatory steps taken together could be investment*", and "*does not help an investment come into existence*", but instead "*that a dispute arising out of an individual step can be arbitrated, provided a larger, overall investment exists*";[845]

vi. means that if there is no "*final investment*", then "*individual steps do not benefit from the qualification of the investment but need to be carefully assessed whether they already, in and of themselves, constitute investment*"; and

vii. the Claimants' position in the Approval Procedure and expenditures (for "*[c]ollecting data, e.g., counting birds, drafting studies and holding shares in a company*") are not investments but rather "*typical business development activities and thus pre-investment*";

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[842] Resp. PHB, para. 14; **RL-0050**, *Joy Mining v. Egypt*, para. 54; **RL-0171**, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 ("***Mamidoil v. Albania***"), para. 288; **CL-0156**, *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010 ("***Inmaris v. Ukraine***"), para. 92.

[843] Resp. PHB, para. 14; **CL-0059**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 ("***ADC v. Hungary***"), para. 331; **CL-0156**, *Inmaris v. Ukraine*, para. 85; **RL-0050**, *Joy Mining v. Egypt*, para. 52; **RL-0053**, *CSOB v. Slovak Republic*, para. 72; **RL-0171**, *Mamidoil v. Albania*, para. 285.

[844] Resp. PHB, para. 15; **CL-0071**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 ("***Lemire v. Ukraine***"), para. 95; **CL-0156**, *Inmaris v. Ukraine*, para. 66.

[845] Resp. PHB, para. 15; **CL-0059**, *ADC v. Hungary*, para. 331; **CL-0156**, *Inmaris v. Ukraine*, para. 92; **RL-0053**, *CSOB v. Slovak Republic*, para. 72; **RL-0168**, *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, 30 November 2011 ("***White Industries v. India***"), paras. 7.6.7-7.6.8.

b. the Claimants' procedural position argument does not meet the ECT Article 1(6) requirement that an asset be "*owned or controlled*", because;[846]

i. "*owned*" is undefined in the ECT, so it is "*necessary to refer to the law of the host State*", which the Respondent suggests the Claimants agree with as based on the Claimants' submission that "*obviously the question of whether an asset is an investment for the purposes of the Energy Charter Treaty is at least informed as well […] by the position under national law*";[847]

ii. German national law provides that "*ownership is akin to property*" and a position in an Approvals Procedure "*cannot be owned by the developer*";[848]

iii. "*controlled*" is undefined in the ECT, although the Understanding relating to ECT Article 1(6) mentions "*control in fact*", which the Respondent submits is, cumulatively, "*according to the actual circumstances in each situation, and considering financial interest, ability to exercise substantial influence over the management and operation as well as over the selection of members of the managing body*";[849]

iv. none of those factors is present, in particular, the ability to exercise substantial influence over the management and operation:[850]

a. which "*presupposes being able to make decisions regarding the asset*", and with the Consent Applications, "*the power to decide on existing rights lies with the deciding authority, not the applicant*";

b. yet, "[n]*o developer was able to control the complex Approval Procedure, as each Approval Procedure was different*" (i.e.,

[846] Resp. PHB, paras. 17-22.

[847] Resp. PHB, para. 18, referring to Tr. Day 9, 133:9-14.

[848] Resp. PHB, para. 18; **RL-0017 / C-0021**, BVerfG June 2020 Decision, paras. 74, 84. The Respondent claims, "*The June 2020 Decision confirmed long-standing jurisprudence; hence, Claimants knew that they did not have a protected asset*": Resp. PHB, fn. 12.

[849] Resp. PHB, para. 19. The text of the Understanding can be found at page 311 below.

[850] Resp. PHB, para. 20.

different studies for different locations "*presented their own individual challenges, e.g., the Horizont Projects required a helicopter landing platform or a maintenance vessel, which were not necessary for projects closer to shore*");

c. "*third parties and authorities had to be involved before an Approval could be granted, and delays had to be expected*";

d. "*it was not guaranteed that the studies would bring the desired result*"; and

e. "*a developer could lose its site under the priority principle*", as "[t]*here was no site exclusivity*" and "*Applicants did not control either the site or the Approval Procedure itself*";

v. the Claimants' position that Approval "*had to be granted under German law as long as Claimants submitted the required information/documents/ studies*", would mean that German Approval provisions "*would constitute a property right and any applicant starting the Approval Procedure would acquire these rights automatically without any commitment of the host State other than regulating the Approval requirements*", which "*ignores that the BSH assessed and determined whether Approval can be granted in each individual case*";[851] and

vi. "[e]*fforts to start and to advance in an administrative procedure … are only pre-investment activities*", with no rights acquired under the regulatory framework "*until an Approval was granted*", which the Claimants never received;[852]

[851] Resp. PHB, para. 21, referring to Tr. Day 1, 31:25–32:2.

[852] Resp. PHB, para. 22; *see also* Resp. C-Mem., paras. 119, 164 *et seq*.

c. existence of "c*hance is not a gateway to jurisdiction* ratione materiae *under the ECT*" because a "*chance*" is not an asset in that:[853]

i. "*chance*" may occur, if at all, in damages as "*loss of chance*", but "*Claimants never alleged that a chance can be an asset*", and damages are "*moot in this case as there is neither investment nor violation of the ECT*";[854]

ii. "*chance is not an asset*", as it "*is not a lasting commitment of resources for productive purposes*", but instead "*a bet, laced with uncertainties*", which is "*inherent in investment, but not identical to it*" as "*confirmed by the wording of Art. 1 (6) ECT*" in that defined items (a) to (f) do not have the "*same contours*" as a "*chance*", which "*looks into the future, while the items (a) to (f) have been established in the past*";[855]

iii. under German national law, "*a chance is not considered investment*";[856]

iv. a "*chance*" cannot be owned or controlled;

v. no prior award "*on record … would consider a chance to be an asset*", with all successful claimants "*dealing with a true commitment by the host State, which is the exact opposite of a chance*";[857] and

vi. "[i]*ncluding chances into the definition of asset would lower the bar to the point that investment protection would be available for anyone*" and "*open the door to genuine abuse, rendering investment protection virtually meaningless*".

[853] Resp. PHB, paras. 23-26.

[854] Resp. PHB, para. 24.

[855] Resp. PHB, para. 25.

[856] Resp. PHB, para. 25. According to the Respondent, "*This follows from the fact that not even expectations of profit, opportunities or possibilities of acquisition are protected per se*": Resp. PHB, fn. 26, referring to **RL-0017 / C-0021**, BVerfG June 2020 Decision, para. 88.

[857] Resp. PHB, para. 26.

565. Secondly, the Respondent submits that there was no "*investment*" under ECT Articles 1(6)(a) to (f) defined items, as follows:[858]

a. as to Article 1(6)(a), having acknowledged that the Claimants "*repeatedly confirmed that they do not rely on Art. 1(6)(a) ECT*", the Respondent reiterates that the Claimants "*did not have property*", "*did not own the sites*", "[n]*o property was affected by Respondent's measures*" and "*the German Constitutional Court's approach to property rights under Art. 14 German Constitution must be equated with the property rights in Art. 1 (6)(a) ECT*", to include "*tangible and intangible*";[859]

b. as to Article 1(6)(b), no dispute arises out of shares "*pursuant to Art. 25 (1) ICSID Convention*" in relation to the First, Second and Third Claimants because their shareholding does not qualify under ECT Article 1(6)(b);[860] and

c. further as to Article 1(6)(b), no dispute arises out of shares "*pursuant to Art. 25 (1) ICSID Convention*" in relation to the Fourth, Fifth and Sixth Claimants because they "*do not hold any shares at all*" and, according to the Respondent:

i. Mr. Schwencke confirmed that the Fourth, Fifth and Sixth Claimants "*were not involved in the Approval Procedure at all*";[861]

ii. shareholding in the Fourth, Fifth and Sixth Claimants companies "*therefore is not investment, as they are empty companies*";[862]

iii. Mr. Schwencke "*only ever dealt with* [the First] *Claimant* []*and never spoke of any loss of control*",[863] and

[858] Resp. PHB, paras. 27-40.

[859] Resp. PHB, para. 28, referring Tr. Day 9, 132:14-15. *See also* Resp. C-Mem., paras. 752 *et seq*.; Resp. Rej., paras. 663 *et seq*.; Tr. Day 9, 138:6-8.

[860] Resp. PHB, para. 29. *See also* Resp. C-Mem., para. 123; Resp. Rej., paras. 56, 416 *et seq*.

[861] Resp. PHB, para. 30, referring to Tr. Day 2, 54:1-4, 86:1-5.

[862] Resp. PHB, para. 30. *See also* Resp. Rej., para. 428.

[863] Resp. PHB, para. 30, referring to Tr. Day 2, 54:1-8.

iv. even if their shares in the First, Second and Third Claimants were an investment:

1. "*the Tribunal does not have jurisdiction, as there is no dispute arising out of an investment as required by Art. 25 (1) ICSID Convention*", and

2. "*protection afforded to shares under Art. 1 (6) ECT is intended for situations where the act of the respondent State affects the shareholder's legal rights*", which in this case were "*never impacted*";[864]

d. as to Article 1(6)(d):

i. there was "*no investment in the form of intellectual property*", as the "*Claimants did not provide any specifics lest evidence regarding the existence of IP rights*", making no reference to IP rights at the Hearing, and not specifying "*which IP rights might be relevant, referring simply to 'information, data and records'*", which are "*not IP, particularly not under German law, as there is no creative element*";[865]

ii. in any event, the Claimants' case "*does not rest on the violation of any IP rights*", as the "*Respondent never took any measure in the offshore wind energy sector related to IP rights*" and "*the requirements of Art. 25 (1) ICSID Convention are not met since the dispute is not arising out of IP rights*";[866] and

iii. although Sections 10a and 10b of the WindSeeG permitted developers to "*declare the granting of exclusive rights of use to the transmitted*

[864] Resp. PHB, para. 31. *See also* Resp. Rej., para. 417; Tr. Day 9, 132:16-20.

[865] Resp. PHB, para. 31. *See also* Resp. C-Mem., para. 125; Resp. Rej., paras. 429 *et seq*.

[866] Resp. PHB, para. 33.

investigation results" for compensation, the fact that the Claimants did so "*confirms that* [their] *IP rights were not harmed*";[867]

e. as to Article 1(6)(f) being "*crucial*" to the Claimants' case,[868] the Respondent argues that "*unspecified procedural positions in the Approval Procedure*" do not satisfy the definition as "[n]*one of the procedural positions constitute*[s] *a right conferred by law*", in that neither the SeeAnlV (any applicable version) nor the WindSeeG "*conferred any rights to applicants before Approval was issued*" and "[s]*ite exclusivity only exists once Approval is granted*",[869] in particular:

   i. the verb tense in ECT Article 1(6)(f) "*makes it clear that a right must already have been 'conferred' or given, by virtue of a law or contract or a licence or permits to be considered investment*", i.e., "*'made' when a right is validly acquired*", as confirmed in prior awards;[870]

   ii. therefore, licenses and permits must "*already have been granted to constitute investment*", with any other interpretation " *illogical, as it would turn any actor into an investor as long as the law of the host State contains the mere possibility of obtaining a license or permit*", rendering moot "[a]*ny legal requirements to be fulfilled to actually obtain the permit*", with "*any developer*" qualifying as an investor "*without having done anything more than pointing out the provision under which a permit might be granted*", which goes "*beyond any goal of the ECT and sensible investment protection*";[871]

[867] Resp. PHB, para. 33. *See also* Resp. Rej., para. 439, fn. 864.

[868] Resp. PHB, para. 34, referring to Tr. Day 9, 133:2, 148:10–149:5.

[869] Resp. PHB, para. 35.

[870] Resp. PHB, para. 35; **CL-0267**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, para. 139; **CL-0088**, *Petrobart Limited v. Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005 ("***Petrobart v. Kyrgyzstan***") , para. 105. *See also* Resp. Rej., para. 442.

[871] Resp. PHB, para. 36.

iii. German national law "*is decisive in settling this matter*" (it is undisputed that the Article 1(6)(f) reference to "*right conferred by law*" means law of the host State);[872]

iv. the 2008 SeeAnlV Section 3, never gave developers "*an unconditional right to receive Approval*", including "*because their documents were formally complete*", as "*formal completeness is not synonymous to meeting the material legal requirements*", and "*BSH alone decided whether the requirements are met according to the law in force at the time of the decision*";[873]

v. the Stakeholder Conference, scheduled once BSH has checked formal completion of documents, "*does not automatically trigger Approval*"[874] (here the Respondent references Dr. Nolte's testimony: the Stakeholder Conference was "*the first … opportunity to talk with associations, other authorities*" about application documents; BSH signalled it was waiting for other authorities' input; "*a lot of additional requirements are being formulated*"; and "*it's usual that after the stakeholder conference, other documents are being asked for*");[875] and

vi. a Consent Application where "*the requirements of the Offshore Installation Ordinance 2008 were fulfilled*" may still result in "*the agencies involved in the Stakeholder Conference c*[oming] *to a different conclusion*".[876]

566. Thirdly, the Respondent submits that the Claimants' activities were "*pre-investment activities*", as they "*never took the necessary final investment decision*", and therefore expenses incurred "*never reached the investment stage*"; moreover, the German

[872] Resp. PHB, para. 37, referring to Cl. Mem. on Juris., para. 85; Tr. Day 9, 133:9-14. *See also* **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, para. 5.56.

[873] Resp. PHB, para. 38. *See also* Resp. C-Mem., paras. 126 *et seq*. and paras. 257 e*t seq*.; Resp. Rej., paras. 443 *et seq*.

[874] Resp. PHB, para. 39.

[875] Resp. PHB, para. 39, referring to Tr. Day 3, 4:14–5:12, 16:25–20:24.

[876] Resp. PHB, para. 39.

Constitutional Court did not recognize a "*thing*" capable of being a "*protected investment*" pursuant to German Constitution Articles 2(1) and 20(3).[877]

567. Further in relation to financial close (or final investment decision ("**FID**")), the Respondent argues that:

a. it "*can only be made after an investor has the full picture of whether a certain project is feasible and what the associated costs are*", referring to the Umlaut Expert Report characterisation of FID (which the Respondent claims the Claimants accept), as occurring once the developer has:[878]

i. "*signed contracts for the main components of the offshore wind park with a notice to proceed mechanism to call o*[n] *the contracts as soon as the FID is granted*";

ii. "*obtained a financing commitment of the banks*", and

iii. "*a time schedule for project realization*";

b. the Projects "*never reached that maturity*", as they "*were never able to take the FID*";[879]

c. in response to the Claimants' reference to "*late-stage development*" and train stations analogy (development stages as train route stops, claiming to be "*sitting outside the late-stage station, just waiting for the lights to change … and the lights changing was the granting of the consent*"),[880] that "[l]*ate-stage development is not synonymous to 'investment', much less the FID*", that it "*is not a known concept under international law*" and it is not supported by any prior award;[881]

[877] Resp. PHB, para. 41, referring to, *inter alia*, Slark Expert Report, para. 103 ("*Final Investment Decision (FID) … is the point at which investor parties agree to undertake an investment in the offshore wind project*").

[878] Resp. PHB, para. 41, referring to Tr. Day 1, 60:19-25; Umlaut Expert Report, para. 56.

[879] Resp. PHB, para. 43; Tr. Day 8, 149:1-5.

[880] See Tr. Day 7, 16:20–17:5.

[881] Resp. PHB, para. 44.

d. in any event, these "*were far from being late-stage projects*", also lacking "*the main subsoil investigation, the three BSH releases as well as contracts for supplies, materials and financing etc., to name a few*", which were "*necessary*" and "*costly*" steps, "*likely to delay the construction phase*", making the Projects "*equivalent to a mining right once the BSH releases had been granted*";[882] and

e. the Claimants' expert "*incorrectly compared Claimants' case to a student who had taken an exam and received her marks*",[883] as they "*were nowhere near*" that stage and had not even done "*everything required*" to receive an Approval (with a number of important new documents required after the Stakeholder Conference), so "[m]*uch like a politician running for public office, there is a marked difference between 'having done everything that is required' to ensure one's election to an office and actually being elected to that office*".[884]

568. Further in relation to expenses incurred "*in furtherance of developing the projects*", the Respondent argues that the Claimants are wrong that these are investments because:[885]

a. "[e]*xpenses are not an asset*",[886]

b. prior awards are "*unanimous that a commitment by the host State is necessary to consider development expenditure investment*":[887]

i. "[a]*nything before the actual investment, such as studies, visits, the opening of development offices or negotiations – is mere business development*"; and

ii. here the "*Respondent always communicated that it does not consider expenditures before Approval to be investment*"';[888]

[882] Resp. PHB, para. 45.
[883] Resp. PHB, para. 45, referring to testimony of Dr. Serena Hesmondhalgh; *see* Tr. Day 7, 30:19-23 and 154:23–155:3.
[884] Resp. PHB, para. 45; Nolte Witness Statement, para. 23.
[885] Resp. PHB, paras. 49-51.
[886] Resp. PHB, para. 49.
[887] Resp. PHB, para. 50; **RL-0060**, *Mihaly v. Sri Lanka*, paras. 51, 60; **RL-0061**, *Zhinvali v. Georgia*, para. 415.
[888] Resp. PHB, para. 50.

c. as a "*great number of developers* [were] *interested in the German EEZ, such commitment would not have been possible and contrary to public interest*";[889]

d. otherwise the Respondent would be guaranteeing success and removing "*all business risk inherent in investment*", and "[t]*here was no such guarantee, which is already evidenced by the complexity of the Approval Procedure, which involves many stakeholders, authorities and interests*",[890] and

e. the "*Claimants' expenses therefore fall under normal business risk*".

569. Fourthly, as to the German Constitutional Court's approach, the Respondent argues that the June 2020 Decision, which "*has some evidentiary value*":[891]

a. confirmed the constitutionality of the WindSeeG, "*finding it to be a reasonable tool to achieve constitutional aims, 'namely to expand the use of offshore wind energy through more effective provisions regarding approval'*";[892]

b. did not recognize that any "*thing*" is capable of protection under the German Constitution Articles 2(1) and 20(3), which instead "*focus*[] *on the right to be protected against laws with retroactive effects*";[893]

c. used the term "*Investition*" ("*translated with both 'investment' and 'expenditure'*"), but only "*in the latter sense*" to refer to developer expenses,[894] which "*does not have a mandatory transnational connotation*"[895] (noting that there is "*no legal*

[889] Resp. PHB, para. 51.

[890] Resp. PHB, para. 51.

[891] Resp. PHB, paras. 52-64; Tr. Day 9, 147:25–148:2 ([Tribunal President:] "*I think the* [June 2020 Decision]*, at minimum, has some evidential value)*.

[892] Resp. PHB, para. 52; **RL-0017 / C-0021**, BVerfG June 2020 Decision, para. 176.

[893] Resp. PHB, para. 53.

[894] Resp. PHB, para. 54; **RL-0017 / C-0021**, BVerfG June 2020 Decision, paras. 80, 88 ("*Seen in isolation, they are merely expenses. … By contrast, investments themselves cannot be protected by Art.14(1) GG, if – as is the case here – there is property*") and 165 ("*This interest can be weighed on the basis of the volume of investment made by the complainants. They have invested several million euros per project. However, this is in contrast to an estimated total investment of more than one billion euros per wind farm*").

[895] Resp. PHB, para. 55.

definition and no specific protective provision" for "*investment*" under German national law);[896]

d. found that "*investments without a connection to existing property can be protected under the principles of protection of legitimate expectations under the rule of law, i.e., under Art. 2 (1) together with Art. 20 (3) German Constitution*", which the Respondent argues is not "*specifically aim*[ed] *at protecting investments*" but instead contains "*a general requirement to protect legitimate expectations, such as the expectation not to be burdened by laws with impermissible retroactive effects*";[897]

e. reflected that "[n]*ot every change in the law that brings disadvantages from the point of view of the affected individual raises questions as to the protection of legitimate expectations under constitutional law*";[898]

f. reflected the "*general expectation that the law will not change is not protected, unless there are exceptional additional aspects that merit special protection*";[899]

g. distinguished between "*laws with real retroactive effects and quasi-retroactive effects*" in order to "*determine whether the expectation of not being burdened by laws with impermissible retroactive effects*" (with a provision having "*real retroactive effect if its onerous legal consequences apply to circumstances that have already been fully concluded prior to the promulgation of said legal provision*",[900] and quasi-retroactive effect in "*circumstances that have been 'set in motion but have not yet been fully concluded'*");[901]

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[896] Resp. PHB, para. 54. The Respondent argues that under German law, "*the mere 'act of putting money into something to make a profit', i.e., investments in the strictest sense of the word, are not considered proprietary legal rights unless they are connected to an already existing proprietary right*", "*only legal positions to which an individual is already entitled, i.e., which the individual has acquired, are protected*" (*see* Resp. Counter-Memorial, para. 756, fns. 985-986 and the German Constitutional Court Cases cited therein) and "*mere expenditures without such connection to an already acquired right are considered mere expenses made in expectation of profit, opportunities or possibilities of acquisition, which are not protected*".

[897] Resp. PHB, para. 57; **RL-0017 / C-0021**, BVerfG June 2020 Decision, paras. 117, 127.

[898] Resp. PHB, para. 58; **RL-0017 / C-0021**, BVerfG June 2020 Decision, para. 123.

[899] Resp. PHB, para. 58; **RL-0017 / C-0021**, BVerfG June 2020 Decision, para. 125.

[900] Resp. PHB, para. 59.

[901] Resp. PHB, para. 60; **RL-0017 / C-0021**, BVerfG June 2020 Decision, paras. 129 *et seq*.

h. reflected that "*legal provisions with quasi-retroactive effect are generally permissible under German constitutional law, limited only by the principle of proportionality*", for a State to be able to "*intervene in matters that have not yet been completed and to respond to changing circumstances, like problems or technological developments*";[902]

i. considered the Claimants' circumstances "[t]*o determine whether it was dealing with a law with real or quasi-retroactive effect*" and in that regard:[903]

   i. determined that as the Claimants "*had only undertaken procedural steps, but the Approval Procedure had not been concluded, the* [WindSeeG] *did not have real retroactive effect*";[904]

   ii. reiterated that "*even quasi-retroactive effect can only be assumed 'where the position of the person … has already been shaped by such recognisable legal contours that it is set apart from the general situation of being a subject of the law'*";[905] and

   iii. considered "*the sum of the procedural steps undertaken by Claimants to be such 'position', setting them apart from anyone who had not initiated an Approval Procedure*";[906]

j. accepted that such procedural positions had become "*futile*";[907] and

k. "*did not elevate these steps to constitutional rights, but merely served as a criterion in qualifying the* [WindSeeG] *as a law with quasi-retroactive effect*", which did not mean it "*was unconstitutional and had to be annulled*" as "[t]*he marginal shortcoming under constitutional law was remedied by Sec. 10a, 10b*".[908]

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[902] Resp. PHB, para. 60; See also Resp. Rej., para. 349.
[903] Resp. PHB, para. 61.
[904] Resp. PHB, para. 62; **RL-0017 / C-0021**, BVerfG June 2020 Decision, para. 135.
[905] Resp. PHB, para. 62; **RL-0017 / C-0021**, BVerfG June 2020 Decision, para. 139.
[906] Resp. PHB, para. 62.
[907] Resp. PHB, para. 63; **RL-0017 / C-0021**, BVerfG June 2020 Decision, para. 141.
[908] Resp. PHB, para. 63. *See also* Resp. Rej., para. 349.

570. Therefore, according to the Respondent, the German Constitutional Court "*did not assess the complainants' 'legal position'* per se*, but only in the context of the assessment of the* [WindSeeG's] *actual impact*", and therefore:[909]

> The legal position of the procedural steps was only prerequisite in the assessment of the [WindSeeG] as a law with retroactive or quasi-retroactive effect. However, the German Constitutional Court did not create a new category of "*assets*" which would help Claimants in the context of the ECT.

571. In its Reply Post-Hearing Brief, the Respondent observes that the Claimants' Post-Hearing Brief does not change its conclusion that the Tribunal does not have jurisdiction *ratione materiae* for lack of investment, because the Claimants are unable "*to answer in a simple and comprehensible manner what the alleged investment is*".[910] It reiterates that (i) expenses are not investment, (ii) a chance is not investment (as confirmed by the Claimants), (iii) there is no investment based on "*Unity of Investment*", (iv) data is not investment and (v) the Claimants' activities were pre-investment only.[911]

572. As to expenses not being investments, the Respondent adds that:[912]

a. if they were, the "*list in Art. 1 (6) ECT would be superfluous*";

b. "*an asset needs to have more than economic value*";

c. the Claimants' use of the term "*financial investment*" "*is not even defined, and hence irrelevant*", seemingly designating "*sums approved by the Mainstream Board*" without proving costs incurred;[913]

d. some unspecified "*sweat equity*" is never investment;[914]

e. **Exhibit C-0177** (Mainstream invoices dated 2008-2021) "*serves neither as definition nor evidence*", and "*the fact that Claimants are unable to unambiguously*

[909] Resp. PHB, para. 64.
[910] Resp. Reply PHB, para. 12.
[911] Resp. Reply PHB, paras. 11-27.
[912] Resp. Reply PHB, paras. 13-16.
[913] Resp. Reply PHB, para. 14, referring to Cl. PHB, paras. 33, 35.
[914] Resp. Reply PHB, para. 14.

allocate the cost items to one specific Claimant shows just how unsubstantiated Claimants' argument of expenses or 'financial investment' is";[915]

f. "[s]*imple cost items cannot be indirect investments since expenditures never are investment in the first place*", and "*nothing of relevance resulted from these expenditures*", as "*money was spent on overhead and studies for counting birds and examining sand, which are all pre-investment activities*";[916] and

g. "*it is not decisive whether an item can be sold on the market*", and ECT Article 1(6) "*does not contain the requirement of 'saleability'*".[917]

573. As to a chance as an asset, the Respondent states:[918]

> The Parties agree that chance is not investment, as Claimants did not even mention chance in their First Post-Hearing-Brief. The topic of chance as investment therefore can be put to rest.

574. As to "*Unity of Investment*", the Respondent observes that:[919]

a. the Claimants "*devote little time to this concept*" in their Post-Hearing Brief;

b. the Claimants "*have not understood that this concept is used in the context of Art. 25 ICSID Convention only but never to define investment under the ECT*";[920]

c. the Schreuer article relied on by the Claimants:[921]

i. "*explicitly points out that the assessment of investment is different under substantive law than under jurisdictional standards*", stressing that "*even*

[915] Resp. Reply PHB, para. 15; **C-0177**, Invoices submitted by Mainstream to BSH from 2008 to 2021 ("**Mainstream Invoices, 2008-2021**").

[916] Resp. Reply PHB, para. 15.

[917] Resp. Reply PHB, para. 16.

[918] Resp. Reply PHB, para. 17.

[919] Resp. Reply PHB, paras. 18-20.

[920] Resp. PHB, para. 14; Resp. Reply PHB, para. 18.

[921] Resp. Reply PHB, para. 19, referring to **CL-0365**, C. Schreuer, "*The Unity of an Investment*", pp. 3, 10-12. According to the Respondent, "*'Unity of investment' does not imply unity of the protection of the investment*"): Resp. Reply PHB, fn. 10.

within the context of Art. 25 ICSID Convention, there cannot be unity of investment if different parties are involved"; and

ii. "*confirms that the decisive criterion for investment is a commitment of the host State and that mere expenses are not investment*";

d. "*activity not qualifying as investment* per se *must be incidental to the actual investment, in order for 'unity of investment' to apply*", and the Claimants have no "*existing investment that incidental activities could relate to*";

e. the cases mentioned in the Schreuer and Kriebaum article "*are distinguishable from the case at hand, as they all related to established investments*" (neither the article nor the cases considered the "*sum of procedural steps*", "*data*" or the "*sum of expenses*" as investment, and instead require an existing investment);[922] and

f. only an "*existing investment will allow to consider all related preparatory steps as integral parts of said investment, without assessing whether the individual preparatory step would in and of itself qualify as investment*", which the Claimants did not have.

575. As to data, the Respondent submits further in that this would not constitute intellectual property ("**IP**") within the meaning of ECT Article 1(6),[923] because:

a. it "*is so unspecific that it is irrelevant*";

b. "*data is not IP*" as "[t]*here undisputedly is no creative element in data*";[924]

c. the "*Claimants do not specify what data exactly they understand to have informed the 'viability of the Projects', limiting themselves to 'including' data 'relating to wind speeds, soil conditions or the effect on the marine environments'*";[925]

[922] Resp. Reply PHB, para. 20, referring to **CL-0366**, C. Schreuer and U. Kriebaum, "*At What Time Must Legitimate Expectation Exist?*" in 9(1) Transnational Dispute Management, January 2012 ("**Schreuer/Kriebaum, *Legitimate Expectation***").

[923] Resp. Reply PHB, paras. 21-24.

[924] Resp. Reply PHB, para. 21. *See also* Resp. PHB, para. 32.

[925] Resp. Reply PHB, para. 22.

d. the Claimants' "*general and unspecific reference to 'Sunk Cost Analysis' is also unhelpful, as there is no reference to any specific part or page*", and since there is "*no agreement on the Sunk Cost Analysis, the reference is irrelevant and cannot serve to substantiate*";

e. the "*Claimants will receive compensation for reusable data and documents (not IP rights!) under* [WindSeeG] *Sec. 10a, 10b*", and their transfer of "*the right of use … does not allow for the conclusion of an existence of IP rights*";[926] and

f. even if the Claimants' data "*were IP and qualified as investment, any further substantive law analysis would have to be limited to this data*",[927] and they "*never alleged violation*".

576. As to pre-investment activity, the Respondent further submits that:

a. the Claimants' Post-Hearing-Brief confirms that their activities are pre-investment (i.e., "*economically significant steps*" *per se* are insufficient and a final legal instrument is necessary);[928]

b. prior awards confirm this is insufficient:[929]

i. *Lemire v. Ukraine*: where the investor had an existing investment and planned to expand;

ii. *Blusun v. Italy*: where the investor had obtained the necessary permit, which the tribunal distinguished from preparation of a tender or negotiation of concession as pre-investment; and

[926] Resp. Reply PHB, para. 23; **RL-0017 / C-0021**, BVerfG June 2020 Decision, para. 175.

[927] Resp. Reply PHB, para. 24. *See also* Resp. PHB, para. 33.

[928] Resp. Reply PHB, para. 25, referring to Cl. PHB, para. 76.

[929] Resp. Reply PHB, para. 26; **CL-0071**, *Lemire v. Ukraine*; **RL-0063**, *Blusun v. Italy*, para. 263; **CL-0173**, *Nordzucker AG v. Republic of Poland*, UNCITRAL, Partial Award (Jurisdiction), 10 December 2008 ("***Nordzucker v. Poland***"), para. 202. The Respondent adds, "*The other references made by Claimants to **CL-0173** relate to existing investments, which Claimants did not have*": Resp. Reply PHB, fn. 23.

iii. *Nordzucker v. Poland*: where the investor established an investment under the German-Polish BIT, which has a completely different definition of investment than the ECT; and

c. in response to the Claimants' argument that the FID criterion is only "*important in case of investment in an already operational project, since in these cases the investor would assume the first financial risk at financial close*", and that it is "*different for greenfield developers, where the first Euro spent allegedly should count as investment*", the Respondent argues:[930]

i. there is "*neither explanation nor authority for this absurd distinction*";

ii. the attempt to exclude the FID as a factor to determine investment "*must fail*" because "[a] *project's viability only can be determined at the time of the FID, not Approval*", and therefore "*it is particularly important for greenfield developers*"; and

iii. "[e]*very developer has expenses 'since the beginning'*", but "[t]*hese are part of the normal business risk and not investment*".

577. The key issues summarised above based on the Respondent's Post-Hearing Briefs also take into account its earlier submissions.

(2) The Claimants' Position

578. According to the Claimants:[931]

a. they invested in Germany in 2008 when they began the process of developing the Projects;

b. the process was "*complex, time-consuming and expensive*" and cost Mainstream "*more than EUR 10 million*";

[930] Resp. Reply PHB, para. 27, referring to Cl. PHB, para. 76.

[931] Cl. Mem. on Juris., paras. 50-52; Cl. Mem. on Merits, paras. 18, 151, 209(i); Smith Witness Statement, paras. 92, 95.

c. they "*took a number of steps in the regulatory approval process, with the aim of receiving consent from the relevant German authority, the BSH, for offshore wind farms to be constructed on the Project sites and connected to the grid*";

d. the BSH charged them to participate in the process; and

e. they took steps involving "*numerous studies, expert reports, analyses, investigations and assessments which were mandated by the BSH in order for the Projects to be developed*", which were "*integral components of the development of any offshore wind farm*".

579. At the Tribunal's request, the Claimants set out in more detail the expenditures incurred by them, attributed to each Claimant's entities, in their Post-Hearing Brief, accompanied by a further expert spreadsheet.[932] This additional detail is discussed in the Tribunal's reasoning below.

580. The Claimants submit that the Respondent "*attempts to attach an inordinately high threshold to what constitutes an 'investment'*",[933] and that:

a. it is wrong to suggest that the Projects amounted to "*nothing but preparatory measures*", as they "*were assets which had value*", as recognised by the BVerfG;[934]

b. energy sector investment is "*long-term, high risk, capital intensive and highly dependent on the exercise of government's regulatory powers*";[935]

c. the Respondent's test would mean:[936]

[932] Cl. PHB, para. 79; Memorandum assessing sunk costs detailed in Exhibits C-0130 and C-0177, 24 November 2023 ("**Brattle Memorandum**").

[933] Cl. Mem. on Juris., para. 53, referring to Resp. Mem. on Juris., Sec. B.

[934] CL. Mem. on Juris., referring to Resp. Mem. on Juris., para. 19; **RL-0017 / C-0021**, BVerfG June 2020 Decision, paras. 140 *et seq*.

[935] Cl. Mem. on Juris., para. 54, quoting **CL-0043**, T. Wälde and A. Kolo, "*Environmental regulation, investment protection and 'regulatory taking' in international law*" in 50(4) International Comparative Law Quarterly, 2011 ("**Wälde/Kolo, *Environmental Regulation***"), p. 819.

[936] Cl. Mem. on Juris., para. 55.

i. "*States could implement a consenting process which involves significant degrees of investment from investors, in terms of time, money, and expertise*";

ii. energy sector investors "*would be required to take this significant risk without the ECT, the multilateral agreement specifically designed to protect investments in the energy sector, providing any protection*"; and

iii. investors would "*have to accept that they could make significant investments of time, money, and expertise based on their legitimate expectations and have those investments rendered worthless by a change to the law made by the host State*"; and

d. that would be contrary to the intent of the drafters of the ECT to boost investment in the energy sector, particularly in highly strategically important offshore wind.[937]

a. Legal Definition of "*Investment*"

581. According to the Claimants, they made "*investments*" under both ECT Article 1(6) and ICSID Convention Article 25(1), as follows:[938]

a. Article 25(1) does not define "*investment*";[939]

b. the definition of "*investment*" is found at Article 1(6) of the ECT;[940]

c. the Respondent's claim that a definition of "*investment*" "*based on an international agreement cannot go beyond what was intended by Art. 25(1) ICSID Convention*" is unsupported, as is its submission as to drafter intention based on the *travaux préparatoires*;[941] and

[937] Cl. Mem. on Juris., para. 56.

[938] Cl. Mem. on Juris., paras. 57 *et seq*.

[939] Cl. Mem. on Juris., para. 59.

[940] Cl. Mem. on Juris., para. 58. *See* also Cl. Mem. on Merits, para. 163; Request for Arbitration, Sec. IV.

[941] Cl. Mem. on Juris., para. 59, referring to Resp. Mem. on Juris., para. 165. The Claimants reference **CL-0017**, VCLT, Art. 32, which provides:

d. there is no requirement to perform a double-barrelled test and, as long as the Claimants "*made 'investments' pursuant to Article 1(6) of the ECT, the dispute also relates to an 'investment' pursuant to Article 25(1) of the ICSID Convention*".[942]

582. The Claimants submit that the Respondent's position as to what constitutes an "*investment*" pursuant to the ICSID Convention Article 25(1) is "*outdated*", "*without recourse to the wording*" and inserts "*jurisdictional hurdles into Article 25(1)*".[943] The Claimants' position is that the Parties should focus on the agreed language in ECT Article 1(6), relying on the prior award in *Gavrilović v. Croatia*:[944]

> In entering into such a treaty, State parties agree to protect certain kinds of economic activity, and in providing that disputes between investors and States relating to that activity may be resolved through arbitration, they evince their belief that such activity constitutes an "investment" within the meaning of the ICSID Convention. This judgment as to which economic activities constitute investments should be given considerable weight and deference. A tribunal would need compelling reasons to disregard such a mutually agreed definition of investment.

583. As to the Respondent's reliance on *Joy Mining v. Egypt*, the Claimants submit that in so far as this 2004 prior award found that ICSID Convention Article 25(1) "*works as a controlling and corrective element*" of the definition of "*investment*",[945] this was rejected by the *ad hoc* committee in *MHS v. Malaysia*, which found that:[946]

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (*a*) leaves the meaning ambiguous or obscure; or
>
> (*b*) leads to a result which is manifestly absurd or unreasonable.

[942] Cl. Mem. on Juris., para. 60.

[943] Cl. Mem. on Juris., para. 61.

[944] Cl. Mem. on Juris., para. 61; **CL-0143**, *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018 ("***Gavrilović v. Croatia***"), para. 192. *See also* **CL-0144**, R. Dolzer, U. Kriebaum and C. Schreuer, *Principles of International Investment Law*, 2022 (excerpt) ("**Dolzer/Kriebaum/Schreuer, *Principles* (2022) (first excerpt)**", p. 90 ("*a conscious decision was made not to define the term 'investment' and to leave the parties flexibility to decide which transactions they wished to submit*").

[945] Cl. Mem. on Juris., quoting Resp. Mem. on Juris., para. 167; **RL-0050**, *Joy Mining v. Egypt*, para. 49.

[946] Cl. Mem. on Juris., para. 66; **CL-0145**, *Malaysian Historical Salvors Sdn Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009 ("***MHS v. Malaysia*, Annulment**"), paras. 61, 71-72. The Claimants state, "*Despite the Award on Jurisdiction in Malaysian Historical Salvors being annulled, the Respondent still seeks to rely on it to support its argument as to how 'investment' should be interpreted*" (referring to Resp. Mem. on Juris., fn. 120): *see* Cl. Mem. on Juris., fn. 99.

a. the applicant had "*unquestionably made an 'investment' within the meaning set out in the UK-Malaysia BIT, and that the sole arbitrator did not reach another considered conclusion*";

b. the sole arbitrator examined, "*virtually exclusively*", the question of whether there was an investment within the meaning of Article 25(1);

c. the sole arbitrator's double-barrelled process was incorrect (investment was left undefined and the *travaux* indicated that there was no consent to the definition);

d. by the terms of their consent parties could define jurisdiction under the ICSID Convention and Article 25(1) had an "*objective content that cannot be varied by the consent of the parties only to a very limited extent related to: (a) the dispute being a 'legal dispute'; and (b) the parties to the dispute being an investor from one Contracting State and another Contracting State*";

e. precedence was to be given "*to awards and analyses that are consistent with its approach, which it finds consonant with the intentions of the Parties to the ICSID Convention*".[947]

584. The *MHS v. Malaysia* award has gained academic support from Professor Mortenson, who opined that "*[s]o long as an activity or asset is colorably economic in nature, it should constitute an investment under Article 25*", and that "*every single enterprise that has been rejected by the restrictive approach would pass muster. In fact, none of them would be particularly close calls*".[948]

585. The prior award in *CMC v. Mozambique*, alternatively, "*noted that a common middle ground between the double-barrelled approach and the deferential approach has developed which involves the consideration of whether the definition of 'investment' under*

[947] Cl. Mem. on Juris., para. 67; **CL-0145**, *MHS v. Malaysia*, Annulment, para. 78. *See*, *e.g.*, **CL-0146**, *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, paras. 157-160.

[948] Cl. Mem. on Juris., para. 68; **CL-0147**, J. Mortenson, "*The Meaning of 'Investment': ICSID's* Travaux *and the Domain of International Investment Law*", in 5 Harvard International Law Journal, No. 1, 2010 ("**Mortenson**"), p. 315 ("*Given the drafting history of the ICSID Convention and the practical advantages of restraint, tribunals should exercise near-total deference to state definitions of 'investment.' So long as an activity or asset is colorably economic in nature, it should constitute an investment under Article 25*").

the relevant treaty does not exceed what is permissible under the ICSID Convention", but the Claimants are not aware of "*a single example of international arbitral practice where the definition of 'investment' in the ECT has been found to exceed what is permissible under the ICSID Convention*".[949]

586. As to the Claimants' investments pursuant to Article 1(6) of the ECT, they submit as follows:[950]

a. the "*claim arises from their substantial investments made in the offshore wind sector in Germany from 2008 onwards, in particular in relation to three offshore wind farms on the offshore sites 'Horizont', 'Horizont Ost' and 'Horizont West' (subsequently renamed Horizont I, Horizont II and Horizont III) in the German North Sea (the 'Projects')*";[951]

b. they "*committed substantial amounts of time, money, and expertise to Germany over a period of several years (not to mention incorporating three German subsidiaries)*", including steps in the consenting process and charges to the Claimants, which "*conduct only made economic sense in the context of a long-term presence in Germany developing off shore windfarms*";[952]

c. although the Annexes to the ECT "*do not mention offshore wind energy as energy materials or products*", "*electrical energy*" is included at Annex EM I item 27.16;[953]

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[949] Cl. Mem. on Juris., para. 69; **CL-0149**, *CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa Austral, LDA v. Republic of Mozambique*, ICSID Case No. ARB/17/23, Award, 24 October 2019 ("***CMC v. Mozambique***"), para. 193. *See* **CL-0150**, *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, 4 February 2021 ("***Littop v. Ukraine***"), para. 340, where "*the tribunal did not consider it necessary to refer to or apply any other legal tests to determine what constitutes an investment beyond the clear wording of Article 1(6) of the ECT*": Cl. Mem. on Juris., fn. 109.

[950] Cl. Mem. on Juris., paras. 71-81.

[951] Cl. Mem. on Juris., para. 71, quoting Request for Arbitration, para. 4. The Claimants add, "*This included, as the Respondent admits, the various steps taken in the consenting process for the Projects, for which, as will be shown in more detail below, the Respondent – through the BSH – even charged Mainstream a considerable amount of money. This conduct only made economic sense in the context of a long-term presence in Germany developing offshore wind farms. In other words, Mainstream's investments meet the definition of* 'investment*' in Article 1(6) ECT*": Cl. Mem. on Juris., para. 72, referring to Resp. Mem. on Juris., para. 170.

[952] Cl. Mem. on Juris., para. 72.

[953] Cl. Mem. on Juris., para. 72, referring to Resp. Mem. on Juris., para. 174.

d. offshore wind farms are power generation facilities, and therefore "*economic activity concerning electrical energy is an Economic Activity in the Energy Sector*" within the meaning set out in ECT Article 1(5):[954]

i. understanding (b)(vii) to ECT Article 1(5) provides as illustrative of an Economic Activity in the Energy Sector "*Construction and operation of power generation facilities, including those powered by wind and other renewable energy sources*";[955]

e. ECT Article 1(6) defines "*investment*" very broadly, including "*every kind of asset*", followed by an illustrative list;[956] and

f. the Claimants' investments in Germany "*were assets and also held the characteristics of numerous of the non-exhaustive illustrative examples set out in Article 1(6)(a)-(f)*".[957]

587. Regarding the nature of their assets as investments, the Claimants rely on several prior awards or *ad hoc* committee decisions:[958]

a. *MHS v. Malaysia*: the committee confirmed that the ordinary meaning of the term "*investment*" is "*the commitment of money or other assets for the purpose of providing a return*" – here the Claimants compare the Projects as assets with value;[959]

b. *Europa Nova v. Czech Republic*: the tribunal found that ECT Article 1(6) does not define "*asset*" but, in context, classes of investments include several kinds of rights, including rights to participate in a company or business or equity participation,

[954] Cl. Mem. on Juris., para. 74.
[955] Cl. Mem. on Juris., paras. 75-76; **CL-0001 / RL-0084**, ECT. The Understanding can be found below at paragraph 635.
[956] Cl. Mem. on Juris., para. 78.
[957] Cl. Mem. on Juris., para. 81.
[958] Cl. Mem. on Juris., paras. 82 *et seq*.
[959] Cl. Mem. on Juris., paras. 82-83; **CL-0145**, *MHS v. Malaysia*, Annulment, para. 57.

encompassing any right invested by an investor, regardless of the form of the investment and any changes thereto;[960] and

c. *Emmis v. Hungary*: the tribunal found that in order to ascertain property capable of constituting an "*investment*" one looks to host State law,[961] and here the BVerfG recognised the Projects as "*assets*" as a matter of German law, being "*the sum of procedural steps taken under the old law to meet the approval requirements then in force, in particular the planning work and explorations carried out by the complainants*".[962]

588. According to the Claimants, taken "*in their true legal and economic context*", the investments were "*a complex operation governed by the Respondent's legislative and regulatory framework*", which the Respondent incorrectly characterises as "*pre-investment*" given the Claimants' "*development work on an industrial scale which was integral to the completion of the offshore wind farms*".[963] They submit that through activities in relation to the Projects, making the Applications and receiving confirmation from the BSH that complete applications had been filed, they were "*acknowledged to have development rights in relation to that particular part of the German EEZ and, in accordance with German law, those development rights were transferable*".[964] The Claimants suggest that "*pre-investment*" "*implies initial due diligence before electing to make a particular investment*", but the Projects involved "*dedication of time, money, and*

[960] Cl. Mem. on Juris., para. 84; **CL-0153**, *WA Investments-Europa Nova Limited v. Czech Republic*, PCA Case No. 2014-19, Award, 15 May 2019 ("***Europa Nova v. Czech Republic***"), para. 351.

[961] Cl. Mem. on Juris., para. 85; **CL-0154**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, paras. 161-162.

[962] Cl. Mem. on Juris., paras. 86-87; **RL-0017 / C-0021**, BVerfG June 2020 Decision, paras. 140, 142. The BVerfG used the terms "*procedural steps*" and "*procedural positions*"; the Claimants argue that both "*refer to the steps taken by Mainstream in pursuant of the Projects*" and "*Mainstream (and therefore the Projects) was one of the claimants referred to in* [the] *finding by the BVerfG*": Cl. Mem. on Juris., fns. 131-132. *See also* Cl. Mem. on Merits, para. 152.

[963] Cl. Mem. on Juris., para. 88, referring to Resp. Mem. on Juris., para. 200.

[964] Cl. Mem. on Juris., para. 89; Schwencke Witness Statement, para. 55. *See also* Cl. Mem. on Merits, Secs. III.A.1-2.

expertise in Germany [that] *was focused solely on the development of the Projects*",[965] not "*a speculative exercise as to whether an investment in offshore wind may be possible*".[966]

589. According to the Claimants, they had developed the Projects to the point where, following the Stakeholder Conference (or *Erörterungstermin*), they "*had taken all relevant steps required to secure consent, with such consent legitimately expected to be shortly forthcoming*", and the Projects were "*a very valuable and saleable asset*".[967]

590. In particular, as to ECT Article 1(6)(b), the Claimants submit that the First, Second and Third Claimants "*owned, at all relevant times, the Fourth, Fifth, and Sixth Claimants*" and those shares "*are 'investments' in Germany*". They were not "*mere corporate bystanders*".[968]

591. In particular, as to the Fifth Claimant:

a. on 13 July 2009, it informed the BSH that it would take over the Projects;[969]

b. from then on, it was the ultimate owner running the Projects from then until shortly before the Stakeholder Conference;

c. from July 2009, it was "*driving the Project*[ ]":[970]

d. it commissioned fieldwork;[971] and

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[965] Cl. Mem. on Juris., para. 90.

[966] Cl. Mem. on Juris., paras. 91-92; **CL-0055**, *PSEG Global, Inc. and Konya Ilgin Electrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 ("***PSEG v. Turkey***"), para. 304 ("*An investment can take many forms before actually reaching the construction stage, including most notably the cost of negotiations and other preparatory work leading to the materialization of the Project, even in connection with pre-investment expenditures*").

[967] Cl. Mem. on Juris., para. 93. *See also* Cl. Mem. on Merits, para. 123; Brattle Expert Report, para. 171 ("*identif*[ying] *pre-consent projects as being saleable assets in the German North Sea*") and Sec. VI.C.1.

[968] Cl. Mem. on Juris., paras. 93-95, referring to Resp. Mem. on Juris., para. 185. The Claimants argue that the Respondent's contention that "*Mainstream has 'failed to provide any details' of the Second Claimant's shareholder status is false. In addition to being explained in the Request for Arbitration … it was further clarified in the Memorial on the Merits*": Cl. Mem. on Juris., fn. 144.

[969] Cl. Mem. on Juris., para. 95. *See also* Cl. Mem. on Merits, fn. 162; **C-0095**, Letter from Mainstream to BSH, 13 July 2009.

[970] Cl. Mem. on Juris., para. 97.

[971] Cl. Mem. on Juris., para. 96(i); **C-0167**, Fugro Geotechnical Report No. 6409058 (2), 27 July 2009; **C-0168**, Garrad Hassan, "*Assessment of meteorological conditions at the Horizont 1 wind farm*", 23 November 2009; **C-0169**, Garrad Hassan, "*Assessment of metrological conditions at the Horizont 2 wind farm*", 23 November 2009; **C-0170**, Garrad Hassan, "*Assessment of metrological conditions at the Horizont 3 wind farm*", 23 November 2009.

e. it corresponded with the BSH in relation to the Projects.[972]

592. The Fourth and Sixth Claimants were incorporated on 16 October 2012, and on 4 March 2013, the Claimants informed the BSH that the Fourth Claimant was responsible for the project development of the Horizont I Project, the Fifth Claimant was responsible for the project development of the Horizont II Project and the Sixth Claimant was responsible for the project development of the Horizont III Project, with applications to be transferred to each,[973] and following internal reorganisation the Projects proceeded as follows:

a. the Fifth Claimant assigned the rights of the Horizont I Project to the Fourth Claimant and the rights of the Horizont III Project to the Sixth Claimant;

b. the Fourth Claimant was required to carry out development of Horizont I and the Sixth Claimant to carry out development of Horizont III;

c. the intragroup restructuring included "*licensing of intellectual property rights and data held by the Fifth Claimant to the Fourth Claimant and the Sixth Claimant*" (the "**IP Licenses**");[974]

d. the Fifth Claimant performed services for the Fourth and Sixth Claimants pursuant to Development Services Agreements between the Claimants;[975] and

e. the Stakeholder Conference Minutes show the Fourth, Fifth and Sixth Claimants all as Applicants.[976]

593. In particular as to ECT Article 1(6)(d), the Claimants submit that the Projects and work "*also constituted valuable intellectual property*", which includes "*copyrights and related*

[972] Cl. Mem. on Juris., para. 96(ii); **C-0171**, Letter from BSH to Fifth Claimant, 22 December 2010.

[973] Cl. Mem. on Juris., para. 96(iii). *See also* Request for Arbitration, paras. 16, 18; **C-0007**, Extract from the German Commercial Register for Horizont I Development GmbH, 15 April 2021; **C-0012**, Extract from the German Commercial Register for Horizont III Power GmbH, 15 April 2021; **C-0172**, Email from Mr. Tilman Schwencke to Ms. Martina Nemitz, 4 March 2013.

[974] Cl. Mem. on Juris., para. 96(iii)(c); **C-0173**, IPR License Agreement between Horizont I and Horizont II, March 2013 ("**IP License from Horizont II to Horizont I**"); **C-0174**, IPR License Agreement between Horizont II and Horizont III, March 2013 ("**IP License from Horizont II to Horizont III**").

[975] Cl. Mem. on Juris., para. 96(iii)(c); **C-0175**, Development Services Agreement between Horizont I and Horizont II, March 2013; **C-0176**, Development Services Agreement between Horizont II and Horizont III, March 2013.

[976] Cl. Mem. on Juris., para. 96(iv); **C-0001**, 2013 Stakeholder Conference Minutes.

rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and the protection of undisclosed information",[977] as follows:

a. work on the Projects comprised "*a significant volume of industrial designs*", for industrial design of the offshore wind farms: (i) park layout; (ii) design basis; (iii) preliminary draft (jacket and measuring mast); (iv) construction ground assessment report; and (v) construction ground and foundation expert report;[978]

b. "*various surveys, studies and assessments provided valuable and viable information about the development of the Projects*", subject to "*a detailed and comprehensive list of the project intellectual property which was licensed*";[979]

c. the value of which is illustrated by compensation pursuant to WindSeeG Section 10a (limited to costs necessary for studies that are still usable in the future), suggesting future use; and

d. the Respondent "*is planning to tender for project sites which overlap with the Project sites*", which suggests an "*attempt to benefit from the intellectual property generated*" by the Claimants.[980]

594. In particular as to ECT Article 1(6)(f) the Claimants submit that the SeeAnlV only allowed a permit to be refused "*if one of the specific grounds for refusal set out therein was present*", so "*applicants had a legal right to a permit if their applications met the prescriptive BSH standards and the other legal requirements were met*",[981] in particular:

a. 2006 SeeAnlV Section 3 (in place until 26 July 2008, after the Consent Applications) provided that, "*Approval shall be refused if the safety and ease of*

[977] Cl. Mem. on Juris., para. 98; **CL-0001 / RL-0084**, ECT, Art. 1(12).

[978] Cl. Mem. on Juris., para. 99; **C-0001**, 2013 Stakeholder Conference Minutes, p. 2.

[979] Cl. Mem. on Juris., para. 100; **C-0173**, IP License from Horizont II to Horizont I, Schedule 1; **C-0174**, IP License from Horizont II to Horizont III, Schedule 1.

[980] Cl. Mem. on Juris., para. 101; Hofmann Expert Report, paras. 111 *et seq*. *See also* Cl. Mem. on Merits, para. 161 and Figure 2.

[981] Cl. Mem. on Juris., para. 102; Hofmann Expert Report, para. 31; **C-0073**, 2006 SeeAnlV, Sec. 3, second sentence. *See also* Cl. Mem. on Merits, paras. 53 *et seq*.

transport is compromised or the marine environment is endangered without this being prevented or compensated by a time limit, conditions or restrictions";[982] and

b. the grounds for refusal were limited to (i) the operation or effect of shipping facilities and navigations signs; (ii) the use of shipping lanes or airspace or shipping would be impaired; (iii) risk of pollution of the marine environment within the meaning of Article 1(1) No. 4 of the United Nations Convention on the Law of the Sea; or (iv) endangerment of bird migration.

595. According to the Claimants, this meant that "*applicants had a legal right if they met all of the relevant BSH standards and legal requirements*".[983] They further submit that even the 2008 SeeAnlV did not afford the discretion claimed because submitting the Consenting Documents required that all documentation dealing with public interest be found to be acceptable, which mechanism was retained.[984] Therefore, they submit, once consent was provided, "*a developer had 'consent' to construct and operate an offshore wind farm*", which is an Economic Activity in the Energy Sector.[985] They further reiterate that the BVerfG recognised the rights held by the Claimants in relation to the Projects.[986]

596. As to "*investments*" pursuant to Article 25(1) of the ICSID Convention, the Claimants submit that the *Salini* criteria are not the "*test*",[987] and that ECT Article 1(6) is determinative because:

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[982] Cl. Mem. on Juris., para. 103. The Claimants claim that the Respondent has not quoted the "*the grounds for refusal applicable under the SeeAnlV at the time of Mainstream's investments in Germany*", referring to Resp. Mem. on Juris., para. 189. According to the Claimants, the "*correct version*" of Section 3 of the SeeAnlV is found at **C-0073**, 2006 SeeAnlV, Sec. 3, second sentence. The Claimants argue that

> the 2008 SeeAnlV entered into force on 26 July 2008, shortly after the Applications had been made (at the time the Applications were made the SeeAnlV 2006 was in force). Accordingly, the legal and regulatory framework applicable on the date(s) Mainstream invested in Germany comprised in part of the SeeAnlV 2006. However, the Applications themselves were governed by the SeeAnlV 2008. Pursuant to section 16a, the SeeAnlV 2008 would be applicable to all projects that had been applied for prior to 26 July 2008 if no public participation in accordance with certain other provisions had taken place until then. No such public participation had taken place in relation to the Projects.

Cl. Mem. on Juris, fn. 162.

[983] Cl. Mem. on Juris., para. 104.

[984] Cl. Mem. on Juris., para. 105; **C-0001**, 2013 Stakeholder Conference Minutes; **EH-0003 / RL-0114**, 2008 SeeAnlV, Sec. 3.

[985] Cl. Mem. on Juris., para. 106.

[986] Cl. Mem. on Juris., para. 107.

[987] Cl. Mem. on Juris., paras. 108 *et seq*.

a. as demonstrated by the ICSID Convention *travaux préparatoires*, deference is shown to the definition of "*investment*" agreed by the Contracting Parties to relevant instrument;[988]

b. the Claimants' investments were in any event, unquestionably, "*colorably economic in nature*",[989] which is all that is required under Article 25(1);

c. the Respondent's further test for what "'*constitutes an investment worthy of protection under the ICSID regime' being the 'Salini Test'*", "*is nowhere to be found in the text of the ECT or the ICSID Convention*" and is "*an outdated approach rejected by the weight of modern investment tribunals*",[990] including:

   i. *Société Civile v. Guinea*: the tribunal found, "*[i]t is true, as noted by the Claimant […], that many arbitral tribunals have considered that [the Salini] criteria have only a relative scope and therefore should not be considered jurisdictional criteria the absence of which would lead to the lack of jurisdiction of an arbitral tribunal*";[991]

   ii. *Inmaris v. Ukraine*: the tribunal stated that the *Salini* criteria "*may be useful in the event that a tribunal were concerned that a BIT or contract definition was so broad that it might appear to capture a transaction that would not normally be characterized as an investment under any reasonable definition*", but did not apply finding that it was "*not persuaded that it is appropriate to impose such a mandatory definition through case law where the Contracting States to the ICSID Convention chose not to specify o*ne";[992]

   iii. *Biwater Gauff v. Tanzania*: the tribunal rejected rigid adherence to the *Salini* criteria advocating a more "*flexible and pragmatic*" approach taking into

[988] Cl. Mem. on Juris., para. 108; **CL-0147**, Mortenson, p. 315.

[989] Cl. Mem. on Juris., para. 109; **CL-0147**, Mortenson, p. 315.

[990] Cl. Mem. on Juris., para. 110, referring to Resp. Mem. on Juris., para. 194.

[991] Cl. Mem. on Juris., para. 114(i); **CL-0155**, *Société Civile Immobilière de Gaëta v. Republic of Guinea*, ICSID Case No. ARB/12/36, Award, 21 December 2015 ("***Société Civile v. Guinea***"), para. 207.

[992] Cl. Mem. on Juris., para. 114(ii); **CL-0156**, *Inmaris v. Ukraine*, para. 129.

account the wider circumstances of the case, including the nature of the instrument containing the consent to ICSID arbitration;[993]

iv. *MHS v. Malaysia*: the UK-Malaysia BIT defined "*investment*" so the *ad hoc* committee found that it "*could not have been the intention of the contracting parties to limit that definition by recourse to the Salini criteria*";[994]

v. *Abaclat v. Argentina*: the tribunal found that *Salini* criteria should not limit the express definition of investment found in the relevant BIT;[995]

vi. *Pantechniki v. Albania*: the sole arbitrator found that *Salini* criteria do not amount to a test of whether an "*investment*" exists and the requirement for a "*contribution to the host State's economic development*" was *"unacceptabl[y] subjective*" and "*cannot be elevated to jurisdictional requirements unless that is their explicit function*";[996]

vii. *Air Canada v. Venezuela*: the tribunal stated that "*[t]he Salini criteria are not rules of law or jurisdictional requirements that the Tribunal must follow. Moreover, their global application, however 'objective' they may appear, is not always appropriate, as each case is different and should be assessed in its own separate and appropriate context. This is because what may be considered a significant contribution for one tribunal or arbitrator may not necessarily be considered as such by another tribunal or arbitrator. In such a case, it depends on a discretionary consideration of the facts*";[997]

viii. *Gavrilović v. Croatia*: the tribunal rejected the application of the *Salini* criteria noting that they "*may be useful in certain circumstances; for*

[993] Cl. Mem. on Juris., para. 114(iii); **CL-0063**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 ("***Biwater Gauff v. Tanzania***"), para. 316.

[994] Cl. Mem. on Juris., para. 114(iv); **CL-0145**, *MHS v. Malaysia*, Annulment, paras. 73-79.

[995] Cl. Mem. on Juris., para. 114(v); **CL-0157**, *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 ("***Abaclat v. Argentina***"), paras. 363-364.

[996] Cl. Mem. on Juris., para. 114(vi); **CL-0158**, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009 ("***Pantechniki v. Albana***"), paras. 36, 43.

[997] Cl. Mem. on Juris., para. 114(vii); **CL-0159**, *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1, Award, 13 September 2021 ("***Air Canada v. Venezuela***"), para. 293.

instance, where a tribunal is concerned that a BIT or contract definition of investment is so broad and overreaching as to capture transactions that manifestly are not investments under any acceptable conception";[998] and

ix. *RREEF v. Spain*: the tribunal determined that the *Salini* criteria were "*additional to the definition contained in the ECT*" and "*there [was] no textual or other basis for adding them*", noting:[999]

> The definition of investment must be interpreted according to article 31 of the Vienna Convention on the Law of Treaties and not in accordance with tests, criteria or guidelines beyond the terms, the context or the object and purpose of the ECT. There is no test, set of criteria or guidelines that can or should be relied upon in international law to restrict or replace the definition that exists in the ECT. There is no reason to place any such test, set of criteria or guidelines on the language of Article 25 of the ICSID Convention.

597. As to the commentary, according to the Claimants:

a. although the *Salini* criteria "*were based on Professor Schreuer's 'typical' indicators of an investment*" as set out in his first edition treatise, Professor Schreuer subsequently criticised the *Salini* tribunal and its successors for overreading ICSID Convention Article 25 "*by transforming the criteria into a test*";[1000]

b. in his second edition treatise, Professor Schreuer states:[1001]

> The development in practice from a descriptive list of typical features towards a set of mandatory legal requirements is unfortunate. The First Edition of this Commentary cannot serve as authority for this development. To the extent that the "*Salini* test" is applied to determine the existence of an investment, its criteria should not be seen as distinct jurisdictional requirements each of which must be met separately. …
>
> A rigid list of criteria that must be met in every case is not likely to facilitate the task of tribunals or to make decisions more predictable. The individual

[998] Cl. Mem. on Juris., para. 114(viii); **CL-0143**, *Gavrilović v. Croatia*, para. 193.

[999] Cl. Mem. on Juris., para. 114(ix); **CL-0023**, *RREEF v. Spain*, Jurisdiction, para. 157.

[1000] Cl. Mem. on Juris., para. 111; **CL-0147**, Mortenson, p. 274.

[1001] Cl. Mem. on Juris., para. 111; **RL-0055**, Schreuer, *Commentary* (second excerpt), paras. 171-172.

> criteria carry a considerable margin of appreciation that may be applied at the tribunal's discretion.

c. Professor Mortenson notes further that the 'test' was borne out of a "*basic misunderstanding of the process that created Article 25*", and the drafting history shows that "*the three core elements of the Salini 'test' were rejected as a test*", and it was "*never the intention for the restrictive* Salini *criteria to become the authoritative test for an investment*":[1002]

> [I]t is clear that the restrictive approach's core jurisdictional criteria were rejected during the negotiation process, despite strenuous and repeated efforts to incorporate them. But that still leaves the question: what limiting effect *did* the drafters understand the "investment" requirement to have? There is a good case that the historical agreement was for the requirement to have *no* administrable effect—that it is a nonjusticiable norm whose enforcement depends solely on the give and take among political entities.

598. According to the Claimants, the Respondent is wrong to rely on a so-called "*Salini test*" as designating certain criteria for an "*investment*".[1003] Nevertheless, they proceed to set out the basis for which they claim to have met any *Salini* criteria of: (i) project of a certain duration, (ii) an element of risk, (iii) substantial commitment, and (iv) constitute a significant contribution to the host State's development.[1004] In particular:

a. as to "*certain duration*", "*a period of two to five years*" is incorrect as a requirement;[1005]

b. the rationale for the duration criteria "*was to seek to exclude ordinary or one-time commercial transactions*", which was not the case for the Projects;[1006]

[1002] Cl. Mem. on Juris., para. 113; **CL-0147**, Mortenson, pp. 280-281, 299 (emphasis in original).

[1003] Cl. Mem. on Juris., para. 112, referring to Resp. Mem. on Juris., para. 198 and fn. 117.

[1004] Cl. Mem. on Juris., paras. 115 *et seq*.

[1005] Cl. Mem. on Juris., para. 117, referring to Resp. Mem. on Juris., para. 198. The Claimants maintain, "*There is no certain duration requirement in the ECT*": Cl. Mem. on Juris., fn. 191; **CL-0150**, *Littop v. Ukraine*, para. 339 ("*The language of Article 1(6) is clear; it does neither require an active contribution nor for the investment to be held for a certain duration*").

[1006] Cl. Mem. on Juris., paras. 117-118; **CL-0160**, *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, para. 141 (where the tribunal found that the "*certain duration*" criterion "*should not be excessively rigorous and the relevant duration is to be assessed in all the circumstances*").

c. the investments were not "*ordinary or one-time commercial transaction conducted over a period of 'one and a half years'*",[1007] and instead:

   i. the Claimants engaged in a complex, expensive, and time-consuming process over a number of years for offshore wind farms consenting;[1008]

   ii. after submitting the Applications, Mr. Schwencke was employed full time by Mainstream focused on consenting steps between the Applications in 2008 and the Stakeholder Conference in March 2013;[1009]

   iii. during that period various surveys, reports and other documents were prepared on behalf of the Claimants and submitted;[1010] and

   iv. the Claimants remained active in the consenting process, including "*address*[ing] *certain technical challenges connected with the Projects*", preparing for and presenting at the Stakeholder Conference on 5 March 2013 and carrying out outstanding tasks thereafter;[1011]

d. as to "*element of risk*", the Claimants allege that the "*Respondent admits that Mainstream's investments incurred risk*" even if the Respondent suggests that Mainstream's commercial risk was not "*specific*" enough to be considered an "*investment*", this position is inconsistent with:[1012]

   i. the *Salini* decision, where the tribunal considered the claimant had assumed the requisite risk because "*there was a risk that Moroccan law could have changed*";[1013]

[1007] Cl. Mem. on Juris., para. 119, quoting Resp. Mem. on Juris., para. 198.

[1008] Cl. Mem. on Juris., para. 119(i). *See also* Cl. Mem. on Merits, Secs. III.B-C.

[1009] Cl. Mem. on Juris., para. 119(ii); Schwencke Witness Statement, paras. 11, 16.

[1010] Cl. Mem. on Juris., para. 119(ii); **C-0001**, 2013 Stakeholder Conference Minutes, pp. 1-2 (highlighting that "*on 22 December 2009, a suite of relevant documentation was submitted to the BSH for approval*" and "*on 5 December 2012, a further suite of required documentation was submitted to the BSH*").

[1011] Cl. Mem. on Juris., para. 119(ii); Schwencke Witness Statement, paras. 69, 84. *See also* Cl. Mem. on Merits para. 124 and fn. 224.

[1012] Cl. Mem. on Juris., para. 120, referring to Resp. Mem. on Juris., para. 199.

[1013] Cl. Mem. on Juris., para. 120; **RL-0054**, *Salini v. Morocco*, paras. 55-56.

ii. the risk that German law could change existing for the offshore wind farm consent process;[1014] and

iii. decisions by subsequent tribunals accepting a wide range of risks;[1015]

e. as to "*substantial commitment*", the Claimants assert that they made "*an economic contribution to Germany*":[1016]

i. incurring "*expenditure of over EUR 10 million in the Projects*", having provided the BSH with its compensation claim, setting out its costs and expenses incurred in pursuant of the Projects pursuant to WindSeeG Section 10a,[1017] accompanied by detailed evidence of Mainstream's costs and expenses documented in the form of the invoices and other records of payments incurred and made over the life of the Projects;[1018]

ii. with work comprising "*a significant volume of industrial designs, and the Intellectual Property Right Licences detail a significant volume of intellectual property and project data generated in the course of the Projects*";[1019]

iii. incorporating three subsidiaries and employing Mr. Schwencke in Germany;[1020] and

[1014] Cl. Mem. on Juris., para. 120.

[1015] Cl. Mem. on Juris., para. 121; **CL-0144**, Dolzer/Kriebaum/Schreuer, *Principles* (2022) (first excerpt), p. 93.

[1016] Cl. Mem. on Juris., paras. 122-125.

[1017] Cl. Mem. on Juris, para. 122.

[1018] Cl. Mem. on Juris., paras. 122-123; **C-0135**, Letter from Mainstream to BSH, 16 June 2021; **C-0136**, Letter from Fourth Claimant to BSH, 15 June 2021; **C-0137**, Letter from Fifth Claimant to BSH, 15 June 2021; **C-0138**, Letter from Sixth Claimant to BSH, 15 June 2021; **C-0177**, Mainstream Invoices, 2008-2021, pp. 42-45, 365-378, 545-548, 557-568 and 598-605. See also Cl. Mem. on Merits, para. 239. The Claimants maintain that "*with these submissions the folder of supporting documentation submitted to the BSH along with **C-0130** … is a comprehensive record of Mainstream's spending in relation to the Projects. It includes the vast majority of the invoices paid by Mainstream in the course of the Projects, along with other types of expenditure (such as employee expenses claims). Mainstream was not required to provide evidence of every item of spending to the BSH (and was not able to locate a very small minority of invoices), but submitted a comprehensive set in any event as a matter of completeness*": Cl. Mem. on Juris., fn. 212.

[1019] Cl. Mem. on Juris., para. 125(i); **C-0173**, IP License from Horizont II to Horizont I; **C-0174**, IP License from Horizont II to Horizont III.

[1020] Cl. Mem. on Juris., para. 125(ii); Schwencke Witness Statement, paras. 7, 16.

iv. according to the Claimants, the Respondent's attempt to deny substantial commitment on the basis that the Claimants' expenditure "*was less than the total investment of a constructed and commissioned offshore wind farm*", "*holds no water in circumstances where it was the Respondent's internationally unlawful conduct which prevented Mainstream from carrying out any further development work*";[1021]

f. as to a "*significant contribution to Germany's development*",[1022] the Claimants observe that:

i. the Respondent dealt with this separately and in detail, allegedly "*misquoting Schreuer, claiming that* [his] *position would be that 'there must be a positive impact on a host state's development'*",[1023] whereas he described the fourth *Salini* criterion as "*the most controversial indicator of an investment*", and that "*[a] test that turns on the contribution to the host State's development should be treated with particular care*", finding that:[1024]

> The reference in the Convention's Preamble indicates that economic development is among with Convention's object and purpose. This would support the proposition that an international transaction that is designed to promote the host State's development enjoys the presumption of being an investment. But it does not follow that an activity that does not obviously contribute to economic development must be excluded from the Convention's protection.

ii. even when finding that the *Salini* test applied, prior tribunals declined to evaluate an enterprise's actual contribution to the host State's economy or development:[1025]

[1021] Cl. Mem. on Juris., para. 124, referring to Resp. Mem. on Juris., para. 201.

[1022] Cl. Mem. on Juris., paras. 126-129.

[1023] Cl. Mem. on Juris., para. 126, referring to Resp. Mem. on Juris., para. 204.

[1024] Cl. Mem. on Juris., para. 126; **RL-0055**, Schreuer, *Commentary* (second excerpt), paras. 164, 173.

[1025] Cl. Mem. on Juris., para. 127.

1. *Saba Fakes v. Turkey*: the tribunal was "*not convinced*" that a contribution to the host State's economic development was required, referring to the Preamble to the ICSID Convention's reference to "*need for international cooperation for economic development*", noting it would be "*excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording*", so while economic development is an objective of the ICSID Convention, it is not independent criterion for the definition of an "*investment*", as development "*is an expected consequence, not a separate requirement, of the investment projects carried out by a number of investors in the aggregate*";[1026]

2. *Deutsche Bank v. Sri Lanka:* the first three *Salini* criteria were used as the benchmarks of investment, "*without a separate criterion of contribution to the economic development of the host State*", with the tribunal finding that[1027]

> the criterion of contribution to economic development has been discredited and has not been adopted recently by any tribunal. It is generally considered that this criterion is unworkable owing to its subjective nature … . Moreover, some transactions may undoubtedly be qualified as investments, even though they do not result in a significant contribution to economic development in a post hoc evaluation of the claimant's activities. This is for example the case of mergers and acquisitions or of failed construction projects.

3. *KT Asia v. Kazakhstan*: the tribunal stated that "*if the investment fails, and thus makes no contribution at all to the host State's economy, that cannot mean that there has been no investment*";[1028]

[1026] Cl. Mem. on Juris., para. 127(i); **CL-0162**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 ("***Saba Fakes v. Turkey***"), para. 111.

[1027] Cl. Mem. on Juris., para. 127(ii); **CL-0161**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 ("***Deutsche Bank v. Sri Lanka***"), paras. 295, 306. *See also* **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, para. 5.43.

[1028] Cl. Mem. on Juris., para. 127(iii); **CL-0163**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 ("***KT Asia v. Kazakhstan***"), para. 171.

4. *Gavazzi v. Romania*: the tribunal found that "*a contribution to an actual economic development of the host state is not always a* conditio sine qua non *to qualify as an investment under Article 25 of the ICSID Convention. Indeed, if this were the case, an investment which was immediately prevented by wrongful acts or omissions of the host State could never qualify for protection as an investment, although such protection would be most needed in such a case*";[1029]

5. *Philip Morris v. Uruguay*: the tribunal rejected the respondent's attempt to rely on the Preamble to the ICSID Convention in order to justify the existence of the fourth *Salini* criterion;[1030]

6. *LESI v. Algeria*: the tribunal found that "*it is not necessary that the investment contribute more specifically to the host country's economic development, something that is difficult to ascertain and that is implicitly covered by the other three criteria*";[1031] and

g. commentators support that the fourth *Salini* criterion does not form part of the definition of "*investment*" under Article 25 of the ICSID Convention.[1032]

599. Despite maintaining that the fourth *Salini* criteria was not required to be met, the Claimants nevertheless proceed to argue that they had met it, based on the following:[1033]

a. there is no criteria that "*an agreement or consent of the host government to receive or admit the investment in question is required in order to find in favor of a contribution to the host state and consequently to find that an investment has been made*", because there is no admission requirement in the ECT or the ICSID

[1029] Cl. Mem. on Juris., para. 127(iv); **CL-0164**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015 ("***Gavazzi v. Romania***"), para. 114.

[1030] Cl. Mem. on Juris., para. 127(v); **CL-0165**, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013 ("***Philip Morris v. Uruguay***"), para. 201.

[1031] Cl. Mem. on Juris., para. 127(vi); **CL-0166**, *Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005 ("***LESI v. Algeria***"), para. II.13.

[1032] Cl. Mem. on Juris., para. 128; **CL-0167**, R. Castro de Figueiredo, "*Chapter 3: The Notion of Investment and Economic Development under the ICSID Convention*" in C. Baltag (ed.), *ICSID Convention after 50 Years: Unsettled Issues*, 2017, p. 103.

[1033] Cl. Mem. on Juris., paras. 129-130.

Convention and none existed under German law at any stage of the consenting process for the Projects to enter into an agreement with the State;[1034]

b. such requirement would "*exclude the vast majority of the claims brought before ICSID, where a foreign investor has not invested subject to a specific invitation or contract with the State*", and prior rulings support no "*consent beyond that set out in the ECT is required*" and that the Claimants' activities are not precluded because they relate to "*pre-investment expenditure*",[1035] including:

i. *CMS v. Argentina*: "*specifically mentions that a direct relationship, giving rise to the jurisdiction of ICSID, can be established if measures are adopted in violation of specific commitments given in treaties*";[1036]

ii. *Alcoa Minerals v. Jamaica*: this "*was a <u>contractual</u> ICSID case*" which required an agreement with the State;[1037]

iii. *Mihaly v. Sri Lanka*: distinguishable according to the Claimants on four grounds:[1038]

1. it concerned a contractual arrangement with the State that failed to materialise, limited to work undertaken to negotiate three pre-contractual letters ("*clearly expressed as being contingent and non-binding*"), whereas in the current case in addition to due diligence pre-contractual expenditure, the Claimants "*actively engaged in development expenditure*", as "*mandated under the legislative and regulatory framework*", and suffered loss because "*as a result of the*

[1034] Cl. Mem. on Juris., para. 130, quoting Resp. Mem. on Juris., para. 211 (emphasis added by the Claimants).
[1035] Cl. Mem. on Juris., para. 130.
[1036] Cl. Mem. on Juris., para. 130(i); **RL-0058**, *CMS v. Argentina*, para. 27.
[1037] Cl. Mem. on Juris., para. 130(ii) (emphasis original); **RL-0059**, *Alcoa Minerals v. Jamaica*.
[1038] Cl. Mem. on Juris., paras. 130(iii)-(vi).

Respondent's internationally unlawful conduct, construction was not able to commence";[1039]

2. the parties expressly disclaimed any legal obligations arising from the preparatory work undertaken, whereas although the Claimants here did not have a contract with the Respondent, there was no disclaiming of legal obligations arising from the preparatory work undertaken (with the Claimants arguing that they "*had a legal right to a permit if the Applications met the prescriptive BSH standards and the other legal requirements were met*" and that the Respondent "*would not have been in a position to 'back out' of the development*" if it completed all of the relevant steps);[1040]

3. the *Mihaly* tribunal considered that "*[i]t is the letters exchanged between the Parties that determine whether or not the money, indubitably expended by the Claimant, constitutes an investment within the meaning of the [ICSID] Convention*", whereas the Claimants' "*expenditure in pursuing the Projects extended far beyond the expenditure that would be incurred in the negotiation and agreement of 'contingent and nonbinding […] Letters'*";[1041] and

4. the majority found that the "*pre-investment expenditure*" was "*by the investor (presumably outside of the host State), rather than by its locally-incorporated subsidiary operating in that territory*", whereas on 13 July 2009, the Projects were taken over by the Fifth Claimant, which incurred "*pre-investment expenditure*" in the form

[1039] Cl. Mem. on Juris., para. 130(iii); **RL-0060**, *Mihaly v. Sri Lanka*, para. 59. *See also* Cl. Mem. on Merits, Sec. III.B. The Claimants contend that the BVerfG "*recognised the relevant expenditure as being part of Mainstream's investments rather than pre-investment expenses*" and that it "*specifically stated that the complainants before it (including Mainstream) 'each have expenses as part of their projects amounting to several million euros. The main part of [the previous expenses] are the exploration of the affected marine areas and costs incurred for expert opinions on soil and natural conditions'*"; the Claimants' expenses included "*payment of invoices issued by the Respondent through the BSH*": Cl. Mem. on Juris., fn. 246.

[1040] Cl. Mem. on Juris., para. 130(iv); **RL-0060**, *Mihaly v. Sri Lanka*, para. 41 *See also* Cl. Mem. on Merits, para. 54; Hofmann Expert Report, para. 31; **C-0073**, 2006 SeeAnlV, Sec. 3, second sentence.

[1041] Cl. Mem. on Juris., para. 130(v); **RL-0060**, *Mihaly v. Sri Lanka*, paras. 37, 59.

of "*technical development work, carried out in Germany, at significant cost, and in pursuance of the completion of prescriptive criteria in order to obtain a legal right*";[1042]

c. *Zhinvali v. Georgia*: the tribunal's finding was based on the "*1996 Georgian Investment Law*", which provided that certain financial rights of foreign investors did not enumerate any right of recovery of development costs in failed transactions and where the parties expressly acknowledged in their pre-contractual arrangements that claimants did not have an investment,[1043] and where the "*development costs*" related to "*the sum of [the claimants'] time charges and out-of-pocket expenditures devoted to the promotion of the finance and other arrangements for the Project*" (e.g., "*hotel and airfare chits, timekeeping records and other such materials of the shareholders, without the necessary linkage of those items to any 'intellectual property' valuation*"),[1044] whereas in the current case "*in the course of the procedure, the Claimants presented the following environmental and geophysical documents to the BSH, the preparation of which had in some cases likely required considerable financial expenditure and which amounted to the full suite of Consenting Documents requested by the BSH*", including documents, expert reports, analyses and surveys commissioned and submitted, going "*far beyond some travel costs and financial modelling*" and instead involving "*detailed layout of the offshore wind farms, expert reports concerning the construction of the turbines and their foundations and specialist assessment on the protection of natural resources*";[1045]

d. *F-W Oil v. Trinidad and Tobago*: that tribunal confirmed that "[d]*isappointed expectations are not enough; some other ingredient such as an express or implied*

[1042] Cl. Mem. on Juris., paras. 130(v)-(vi); see also fns. 255-256 and the sources cited therein.

[1043] Cl. Mem. on Juris., paras. 130(ix); **RL-0061**, *Zhinvali v. Georgia*, para. 415. The Claimants point out that the Respondent's citation (*see* Resp. Mem. on Juris., para. 217) goes so far as to omit the key words in its quote, which should read "*the Government of Georgia did not otherwise agree or 'consent' to undertake State responsibility for those costs as a qualifying 'investment' **under Georgian law***" (emphasis added by the Claimants): Cl. Mem. on Juris., fn. 258.

[1044] Cl. Mem. on Juris., paras. 130(ix); **RL-0061**, *Zhinvali v. Georgia*, paras. 195, 386.

[1045] Cl. Mem. on Juris., paras. 130(ix); *see also* Hofmann Expert Report, paras. 66-68; **C-0001**, 2013 Stakeholder Conference Minutes, p. 2. The Claimants add that this "*also involved … payment of a considerable amount of money in settlement of invoices issued by the Respondent through the BSH*": Cl. Mem. on Juris., fn. 265.

request to perform the work or make the expenditure must also be present before the responsibility of the intended employer is engaged. Competitors for a project often expend work or deploy equipment and materials in advance to gain a tendering advantage or a flying start on the project once it is underway",[1046] whereas the Claimants' expenditure "*was not a speculative deployment of equipment and materials to gain a tendering advantage or a 'flying start'*", but rather followed the "*prescriptive steps required … in order to gain a legal right to a permit*";[1047]

e. *Blusun v. Italy*: that tribunal found there were "*investments*" under the ECT and that, even under the *Salini* criteria, "*the Claimants clearly had an investment for ICSID purposes*", and considered that after "*merely preparatory work*" is concluded and a process involving substantial resources is commenced, "*the project qualifies as an investment*", which the Claimants submit is "*the more accurate characterisation*" of their own activities;[1048]

f. *Lemire v. Ukraine*: the tribunal found that "[i]*f an investor claims that his investment, once made, was subsequently denied frequencies and broadcasting licences in violation of Ukraine's obligations as assumed in the BIT, this claim constitutes an 'investment dispute' …; the Centre has jurisdiction and the Tribunal competence to adjudicate it*"[1049]

g. *PSEG v. Turkey*: the tribunal took a wide view of "*investment*" and the significance of "*pre-investment expenditures*";[1050]

h. *Nordzucker v. Poland*: the tribunal found that following failing to acquire two sugar groups during Polish privatisation, the "*intended investments*" were "*sufficiently 'mature'*" to constitute "*investments*", including due to a letter from the Polish Minister of the Treasury to the claimant, stating that "*an accord was reached on*

[1046] Cl. Mem. on Juris., paras. 130(x); **RL-0062**, *F-W Oil v. Trinidad and Tobago*, para. 141.
[1047] Cl. Mem. on Juris., paras. 130(x), referring to Cl. Mem. on Merits, Sec. III.B.
[1048] Cl. Mem. on Juris., para. 130(xi); **RL-0063**, *Blusun v. Italy*, paras. 262-263, 271.
[1049] Cl. Mem. on Juris., para. 131(i); **CL-0071**, *Lemire v. Ukraine*, paras. 89-90.
[1050] Cl. Mem. on Juris., para. 131(ii); **CL-0055**, *PSEG v. Turkey*, para. 304.

essential matters" and a "*prompt finalization of these transaction[s] seems to be possible*" (or "*only one formality away from the acquisition*"), which the Claimants submit is "*similar to the numerous indications made by the BSH to Mainstream that consent for the Projects would soon be forthcoming*";[1051]

i. *Devas v. India*: India sought to rely on its bilateral investment treaty's "*admission clause model*", extending protection to "*assets invested and admitted in accordance with the laws and regulations of the host State*", but the claimants argued that Indian officials confirmed that it had the necessary approvals, and the tribunal found the investment was not only "*pre-investment activities*", identifying shares in Indian-incorporated subsidiaries to be "*investments*", and significant time and money investment at a time when "*the licence had not yet been approved*";[1052]

j. *Bosca v. Lithuania*: based on a dispute arising out of a cancelled tender process for the purchase of a sparkling wine manufacturer, the claimant "*devot*[ed] *resources to a commercial venture in Lithuania with the expectation of profit*", which the tribunal accepted included "*considerable know-how*" and was an "*investment*";[1053] and

k. *Bear Creek v. Peru*: the tribunal stated that "*it is uncontroversial that an investment typically consists of several inter-related economic activities which, step by step, finally lead to the implementation of a project such as a mining activity*".[1054]

600. Finally, and specifically regarding the Respondent's submissions as to whether or not there was a specific "*agreement*" or "*consent*" from Germany for the Claimants to invest, the Claimants submit that the Tribunal "*should dispense with*" those elements as criteria because the argument for them "*has no support as a matter of international law*". They

[1051] Cl. Mem. on Juris., para. 131(iii); **CL-0173**, *Nordzucker v. Poland*, paras. 202, 204, 206.

[1052] Cl. Mem. on Juris., para. 131(iv); **CL-0174**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016 ("***Devas v. India***"), paras. 171-172, 200, 208.

[1053] Cl. Mem. on Juris., para. 131(v); **CL-0175**, *Luigiterzo Bosca v. Republic of Lithuania*, PCA Case No. 2011-05 (UNCITRAL), Award, 17 May 2013 ("***Bosca v. Lithuania***"), paras. 164, 168. The Claimants maintain that they had "*taken a similar course in relation to the Projects*": *see* Cl. Mem. on Merits, Sec. III.C.5.

[1054] Cl. Mem. on Juris., para. 131(vi); **CL-0176**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 ("***Bear Creek v. Peru***"), para. 296.

further note that there are "*serious factual flaws*" in the Respondent's case, including that:[1055]

a. Mr. Schwencke was not the only employee in Germany and his team included Mr. Ole Stobbe and Mr. Max Friese;[1056]

b. the Claimants did submit proof of the studies, surveys, assessments, analyses and investigations carried out in the course of the Projects, as confirmed by the BSH at the Stakeholder Conference (and they "*provided the BSH with detailed evidence of … financing, internal costs, and advisers' fees (which included German legal advice from Dr Prall) and even fees payable to the BSH pursuant to section 10a of the WindSeeG*");[1057] and

c. the Projects never entered into main contracts or received consent because of the Respondent's "*internationally unlawful conduct which caused such a state of affairs*", and the Claimants "*had taken and adhered to all relevant steps in order to progress the Projects, including to those stages, and was simply awaiting consent which should have been delivered when the Projects were halted by the Respondent*".[1058]

b. Application to the Facts

601. The assets that the Claimants submit to be qualifying investments (i.e., the vehicle or vehicles through which the investment was made or operated) in the current arbitration are as set out in their Reply.[1059] These include:

a. in relation to **ECT Article 1(6)(b)** investments in the form of "*a company or business enterprise, or shares, stocks, or other forms of equity participation in a*

[1055] Cl. Mem. on Juris., paras. 132-133, referring to Resp. Mem. on Juris., paras. 221 *et seq*.

[1056] Cl. Mem. on Juris., para. 133(i); Prall Witness Statement, para. 18.

[1057] Cl. Mem. on Juris., para. 133(ii); **C-0001**, 2013 Stakeholder Conference Minutes, p. 2. *See also* Cl. Mem. on Merits, para. 19.

[1058] Cl. Mem. on Juris., para. 133(iii). *See also* Cl. Mem. on Merits, Sec. III.C.

[1059] Cl. Reply, paras. 285-298. *See also* Cl. PHB, para. 77.

company or business enterprise, and bonds and other debt of a company or business enterprise",[1060] including:

i. the First, Second and Third Claimants' 100% (direct or indirect) shareholding in the Fourth, Fifth and Sixth Claimants;[1061]

ii. the Fourth, Fifth and Sixth Claimants all engaged in the development of the Projects;[1062]

iii. from 13 July 2009, the Fifth Claimant took over the Projects, becoming the applicant and placing a German subsidiary in charge of the development until termination of the regulatory approvals process;[1063]

iv. from early March 2012, the Claimants reorganised their corporate responsibilities for the Projects, with the Fifth Claimant transferring the applications for the Horizont I and III Projects to the Fourth and Sixth Claimants respectively,[1064] and from that time:

1. the Fourth Claimant was responsible for the project development of the Horizont I Project;

2. the Fifth Claimant was responsible for the project development of the Horizont II Project;

3. the Sixth Claimant was responsible for the development of the Horizont III Project; and

[1060] Cl. Reply, paras. 285-290; **CL-0001 / RL-0084**, ECT, Art. 1(6)(b).

[1061] Cl. Reply, para. 286; **C-0251**, BSH, Declaratory Judgment concerning Horizont I, 25 January 2023 ("**BSH Order (Horizont I)**"); **C-0252**, BSH, Declaratory Judgment concerning Horizont II, 25 January 2023 ("**BSH Order (Horizont II)**"); **C-0253**, BSH, Declaratory Judgment concerning Horizont III, 25 January 2023 ("**BSH Order (Horizont III)**"). See also Cl. Mem. on Juris., para. 55.

[1062] Cl. Reply, para. 288.

[1063] Cl. Reply, para. 290; **C-0095**, Letter from Mainstream to BSH, 13 July 2009. *See also* Cl. Mem. on Juris., para. 95; Cl. Mem. on Merits, fn. 163.

[1064] Cl. Mem. on Juris., para. 96(iii); **C-0172**, Email from Mr. Tilman Schwencke to Ms. Martina Nemitz, 4 March 2013.

v. the corporate organisation after the restructuring is set out in the Claimants' Memorial on the Merits as follows:[1065]

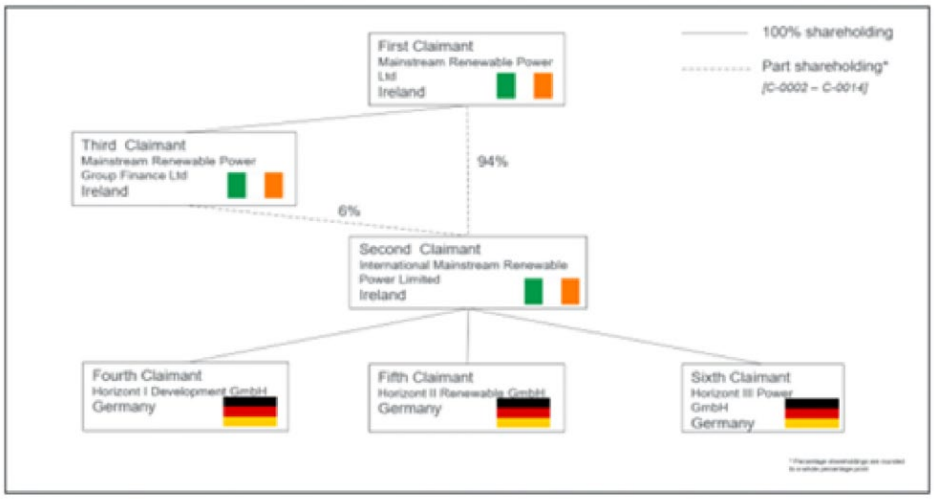


Figure 1: Ownership structure of the Claimant entities

b. in relation to **ECT Article 1(6)(d)** investments in the form of "*Intellectual Property*", defined at Article 1(12) of the ECT as including "*copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and the protection of undisclosed information*",[1066] including:

i. data contained in the results of those surveys and studies commissioned by the Claimants as submitted to the BSH, "*constituted intellectual property over which* [the Claimants] *held an exclusive right of use*";[1067]

ii. the Claimants "*engaged in significant work relating to the industrial design of the offshore wind farms*", which they developed for the Projects;[1068]

[1065] Cl. Mem. on Merits, para. 45.

[1066] Cl. Reply, paras. 291-296; **CL-0001 / RL-0084**, ECT, Arts. 1(6)(d), 1(12).

[1067] Cl. Reply, para. 292. *See also* Cl. Mem. on Juris., para. 101.

[1068] Cl. Reply, para. 292. *See also* Cl. Mem. on Juris., para. 99; **C-0001**, 2013 Stakeholder Conference Minutes, p. 2.

iii. the Fourth, Fifth and Sixth Claimants owned the relevant Consenting Documents, comprising the Claimants' intellectual property including "*results of a scientific analysis which assesses the viability of the Project sites for an offshore wind farm*",[1069] and WindSeeG Section 10a was enacted in response to the BVerfG Order:

1. to create a framework for compensation for developers affected by the WindSeeG who did not benefit from transitional provisions;[1070] and

2. to require the BSH to reimburse project owners whose regulatory approvals process was terminated by WindSeeG for costs of studies necessary for the consenting process, provided that the results and documents could be used for future preliminary studies over the same area;[1071]

iv. pursuant to Declarations for Transfer for the Projects to the BSH dated 27 March 2023, the Fourth, Fifth and Sixth Claimants transferred the exclusive right of use of "*intellectual property contained within the surveys/studies/investigations in relation to the Projects which were considered to be considered 'reusable' by the BSH in return for compensation payable by the future successful bidder over those sites pursuant to section 10a, para. 5 WindSeeG and section 10b para. 2 sentence 2 WindSeeG*";[1072] and

v. the Fourth, Fifth and Sixth Claimants also transferred "*data connected to development expenditure which the BSH considered 'reusable' but did not consider compensable*", which otherwise the Claimants "*could have sold*

[1069] Cl. Reply, para. 295; **C-0251**, BSH Order (Horizont I); **C-0252**, BSH Order (Horizont II); **C-0253**, BSH Order (Horizont III).

[1070] Cl. Reply, para. 293. *See also* Cl. Mem. on Merits, para. 156.

[1071] Cl. Reply, para. 294; Hofmann Expert Report, para. 105.

[1072] Cl. Reply, para. 296; **C-0269**, BSH, Declaration of Transfer for Horizont I, 24 March 2023; **C-0270**, BSH, Declaration of Transfer for Horizont II, 24 March 2023; **C-0271**, BSH, Declaration of Transfer for Horizont III, 24 March 2023.

the exclusive right of use of the intellectual property to a third party";[1073] and

c. in relation to **ECT Article 1(6)(f)** investments in the form of "*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*",[1074] based on:

i. the Claimants having obtained "*the required documentation in order to receive consent and, but for the Respondent's conduct, should have had a legal right to consent*";

ii. the BVerfG having "*recognised the rights held by Mainstream in relation to the Projects, finding that the procedural steps taken by Mainstream in development of the Projects were protected under the* [German Constitution]";[1075] and

iii. the BVerfG having "*found a violation of the principle of general protection of legitimate expectations pursuant to Article 2(1) GG and Article 20(3) GG since the changes to the applicable legal, regulatory and political framework interfered with Mainstream's liberties and thereby disappointed its expectations of stability worthy of protection*".[1076]

602. The Claimants submit in their Post-Hearing Brief, as raised during the Hearing, that "*the Projects should be viewed as an integral whole*", noting also that "*elements of* [the Claimants'] *investments fit within the illustrative list in Article 1(6) ECT*" (even though it is not necessary for them to do so),[1077] as follows:

a. pursuant to **ECT Article 1(6)(b)**:[1078]

[1073] Cl. Reply, para. 296.
[1074] Cl. Reply, paras. 297-298; **CL-0001 / RL-0084**, ECT, Art. 1(6)(f).
[1075] Cl. Reply, para. 298. *See also* Cl. Mem. on Juris., para. 107.
[1076] Cl. Reply, para. 298; Hofmann Expert Report, para. 101.
[1077] Cl. PHB, para. 77.
[1078] Cl. PHB, para. 77(i); **CD-0001**, Cl. Opening Statement, slides 21-22, 75.

i. "[f]*rom 13 July 2009 until 4 March 2013, the Fifth Claimant was responsible for the Projects and held the asset*";

ii. "[a]*fter that, the Fourth Claimant held Horizont I and the Sixth Claimant Horizont III, with the Fifth Claimant retaining Horizont II*";

iii. "[t]*he Toto and Typhoon transactions likely would have involved a sale of the equity in the Fifth Claimant*"; and

iv. "[t]*he shares in the Fourth-Sixth Claimants (particularly the Fifth Claimant), which were incorporated in Germany, were an asset in their own right held by the First, Second and Third Claimants*";

b. pursuant to **ECT Article 1(6)(d)**: "[t]*he Sunk Costs Analysis reveals the intellectual property generated by Mainstream's investments in the form of data which informed the viability of the Projects, including in relation to wind speeds, soil conditions, or the effect on the marine environment*";[1079] and

c. pursuant to **ECT Article 1(6)(f)**: "[t]*he BVerfG recognised the procedural positions reached by Mainstream in relation to the Projects as being protected under the German Constitution*".[1080]

603. The Claimants' position is that their investment in Germany from 2008 was at the beginning of the process of developing the Projects. This process, according to the Claimants, was "*complex, time-consuming and expensive*" and cost them "*more than EUR 10 million*". It involved taking "*a number of steps in the regulatory approval process, with the aim of receiving consent from the relevant German authority, the BSH, for offshore wind farms to be constructed on the Project sites and connected to the grid*", and involved "*numerous studies, expert reports, analyses, investigations and assessments which were mandated by the BSH in order for the Projects to be developed*", which were "*integral*

[1079] Cl. PHB, para. 77(ii).

[1080] Cl. PHB, para. 77 (iii); **RL-0017 / C-0021**, BVerfG June 2020 Decision; Tr. Day 9, 148:13–151:12.

components of the development of any offshore wind farm", and required the Claimants to make payment to the BSH to participate in the process.[1081]

604. Based on the narrative in their Reply, the Claimants itemise the expenditure comprising their investments as follow:[1082]

Date	Event	Description	Amount	Exhibit
27 June 2008	Applications submitted	Kickstarted the Projects development Financial outlay for preparing the Applications, including the fees for the Applications (performing work with "*local and experienced partners in northern Germany to develop the offshore wind park 'Horizont'*")[1083]	EUR 40,000	**C-0092**
11 July 2008	Applications submitted	As above	As above	**C-0092**
4 September 2008	Board approved development expenditure for all three Project sites for financial year ending March 2009[1084]	Utilised on development of Projects, in Germany, including first environmental and geophysical surveys and the EIA[1085] Four surveys per month by boat, and two surveys per month by plane[1086]	EUR 590,000	**C-0096** **C-0098**
16 September 2008	Applications sent to relevant public stakeholders[1087]			**C-0001**
16 September 2008	Project sites identified on map published on BSH website[1088]			**C-0261**
Mid-September 2008	Commissioning, reviewing, performing surveys, studies and investigations as necessary for consenting process[1089]	Work primarily managed by Mr. Schwencke and team in Germany		**C-0098**

[1081] Cl. Mem. on Juris., paras. 50-52. *See also* Smith Witness Statement, paras. 92, 95; Cl. Mem. on Merits, paras. 18, 151, 209(i)

[1082] Cl. Reply, para. 276.

[1083] **C-0092**, Horizont I Application, p. 5. *See also* **C-0093**, Horizont II Application, p. 5; **C-0094**, Horizont III Application, p. 5.

[1084] Schwencke Witness Statement, para. 40; **C-0096**, September 2008 Mainstream Board Report, p. 1.

[1085] **C-0098**, February/March 2009 Mainstream Board Report, p. 1.

[1086] **C-0098**, February/March 2009 Mainstream Board Report, p. 1.

[1087] Schwencke Witness Statement, para. 41; **C-0001**, 2013 Stakeholder Conference Minutes, p. 1.

[1088] **C-0261**, Letters from the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (Wind Energy), 16 September 2008 (sharing the Applications with the relevant public stakeholders).

[1089] **C-0098**, February/March 2009 Mainstream Board Report, p. 1.

February/March 2009	Board investment decision to develop the Projects	February/March 2009 Board Report:[1090] "[t]*o receive site exclusivity and consent*[,] *obligatory standards set by the BSH on environmental, geotechnical and geophysical investigations have to be undertaken*" Investment in producing Consenting Documents as to develop the Projects February/March 2009 Board Report details investigations performed pursuant to development plan for 2009 Third party contracts to deliver investigations including:[1091] o Continuation of bird/maritime mammals surveys (March to November 2009) o Fish (including suitable boat) and benthic surveys (Spring and Autumn 2009) o Risk analysis on ship collision (Summer 2009) o Ship charter, including fuel (March to November 2009)	EUR 750,000 EUR 400,000 EUR 100,000 EUR 700,000	**C-0098**
30 April 2009	Application Conference (*Antragskonferenz*)	Applications moved to the next substantive stage of the consenting process[1092]		**C-0097**
13 July 2009	BSH informed of takeover	Projects to be taken over by Fifth Claimant, incorporated in Germany[1093] Fifth Claimant actively developing Projects Fourth and Sixth Claimants brought in to manage Projects		**C-0095**
22 December 2009	Consenting Documents submitted to BSH	Work to submission stage, working closely with experts and consultants, applying own expertise on development of offshore wind farms, overall management to submit a suite of documents involved significant expenditure and time cost Including:	Total EUR 4.3 million, excl. over-heads[1100]	**C-0091** **C-0262** **C-0001**

[1090] **C-0098**, February/March 2009 Mainstream Board Report, p. 1.

[1091] **C-0098**, February/March 2009 Mainstream Board Report, p. 1.

[1092] Schwencke Witness Statement, para. 51; **C-0097**, Minutes of April 2009 Application Conference.

[1093] Cl. Mem. on Juris., para. 96; **C-0095**, Letter from Mainstream to BSH, 13 July 2009.

[1100] **C-0091**, 15 December 2009 Board Paper, p. 50. *See further* the exhibits cited by the Claimants in Cl. Reply, fn. 770.

		(a) a risk analysis; (b) collision analysis (re: jacket foundation structure and a measuring mast), by Germanischer Lloyd pursuant to contract;[1094] (c) environmental impact study; (d) expert report, commissioned, conducted by BioConsult,[1095] re: species protection study; (e) expert report re: Natura 2000 impact assessment; (f) specialist assessment of protected resting migratory birds; (g) study re: fish and benthos; (h) study re: marine mammals; (i) study re: bird migration (with studies at (f)-(h), by BioConsult pursuant to contracts);[1096] (j) expert report re: expected noise emissions caused by construction and operation of the Projects; (k) expert report re: geophysical investigations; (l) expert report re: identification of reference point heating; (m) documents required for first BSH release according to its construction standard: (i) design basis of Projects, performed by Hochtief pursuant to contract;[1097] (ii) preliminary draft of jacket and measuring mast, performed by Germanischer Lloyd pursuant to contract;[1098] (iii) construction ground assessment report;		

[1094] **C-0091**, 15 December 2009 Board Paper, pp. 51-52.

[1095] **C-0262**, Species Protection Law Assessment for Horizont I, 21 December 2009; **C-0263**, Species Protection Law Assessment for Horizont II, 21 December 2009; **C-0264**, Species Protection Law Assessment for Horizont III, 21 December 2009.

[1096] **C-0091**, 15 December 2009 Board Paper, pp. 51-52.

[1097] **C-0091**, 15 December 2009 Board Paper, p. 51.

[1098] **C-0091**, 15 December 2009 Board Paper, pp. 51-52.

		(iv) construction ground and foundation expert report; (v) geological report; (vi) certificate of conformity/expert report on design basis; (vii) expert opinion on preliminary draft of jacket and measuring mast[1099]		
2010	Second year of EIA	Estimated expenditure approx. EUR 2.4 million (excluding overheads),[1101] including: (a) Ship charter, including estimated fuel contingency (December 2009 to November 2010) – investment of EUR 660,000; (b) Continuation of the bird/maritime mammal surveys (December 2009 to November 2010) and finalising the EIA – investment of EUR 1 million; (c) Fish and benthic surveys (spring and autumn 2010) – investment of EUR 400,000; (d) Additional costs concerning BSH consenting costs, design work, possibly Metocean studies, development and legal – investment of EUR 340,000.[1102]		**C-0091**
5 December 2012	Update Consenting Documents for SeeAnlV[1103]	By end of 2012, invested EUR 5.9 million in the Projects, excluding overheads[1104] Entered into contract with GLGH/Noble Denton to complete study on "feasibility and additional cost of the deployment of Jack-up vessels (and floating installation)" in the Projects[1105]		**C-0057**
5 March 2013	Stakeholder Conference			**C-0265** **C-0130**

[1099] **C-0001**, 2013 Stakeholder Conference Minutes, p. 2.

[1101] **C-0091**, 15 December 2009 Board Paper, p. 53. The Claimants state that the "*actual year-end spend by Mainstream (excluding overheads) was EUR 1,528,000 million*": Cl. Reply, fn. 771; **C-0265**, Horizont Development Costs (excluding overheads), 2009-2017 ("**Horizont DEVEX Cost Spend**").

[1102] **C-0091**, 15 December 2009 Board Paper, p. 53.

[1103] **C-0001**, 2013 Stakeholder Conference Minutes, pp. 2-3.

[1104] **C-0057**, 18 December 2012 Board Paper, p. 46. According to the Claimants, "This *figure is supported by the calculations in **C-0265** ... which in turn supports the veracity of **C-0130** and the invoices submitted under it in **C-0177***": Cl. Reply, fn. 774.

[1105] **C-0057**, 18 December 2012 Board Paper, p. 46.

May 2013		Total costs for Projects (removing overheads in "*Building Related*", "*Prof fees and IS*", "*Other Costs*" and "*Internal Costs*" (i.e., payroll and overheads)) over five years	EUR 6.1 million (excl. over-heads)[1106]	
May 2013	Agreement TenneT	For layout of export cable for grid connection[1107]		**C-0116**

605. The Claimants have repeatedly asserted that they incurred significant development expenditure in the course of the Projects, totalling over EUR 10 million,[1108] based on:

a. "*total spend*" for the Projects as notified to the BSH on 15–16 June 2021;[1109]

b. spreadsheet data provided to the BSH with the Claimants' compensation claim, including;[1110]

i. payroll and overheads, described by the Claimants as "*Mainstream's 'sweat equity' related to the Projects*";[1111] and

[1106] **C-0110**, 21 May 2013 Board Paper, p. 63. According to the Claimants, "*This figure is supported by the calculations in **C-0265** … which display that the total development expenditure up to the end of 2013 was EUR 6,271,192, which in turn supports the veracity of **C-0177** and the invoices submitted under it. The fact that there was a relatively low spend in the second half of 2013 is explained by the fact that, save for performing the minor additional pieces of work after the Stakeholder Conference, Mainstream simply was waiting for consent to be processed for the Projects*": Cl. Reply, fn. 776

[1107] **C-0116**, Minutes of meeting between the Claimants, TenneT and BSH, 16 May 2013; **C-0118**, 18 December 2013 Board Paper, p. 79. The Claimants clarify that "*as noted in their Memorial on Jurisdiction,*

> a comprehensive record of Mainstream's spending in relation to the Projects was submitted to the BSH and has been added to the record in this Arbitration [**C-0177**, Mainstream Invoices, 2008-2021]. Mainstream has clarified to the BSH and reorganised the invoices which it originally submitted (and which were put on the record as **C-0177**) on three occasions. On 7 October 2022, Mainstream provided clarifications to the BSH as to how it had allocated the various invoices (**C-0266**, Email from Carlotta Gradissimo to the BSH, subject title: "*RE: § 10a WindSeeG - Verfahren zum BSH-Geschäftszeichen 0800O2-5562/Horizont I A*" dated 7 October 2022). Following requests for additional information from the BSH, Mainstream also provided further clarifications on 29 December 2022 and 10 January 2023 (**C-0267**, Email from Carlotta Gradissimo to the BSH, subject title: "*Re: Erstattungsverfahren nach § 10a WindSeeG / 10b WindSeeG-neu - Horizont - Hinweise des BSH*" dated 29 December 2022; **C-0268**, Email from Carlotta Gradissimo to the BSH, subject title: "*Re: Erstattungsverfahren nach § 10a WindSeeG / 10b WindSeeG-neu - Horizont - Hinweise des BSH*" dated 10 January 2023). Given that these clarifications were sent to the BSH, they have also been available to the Respondent.

Cl. Reply, fn. 777.

[1108] Cl. PHB, para. 78. *See also* Cl. Mem. on Merits, para. 209(i).

[1109] Cl. PHB, paras. 57, 78; **C-0135**, Letter from Mainstream to BSH, 16 June 2021; **C-0136**, Letter from Fourth Claimant to BSH, 15 June 2021; **C-0137**, Letter from Fifth Claimant to BSH, 15 June 2021; **C-0138**, Letter from Sixth Claimant to BSH, 15 June 2021.

[1110] Cl. PHB, para. 78; **C-0130**, Annex 1 to Mainstream's Letters to BSH, 15 June 2021 ("**Horizont Costs from 2009-2021**").

[1111] Cl. PHB, para. 78; **C-0130**, Horizont Costs from 2009-2021, p. 3.

ii. reallocation of costs from the Fifth Claimant to the Fourth and Sixth Claimants respectively after their incorporation (also in the in spreadsheet supported by invoices provided to the BSH).[1112]

606. Subject to the Claimants noting that an "*investment*" under ECT Article 1(6) is not limited to financial outlays,[1113] pursuant to the Tribunal's directions at the Hearing, both Parties' quantum experts carried out a sunk costs analysis, which was submitted with the Claimants' Post-Hearing Brief, together with a memorandum written by the Claimants' experts (the "**Brattle Memorandum**"). The Parties' experts explained that they completed a detailed review of Exhibits C-0130 and C-0177[1114] and compiled the data in a new spreadsheet (the "**Sunk Costs Analysis**").[1115] Based on that analysis, the Claimants' experts opine that:

a. at December 2017, cumulative spending in relation to the Horizont Projects amounted to EUR 10.7 million;[1116]

b. the vast majority of costs were recorded in the annual accounts of the Fourth, Fifth and Sixth Claimants;

c. C-0130 breaks out the EUR 10.7 million of expenses by year, by project company and into "*internal*" and "*external*" expenses;

d. C-0177 is a compilation of invoices corresponding with external expenses indicated in C-0130;

e. costs incurred by the Fifth Claimant, when responsible for all three Projects, were reallocated to the Fourth and Sixth Claimant when they became responsible for

[1112] Cl. PHB, para. 78; **C-0130**, Horizont Costs from 2009-2021, p. 4; **C-0177**, Mainstream Invoices, 2008-2021.
[1113] Cl. PHB, para. 79; Tr. Day 9, 158:9-13.
[1114] **C-0130**, Horizont Costs from 2009-2021, p. 3; **C-0177**, Mainstream Invoices, 2008-2021.
[1115] Spreadsheet entitled "*Hesmondhalgh-Caldwell Workpapers: Tables H*", 24 November 2023 ("**Sunk Costs Analysis**").
[1116] Brattle Memorandum, para. 1.

Horizont I and Horizont III respectively in the manner set out in the Sunk Costs Analysis;[1117] and

f. "*many*" surveys and studies were performed across all three Project sites rather than on a project-by-project basis, "*meaning that it often is not possible to differentiate a single invoice between Horizont I, Horizont II and Horizont III*".[1118]

607. The Claimants set out in Exhibits C-0130 and C-0177 the cost line items they identify as connected to the Projects from 2008-2021. In their Reply, they include references to contemporaneous board papers,[1119] and Exhibit C-0265 details Horizont's development expenditures (excluding overheads) from 2009-2017.[1120] According to the Claimants, "[t]*his demonstrated that the DEVEX up to 2017 was EUR 6,342,017 (excluding overheads)*".[1121] The Claimants' experts explain the interaction between C-0130, C-0177 and C-0265, producing the following summary table:[1122]

TABLE 3: SUMMARY OF C-0177, C-0130 AND C-0265

			C-0177 EUR [A] See note	C-0130 EUR [B] See note	C-0265 EUR [C] See note	Difference to C-0130 EUR [D] [A]-[B]	Difference to C-0265 EUR [E] [A]-[C]
Total costs	[1]		6,478,660	7,284,585	6,342,017	-805,925	136,643
Exclusions							
Post-final measures	[2]		366,004	74,789	-18,433		
Unrelated expenses	[3]		114,642				
Total exclusions	[4]	[2]+[3]	480,646	74,789	-18,433		
Net costs	[5]	[1]-[4]	5,998,014	7,209,796	6,360,450	-1,211,782	-362,436
from which Professional fees and IS	[6]		142,554	332,019			

Notes and sources:
[A]: C-0177, Invoices submitted by Mainstream to the BSH, 2008 to 2021.
[B]: C-0130, Annex 1 to Mainstream's Letters to the BSH, dated 15 June 2021, p.3.
[C]: C-0265, Horizont DEVEX Cost Spend (excluding overheads) 2009-2017, 2009-2017.

[1117] Brattle Memorandum, paras. 12-23.

[1118] Cl. PHB, para. 79. *See*, *for example*, **C-0177**, Mainstream Invoices, 2008-2021, p. 148 ("*In accordance with the contract of 29.07.2009 we will charge you the following items: Offshore Wind Parks Horizon I, Horizon II and Horizon III. Hydrographic site conditions. Statistical analysis*").

[1119] Cl. Reply, para. 276.

[1120] Cl. Reply, fn. 776; **C-0265**, Horizont DEVEX Cost Spend.

[1121] Cl. PHB, para. 80(ii)

[1122] Brattle Memorandum, paras. 29-39.

608. The Respondent's experts reviewed C-0130 and C-0177,[1123] and made a number of adjustments to the amounts recorded in Tables H1 and H2 therein,[1124] which the Claimants' experts subsequently accepted and incorporated in the updated spreadsheet accompanying the post-hearing Sunk Costs Analysis (or indicated their disagreement).[1125]

609. The Parties' experts' positions ("*Brattle*" for the Claimants and "*Secretariat*" for the Respondent) may be summarised as follows:

Mainstream - Cost Options

	C-0130 (Horizon Projects Devex)		Annual Accounts	C-0177 (Compiled Invoices)	
	Original	Revised		Brattle	Secretariat
Internal Costs	3.40	3.40	2.58	2.58	2.58
External Costs	7.30	7.20	6.33	5.99	5.60
	10.70	10.60	8.91	8.57	8.18
Mgmt Costs	n/a	n/a	1.64	1.64	0.00
Total Costs	10.70	10.60	10.55	**10.21**	**8.18**
			Diff btw Brattle & Sec		2.03

Internal costs (2.58M) derived from Annual a/cs (remains constant)
External costs vary due to Brattle/Sec disagreement on allocation
Management costs excluded by Secretariat

610. The Claimants' Sunk Costs Analysis does not include for each invoice in Exhibit C-0177 a column in the spreadsheet detailing which of the non-exhaustive criteria of what amounts to an "*investment*" under Article 1(6) ECT applied to the relevant invoice. This was despite the Tribunal directing the Claimants to provide this information (and the Claimants' experts having produced it in an earlier draft of their analysis).[1126]

611. The Respondent's experts, on the other hand, did include a categorisation of costs based on the appropriate ECT Article 1(6) category. They conclude that the costs "*relating to the development of the Horizont Projects*" amounted to EUR 5,634,007,[1127] based on the

[1123] Alexander Demuth, Memorandum in response to Brattle's costs analysis, 24 November 2023 ("**Secretariat Memorandum**").
[1124] Secretariat Memorandum, paras. 1.1-1.3.
[1125] *See*, *e.g.*, Sunk Costs Analysis, Table H1, column [N].
[1126] Brattle Memorandum, para. 6.
[1127] Secretariat Memorandum, para. 5.1.

information contained in C-177 and their assessment whether or not particular invoices should be included or excluded.[1128] The Claimants' experts did not engage in this assessment, stating that they were "*instructed that this a legal question that will be decided by the Tribunal, not the quantum experts*", and that their "*role is limited to identifying whether cost items included within the invoices set out in C-0177 were related to Germany or not*".[1129]

612. In this regard, according to the Claimants:[1130]

> [A]n invoice-by-invoice categorisation of what Mainstream's investments (within the meaning set out in Article 1(6) ECT) were does not reflect the nature of Mainstream's investment or its case: in economic terms, each of these financial outlays should not be considered in isolation as "investments" but, rather, they were united to serve a common purpose: the development of the Projects. This is central to the concept of the unity of investment: investments should not be dissected into their individual legal components, but rather treated as an integral whole. It is not Mainstream's case that each and every invoice, taken alone, is an investment under the ECT. It also does not have to be. Rather, Mainstream's case remains that the procedural positions taken as a result of its development of the Projects from their inception are investments. Each time that Mainstream invested in the Projects it did so on the legitimate expectation that there would not be a radical overhaul of the applicable framework.

613. As indicated above, the Tribunal had directed the Claimants to identify which Claimant entity or entities incurred the relevant costs set out in the invoices in C-0177. In their Post-Hearing Brief, the Claimants elaborate that:

a. the Applications "*were submitted by MRP UK which was the payor for certain invoices, as detailed in the Sunk Costs Analysis*", and that "[a]*ny investments of this entity are indirect investments of the First Claimant*",[1131] shown in the green in the chart above at paragraph 604;

[1128] Secretariat Memorandum, para. 2.1.

[1129] Brattle Memorandum, para. 5.

[1130] Cl. PHB, para. 80(i).

[1131] Cl. PHB, para. 80(iii).

b. on 13 July 2009, the Fifth Claimant took over the Projects, which thereafter "*was the payor for the vast majority of the invoices*",[1132] shown in blue in the chart above at paragraph 604;

c. on 4 March 2013, the Fifth Claimant transferred the Applications for Horizont I and Horizont III to the Fourth and Sixth Claimants respectively, at which point the Claimants "*reallocated the costs relevant to Horizont I and Horizont III to those entities, as explained in the Brattle Memorandum*",[1133] shown in orange in the chart above at paragraph 604; and

d. as to the corporate structure of the Claimants companies, "*any financial investments were ultimately an indirect investment of the First Claimant*" and "[f]*rom July 2009, any financial investments were directly made by the Fifth Claimant (which also would be an indirect investment of the First, Second and Third Claimants)*".[1134]

614. The Claimants' case is, therefore, that the First Claimant was the indirect investor initially, then the Fifth Claimant became the direct investor from July 2009 and the Fourth and Sixth Claimants became the direct investors from March 2013, with the First, Second, and Third (and from March 2013, the Fifth) Claimants all being indirect investors through the Fourth and Sixth Claimants (this is considered further below in relation to the third jurisdictional objection *ratione personae*).

(3) Tribunal's Reasoning and Analysis

615. As will be evident, the Tribunal has set out the Parties' respective submissions on jurisdiction *ratione materiae* in some detail, as this goes to the heart of the claim, both in terms of the existence of an "*investment*" but also the nature and economic value of any such investment in the context of how this informs any entitlement to damages in the event of breach of the relevant investment protections. The Tribunal first considers the scope of

[1132] Cl. PHB, para. 80(iii); **CD-0001**, Cl. Opening Statement, slide 21.
[1133] Cl. PHB, para. 80(iii). **CD-0001**, CL. Opening Statement, slide 22.
[1134] Cl. PHB, para. 80(iii); **CD-0001**, CL. Opening Statement, slide 75. *See also* Cl. Reply, para. 290.

its subject-matter jurisdiction pursuant to ICSID Convention Article 25(1) and ECT Article 1(6), followed by its application to the particular investments in this claim.

a. Legal Definition of "Investment"

616. Both the Claimants and the Respondent agree that the Tribunal must consider the scope of subject-matter jurisdiction pursuant to both ICSID Convention Article 25(1) and ECT Article 1(6).[1135] Both further accept that ICSID Convention contains no definition of description of the term "*investment*", and that the Tribunal should refer to ECT Article 1(6) for that definition.[1136]

617. From that departure point:

a. the Respondent then takes the position that ICSID Convention Article 25(1) plays a controlling role in restricting the scope of protected investment, i.e., that "[a]*ny definition based on an international agreement cannot go beyond what was intended by Art. 25 (1) ICSID Convention*",[1137] and urges the Tribunal to adopt the elements used in the prior decision in *Salini v. Morocco*, which it submits excludes "*pre-investment*" activity; [1138] and

b. the Claimants, on the other hand, take the position that as the Claimants made "*investments*" pursuant to Article 1(6) of the ECT, the dispute also relates to an "*investment*" pursuant to Article 25(1) of the ICSID Convention,[1139] and the Respondent's position otherwise is "*outdated*" and "*without recourse to the wording*" of the relevant treaties, inserting additional "*jurisdictional hurdles into Article 25(1)*".[1140]

618. In support of their respective interpretations as to scope of subject-matter jurisdiction, the Parties rely on the language of the ICSID Convention and the ECT, treatises of

[1135] Resp. Mem. on Juris., paras. 161-162; Cl. Mem. on Juris., paras. 57-58.
[1136] Resp. Mem. on Juris., para. 164; Cl. Mem. on Juris., para. 59.
[1137] Resp. Mem. on Juris., para. 165.
[1138] Resp. Mem. on Juris., paras. 195-196.
[1139] Cl. Mem. on Merits, para. 163; Cl. Mem. on Juris., para. 58.
[1140] Cl. Mem. on Juris., para. 61.

Professor Scheurer and others, prior rulings including *Salini v. Morocco* and the *travaux préparatoires* of the ICSID Convention and the ECT. Although not expressly stated, the Parties' approach broadly aligns with the Statute of the International Court of Justice Article 38(1), which provides for four sources of international law for the ICJ:[1141]

> a. international conventions, whether general or particular, establishing rules expressly recognised by contesting states,
>
> b. international custom, as evidence of a general practice accepted as law,
>
> c. the general principles of law recognised by civilised nations and
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.

619. This Tribunal is neither the ICJ nor any other form of judicial body recognised by the Statute of the ICJ. Nevertheless, in aid of proper and consistent application and development of international law generally, it broadly follows the approach prescribed at ICJ Statute Article 38(1) in its approach to sources of international law and their hierarchy.

i. ICSID Convention Article 25(1) and ECT Article 1(6)

620. The relevant international conventions for the *ratione materiae* jurisdictional objection are the ICSID Convention and the ECT, as well as the VCLT. Their terms, coupled again with rules of general international law, provide the applicable law to this objection.

621. According to the Respondent, the Tribunal must consider whether there was an "*investment*" on behalf of Claimants pursuant to ICSID Convention Article 25(1) when deciding on its jurisdiction *ratione materiae*, and as neither Article 25(1) ICSID nor other provisions of the ICSID Convention offer any definition or even description of the term "*investment*", "*reference in general must be made to the multilateral agreement that shall be applied to the merits of the case*" (i.e., the ECT).[1142] It accepts that the Tribunal will have to refer to the ECT in order to define the term but any definition based on an international agreement "*cannot go beyond what was intended by Art. 25 (1) ICSID*

[1141] As noted above at footnote 618, the ICJ Statute is available at: https://www.icj-cij.org/statute.

[1142] Res. Mem. on Juris., para. 164.

Convention", and that Article 25(1) "*does contain some notions regarding jurisdiction* ratione materiae*, such as the directness of the dispute in relation to the investment*".[1143]

622. ICSID Convention Article 25(1) provides as follows:

> **Jurisdiction of the Centre**
>
> **Article 25**
>
> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

623. Article 25(1) does not define "*investment*", and no definition appears elsewhere in the ICSID Convention.

624. The Respondent relies on the ICSID Convention Preamble, which provides:

> **PREAMBLE**
>
> **The Contracting States**
>
> **Considering** the need for international cooperation for economic development, and the role of private international investment therein;
>
> **Bearing in mind** the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;
>
> **Recognizing** that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;
>
> **Attaching particular importance** to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;
>
> **Desiring** to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

[1143] Resp. Mem. on Juris., para. 164.

> **Recognizing** that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and
>
> **Declaring** that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,
>
> …

625. In addition, the purpose of the ICSID Convention is as follows:

> **Establishment and Organization**
>
> **Article 1**
>
> (1) There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).
>
> (2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

626. According to the Respondent, the first recital of the Preamble, "[c]*onsidering the need for international cooperation for economic development and the role of private international investment therein*", demonstrates that "*investment*" within the meaning of the ICSID Convention requires the activity to contribute significantly to the host State's development, differentiating protected "*investment*" from "*normal commercial activities*".[1144] Based on the preambular language, the Respondent concludes that the ICSID signatories "*did not agree to protection by arbitral tribunals for every business set up in their territory*", that "*setting up a business without contributing to the host state's economic development does not qualify as an investment*",[1145] and that using another investment agreement (e.g., the ECT) to establish otherwise would "*open up investment protection to every company that*

[1144] Resp. Mem. on Juris., paras. 204-205; **RL-0055**, Schreuer, *Convention* (second excerpt), pp. 131 *et seq*.; **RL-0056**, *MHS v. Malaysia*, Award, para. 125; **RL-0051**, *Mitchell v. DRC*, para. 29.

[1145] Resp. Mem. on Juris., para. 206.

manufactures products that consume energy or can somehow be utilized in the energy sector".[1146]

627. The language of ICSID Convention Article 25(1) is to be read against the absence of any definition of "*investment*",[1147] as well as the Convention's purpose to "*provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention*", as is clear from Article 1(2). As to the scope of investment disputes for which those facilities are provided, a tribunal may look beyond the ICSID Convention to the investment agreements, legislature or bilateral or multilateral investment treaty applicable to the dispute. In this case, that is the ECT.

628. By contrast, the ECT purpose is provided in ECT Article 2 as follows:[1148]

Article 2 - Purpose of the Treaty

> This Treaty establishes a legal framework in order to promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.

629. Prior to getting to the definition of "*investment*" at Article 1(6), it is also worth considering also the Preamble of the ECT, which states as follows:[1149]

PREAMBLE

> The Contracting Parties to this Treaty,
>
> …
>
> Recalling that all signatories to the Concluding Document of the Hague Conference undertook to pursue the objectives and principles of the European Energy Charter and implement and broaden their cooperation as soon as possible by negotiating in good faith an Energy Charter Treaty and Protocols, and desiring to place the commitments contained in that Charter on a secure and binding international legal basis;

[1146] Resp. Mem. on Juris., paras. 207-208; **RL-0050**, *Joy Mining v. Egypt*, para. 58.

[1147] *See* **CL-0017**, VCLT, Art. 31.

[1148] **CL-0001 / RL-0084**, ECT. Art. 2.

[1149] **CL-0001 / RL-0084**, ECT. Preamble.

> Desiring also to establish the structural framework required to implement the principles enunciated in the European Energy Charter;
>
> Wishing to implement the basic concept of the European Energy Charter initiative which is to catalyse economic growth by means of measures to liberalize investment and trade in energy;
>
> Affirming that Contracting Parties attach the utmost importance to the effective implementation of full national treatment and most favoured nation treatment, and that these commitments will be applied to the Making of Investments pursuant to a supplementary treaty;
>
> …
>
> Determined progressively to remove technical, administrative and other barriers to trade in Energy Materials and Products and related equipment, technologies and services;
>
> …
>
> Recognizing the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy;
>
> Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects; and
>
> Recognising the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes,
>
> …

630. The ECT's stated purpose and preambular language demonstrate (among other things) that it establishes a legal framework to promote long-term cooperation in the energy field, in accordance with the objectives and principles of the European Energy Charter, including to pursue the objectives and principles and implement and broaden cooperation for the Charter, to place the commitments in it on a secure and binding international legal basis and to establish the structural framework to implement the principles, attaching the utmost importance to the effective implementation of full national treatment and most favoured nation treatment, which is to be applied to the making of investments, and at the same time progressively to remove technical, administrative and other barriers to trade in "*Energy Materials and Products and related equipment, technologies and services*".

631. The key elements are pursuit of long-term investment and progressive removal of barriers in the energy field. The ECT is agnostic to energy type or source; its Preamble recognises the necessity for the most efficient activity, expressly recalls the United Nations Framework Convention on Climate Change ("**UNFCCC**"), as well as the Convention on Long-Range Transboundary Air Pollution and its protocols, and "*other international environmental agreements with energy-related aspects*", and recognises the increasingly urgent need for measures to protect the environment, including decommissioning of energy installations and anticipating investment in low carbon emitting energy systems. This is directly relevant to the Respondent's argument that development of wind generated energy is not within the ECT's defined Energy Materials and Products; on the contrary, the need for efficient energy, aligned with the UNFCCC and environmental protection objectives, was expressly recalled and recognised in the ECT Preamble. For the avoidance of doubt, the stated objective of the UNFCCC is as follows:[1150]

> **Article 2**
>
> **OBJECTIVE**
>
> The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

632. Within the ECT's legal framework to promote long-term cooperation in the energy field, in accordance with the objectives and principles of the European Energy Charter, placing those commitments on a secure and binding international legal basis and establishing the structural framework to implement them, ECT Article 1(6) provides a detailed definition of "*investment*" for the purpose of investment protection conferred pursuant to it:[1151]

[1150] **CL-0257**, UN Framework Convention on Climate Change, 9 May 1992 ("**UNFCCC**"), Art. 2.

[1151] **CL-0001 / RL-0084**, ECT, Art. 1(6).

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

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

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

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

(d) Intellectual Property;

(e) Returns;

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

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

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

[**UNDERSTANDINGS**

…

3. With respect to Article 1(6)

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

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

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

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

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

633. "*Investment*", as defined in ECT Article 1(6), "*must be connected to an economic activity concerning energy within Annex EM I and EM II*".[1152] This includes any investment associated with an "*Economic Activity in the Energy Sector*", which is defined in ECT Article 1(5), and "*Energy Materials and Products*" which are defined in ECT Article 1(4) and Annexes EM I and EM II.

634. Article 1(4) defines "*Energy Materials and Products*" as follows:[1153]

> "Energy Materials and Products", based on the Harmonized System of the Customs Cooperation Council and the Combined Nomenclature of the European Communities, means the items included in Annex EM I and Annex EM II.

635. Article 1(5) defines "*Economic Activity in the Energy Sector*" as follows:[1154]

> "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.
>
> [**UNDERSTANDINGS**
>
> …
>
> **2. With respect to Article 1(5)**
>
> (a) It is understood that the Treaty confers no rights to engage in economic activities other than Economic Activities in the Energy Sector.

[1152] *See* Resp. Mem. on Juris., para. 174; Cl. Mem. on Juris., para. 73.

[1153] **CL-0001 / RL-0084**, ECT, Art. 1(4).

[1154] **CL-0001 / RL-0084**, ECT, Art. 1(5).

(b) The following activities are illustrative of Economic Activity in the Energy Sector:

(i) prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium;

(ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;

(iii) land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines;

(iv) removal and disposal of wastes from energy related facilities such as power stations, including radioactive wastes from nuclear power stations;

(v) decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants;

(vi) marketing and sale of, and trade in Energy Materials and Products, e.g., retail sales of gasoline; and

(vii) research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at Improving Energy Efficiency.]

636. For completeness, ECT Article 1(8) further provides as follows:[1155]

> "Make Investments" or "Making of Investments" means establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity.

637. According to the Respondent, ECT Article 1(6) read together with Articles 1(4)-(5) requires that an Article 1(6) investment (being property, companies, debts claims, intellectual property, returns or contractual rights), must be connected to an economic activity concerning energy within Annexes EM I and EM II, which do not mention offshore wind energy. It submits that the reference in Understanding 2 to Article 1(5) "*construction and operation of power generation facilities, including those powered by wind and other*

[1155] **CL-0001 / RL-0084**, ECT, Art. 1(7).

renewable energy sources", extends only to investment in a power generation facility that has actually been constructed and is operational.[1156]

638. The Claimants accept that Annexes EM I and EM II do not expressly include offshore wind energy as "*Energy Materials or Products*". However, they point out that "*electrical energy*" is included at Annex EM I item 27.16. They characterise offshore wind farms as power generation facilities, and therefore economic activity concerning electrical energy is an "*Economic Activity in the Energy Sector*" within the meaning set out in ECT Article 1(5).[1157] The Claimants further rely on Understanding (b)(vii) to Article 1(5), which provides illustrative "*Economic Activity in the Energy Sector*" as including, "*research, consulting, planning, management and design activities related to the activities mentioned above [i.e. including the construction and operation of wind farms], including those aimed at Improving Energy Efficiency]*".[1158]

639. The Tribunal accepts that ECT Article 1(6) defines "*investment*" very broadly, including "*every kind of asset*", followed by an illustrative list.[1159] However, given the specific focus of the ECT on investment in the energy field, the investment also must be associated with an 'Economic Activity in the Energy Sector,' as defined in ECT Article 1(5) to concern the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products (or distribution of heat to multiple premises).

640. A qualifying investment "*must be connected to an economic activity concerning energy within Annex EM I and EM II*", which list qualifying Energy Materials and Products.[1160] However, "*investment*" at Article 1(6) further refers to "***any investment associated with***

[1156] Resp. Mem. on Juris., paras. 174-178.

[1157] Cl. Mem. on Juris., paras. 73-74.

[1158] Cl. Mem. on Juris., para. 76.

[1159] *See* **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, para. 5.47 (the tribunal found that ECT Article 1(6), read with Understanding IV, comprises a broad definition of investment as "*every kind of asset, owned or controlled directly or indirectly by an Investor*"); **CL-0088**, *Petrobart v. Kyrgyzstan*, para. 105 (the tribunal confirmed that the list of types of "*asset*" at Articles 1(6)(a)-(f) of the ECT was "*not exhaustive*"); **CL-0152**, *Energoalians LLC v. Republic of Moldova*, French Cour de Cassation, Case No. 16-16568, Judgment, 4 November 2018 ("***Energoalians v. Moldova***"), para. 2 (the French Court of Cassation confirmed that "*the provisions of* [the ECT] *do not specify the criteria characterising an investment, but only list, in a non-exhaustive manner, the assets considered as investments*").

[1160] Resp. Mem. on Juris., para. 176.

an Economic Activity in the Energy Sector" (emphasis added). This broad characterisation of qualifying "*investment*", requiring only association with an Economic Activity in the Energy Sector, read together with the illustrative reference to "*research, consulting, planning, management and design activities*" at Understanding (b)(vii) to Article 1(5), and the express reference to "*electrical energy*" without limit as to source at Annex EM I item 27.16, lends itself to an intention by the signatories to include development in renewable energy projects.

641. Although not necessary for this conclusion, if one is further to consider the preambular language recalling the UNFCCC and its focus on stabilising greenhouse gases in the atmosphere, and recalling other international environmental agreements with energy-related aspects (which would include the Paris Agreement subsequently entered into within the UNFCCC framework), it would be extraordinary for a State party to those instruments to suggest that the ECT excluded protection of renewable energy system development, such as offshore wind farms. The Tribunal does not accept that this is a proper reading of the ECT.

ii. The *Travaux Préparatoires*

642. The Parties have raised further arguments arising out of *travaux préparatoires*, in particular to the ICSID Convention. As the Claimants point out, VCLT Article 32 provides that "[r]*ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable*".

643. The Respondent refers to "*the overarching purpose of the ICSID Convention*", which it submits "*must not be forgotten when deciding whether an economic activity qualifies as an investment worthy of protection under the ICSID Convention*", suggesting it is "*well recognized that the term 'investment' was never meant to cover all types of 'property,*

rights and interests"',[1161] and that "*[o]rdinary commercial transactions were never to be covered by the Convention, either*".[1162] On that basis, it concludes that "*the term in Art. 25(1) ICSID Convention may be wide, but it does have its limits*".[1163]

644. According to the Claimants, the Respondent's claim that a definition of "*investment*" "*based on an international agreement cannot go beyond what was intended by Article 25(1) ICSID Convention*" is unsupported,[1164] as is its submissions as to drafter intention based on the *travaux préparatoires*.[1165] In particular, according to the Claimants, in the *travaux préparatoires*, deference is shown to the definition of "*investment*" as agreed by the Contracting Parties to the relevant investment protection instrument.[1166]

645. The Claimants rely in this regard on a journal article by Professor Mortenson, which states that[1167]

> … because ICSID was designed to enable precisely such "re-definition" of investment via subsequent state agreement, that objection seems weak—particularly for those BITs that specify ICSID as the sole method of dispute resolution. As between these two sources of state practice, considered ex ante judgments probably ought to carry greater weight than decisions made subject to the distorting short-term incentives that affect state agents litigating live controversies. State practice thus seems at worst ambiguous on the question, and in no event a source of such clarity as to override the other considerations outlined herein.
>
> The doctrinal path is clear, in short, to implement the analysis suggested in this Article. Tribunals have every reason to put paid to the restrictive approach and restore the bargained-for meaning of the ICSID Convention.

646. He adds further:[1168]

> Given the drafting history of the ICSID Convention and the practical advantages of restraint, tribunals should exercise near-total deference to state definitions of "investment." So long as an activity or asset is colorably economic in nature, it should

[1161] Resp. Mem. on Juris., para. 165; **RL-0048**, Dolzer/Schreuer, *Principles* (2012) (Respondent's excerpt), pp. 60 *et seq*.

[1162] Resp. Mem. on Juris., para. 165; **RL-0049**, Schreuer, *Commentary* (first excerpt), p. 117.

[1163] Resp. Mem. on Juris., para. 165.

[1164] Cl. Mem. on Juris., para. 59, referring to Resp. Mem. on Juris., para. 165.

[1165] Cl. Mem. on Juris., para. 59; **CL-0017**, VCLT, Art. 32.

[1166] Cl. Mem. on Juris., para. 108.

[1167] **CL-0147**, Mortenson, pp. 311-312.

[1168] **CL-0147**, Mortenson, pp. 315, 318.

> constitute an investment under Article 25. On this approach, every single enterprise that has been rejected by the restrictive approach would pass muster. In fact, none of them would be particularly close calls.
>
> This does not strip the investment requirement of meaning. It simply places primary control over that meaning back in the hands of the states parties to the Convention. Nor, it should be noted, does it totally eliminate the tribunal's role of gatekeeper. In the apt formulation of one tribunal, "something absurd" can still be excluded from ICSID jurisdiction. …
>
> …
>
> In the final analysis, the purpose of ICSID was to create a reliable forum that would empower states to strike a deal with potential sources of foreign capital: in exchange for foreigners' investment of energy, capital, and effort, host governments would create a legally secure environment in which to operate. ICSID is thus a procedural enabling mechanism for a complicated economic principle that can be taken advantage of by anyone who chooses to join—and can be ignored by anyone who wants to stay out. So long as states do not propose facially absurd definitions of "investment" that are not grounded in a plausibly economic activity or asset, the best course is to let member nations agree on the development infrastructure as they see fit. The whole point of the grand bargain is that states are free to decide what kinds of foreign economic enterprise to encourage as a way of developing their domestic economies. ICSID tribunals should not stand in the way.

647. The Respondent relies on the Report of the Executive Directors, as addressed in Professor Schreuer's commentary. The relevant extract provides in full:[1169]

> In the debate over the draft for the Executive Directors' Report, Mr. Broches recalled that none of the suggested definitions for the word "investment" had proved acceptable. He suggested that while it might be difficult to define the term, an investment was in fact readily recognizable. He proposed that the Report should say that the Executive Directors did not think it necessary or desirable to attempt a definition … . After some further debate about the desirability of a definition, the more neutral Statement was adopted that no attempt had been made to define the term "investment" … . Historically, this is, of course, incorrect. There were a number of attempts but they all failed.
> The relevant portion of the Report of the Executive Directors, as adopted, says:
>
> > 27. No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so

[1169] **RL-0049**, Schreuer, *Commentary* (first excerpt), paras. 119-121 (footnotes omitted).

> desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).
>
> Therefore, the Convention offers no explanation of the concept of investment. It is left to the parties what kinds of investments they wish to bring to ICSID. The only possible indication of an objective meaning that can be gleaned from the Convention is contained in the Preamble's first sentence, which speaks of: "the need for international co-operation for economic development and the role of private international investment therein". This declared purpose of the Convention is confirmed by the Report of the Executive Directors which points out that the Convention was "prompted by the desire to strengthen the partnership between countries in the cause of economic development". Therefore, it is arguable that the Convention's object and purpose indicate that there should be some positive impact on development. But it does not necessarily follow that an activity that does not contribute to the host State's development cannot be an investment in the sense of Art. 25 and is hence outside the Centre's jurisdiction … .

iii. Teachings of the Most Highly Qualified Publicists

648. As noted above, both Parties have relied upon the commentary of Professor Schreuer (and the Claimants on Professor Mortenson), which in the context of the ICSID Convention may properly be regarded as teachings of the most highly qualified publicist(s).

649. As pointed out by the Claimants, the Respondent's argument that the ICSID Convention imposed the criteria it characterises as the "*Salini test*" was based on "*typical*" indicators of an investment identified by Professor Schreuer in the first edition of his treatise, dated 2001, as referred to in the prior award in *Joy Mining v. Egypt*.[1170] As the Claimants further point out, Professor Schreuer subsequently criticised the prior decision in *Salini v. Morocco* (and its successors) for overreading Article 25 of the ICSID Convention "*by transforming the criteria into a test*".[1171]

650. In his second edition, dated 2009, Professor Schreuer states:[1172]

> The development in practice from a descriptive list of typical features towards a set of mandatory legal requirements is unfortunate. The First Edition of this Commentary cannot serve as authority for this development. To the extent that the "*Salini* test" is applied to determine the existence of an investment, its criteria should

[1170] *See* **RL-0050**, *Joy Mining v. Egypt*, fns. 11, 18.

[1171] Cl. Mem. on Juris., para. 111.

[1172] **RL-0055**, Schreuer, *Commentary* (second excerpt), paras. 171-172.

> not be seen as distinct jurisdictional requirements each of which must be met separately. …
>
> A rigid list of criteria that must be met in every case is not likely to facilitate the task of tribunals or to make decisions more predictable. The individual criteria carry a considerable margin of appreciation that may be applied at the tribunal's discretion.

651. Professor Mortenson further notes that the 'test' was borne out of a "*basic misunderstanding of the process that created Article 25*", the drafting history shows that "*the three core elements of the* Salini *test were explicitly* ***considered and rejected***", and that:[1173]

> it is clear that the restrictive approach's core jurisdictional criteria were rejected during the negotiation process, despite strenuous and repeated efforts to incorporate them. But that still leaves the question: what limiting effect *did* the drafters understand the "investment" requirement to have? There is a good case that the historical agreement was for the requirement to have *no* administrable effect—that it is a nonjusticiable norm whose enforcement depends solely on the give and take among political entities.

iv. Prior Decisions and Awards

652. Finally, regarding the definition of "*investment*", both the Claimants and the Respondent rely on a large number of prior decisions and awards. The Tribunal considers those prior rulings below.

653. Preliminary, the Tribunal recognises that, whilst prior rulings do not create binding precedent, there is a benefit to seeking to find consistency where possible. As noted by the tribunal in the prior decision in *Saipem v. Bangladesh*, this Tribunal also "*is of the opinion that it must pay due consideration to earlier decisions of international tribunals*", that "*subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases*", and that "*it has a duty to seek to contribute to the harmonious development of investment law and … towards certainty of the rule of law*".[1174]

654. To support its case for the existence of an additional ICSID Convention Article 25(1) jurisdictional hurdle, the Respondent relies on prior rulings that followed the approach in

[1173] **CL-0147**, Mortenson, pp. 280-281, 299 (emphasis in original).

[1174] **CL-0140**, *Saipem v. Bangladesh*, para. 90.

Salini v. Morocco, all postdating the first edition of Professor Schreuer's treatise but pre-dating his second edition clarification above that the "*Salini test*" criteria "*should not be seen as distinct jurisdictional requirements each of which must be met separately*" and that a "*rigid list of criteria that must be met in every case is not likely to facilitate the task of tribunals or to make decisions more predictable*". Those prior rulings include in particular:

a. *Joy Mining v. Egypt* ("[t]*he parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention*" or otherwise Article 25 "*would be turned into a meaningless provision*");[1175] and

b. *Mitchell v. DRC* ("*while Art. 1(6) ECT may be a starting point for assessing whether certain activities in the host state can be considered an investment, Art. 25(1) ICSID Convention works as a controlling and corrective element*").[1176]

655. In response, the Claimants submit that the conclusion in *Joy Mining v. Egypt*, that ICSID Convention Article 25(1) "*works as a controlling and corrective element*" of the definition of "*investment*", was rejected in subsequent rulings,[1177] including:

a. *MHS v. Malaysia*, where the *ad hoc* committee found that the applicant had "*unquestionably made an 'investment' within the meaning set out in the UK-Malaysia BIT, and that the sole arbitrator did not reach another considered conclusion*", and concluded that the "*objective content*" of Article 25(1) was limited to "*(a) the dispute being a 'legal dispute'; and (b) the parties to the dispute being an investor from one Contracting State and another Contracting State*";[1178] and

b. *Gavrilović v. Croatia*: where the tribunal found that the "*Salini test*" "*may be useful in certain circumstances; for instance, where a tribunal is concerned that a BIT or contract definition of investment is so broad and overreaching as to capture transactions that manifestly are not investments under any acceptable conception*",

[1175] Resp. Mem. on Juris., para. 167; **RL-0050**, *Joy Mining v. Egypt*, paras. 49-50.

[1176] Resp. Mem. on Juris., para. 167; **RL-0051**, *Mitchell v. DRC*, para. 31.

[1177] CL. Mem. on Juris., paras. 65 *et seq.*, referring to Resp. Mem. on Juris., para. 166; **RL-0050**, *Joy Mining v. Egypt*, para. 49.

[1178] CL. Mem. on Juris., para. 66; **CL-0145**, *MHS v. Malaysia*, Annulment, paras. 61, 71-72.

but generally "[i]*n entering into* [a BIT]*, State parties agree to protect certain kinds of economic activity, and in providing that disputes between investors and States relating to that activity may be resolved through arbitration, they evince their belief that such activity constitutes an 'investment' within the meaning of the ICSID Convention*", and "*judgment as to which economic activities constitute investments should be given considerable weight and deference*", requiring "*compelling reasons to disregard such a mutually agreed definition of investment*").[1179]

656. The Respondent further relies on six additional prior rulings by ICSID tribunals to show that host State agreement or consent to receive or admit the investment is required to show contribution to the host state and that an investment had been made.[1180] However, for each of these prior rulings, the Claimants argue that they were distinguishable. The Tribunal considers each below.

657. First, in *CMS v. Argentina*, the Respondent relies on the tribunal's finding that "*questions of general economic policy, not directly related to the investment, as opposed to measures specifically addressed to the operations of the business concerned, will normally fall outside the jurisdiction of the Centre*", unless "*adopted in violation of specific commitments given to the investor in treaties, legislation or contracts*".[1181] The Claimants counter that the tribunal specifically mentioned that a direct relationship giving rise to the jurisdiction of ICSID may be established provided the measures were adopted in violation of specific commitments given in the underlying treaties.[1182] The precise language used by the *CMS* tribunal is as follows:[1183]

> The ICSID Convention and the jurisdiction of the tribunal established under it were conceived as a system of adjudication of legal disputes arising directly out of an investment, a premise that is specifically included in Article 25(1) of that Convention. This definition excludes quite clearly two kinds of disputes. First, it excludes non-legal questions and, second, it excludes disputes that do not arise directly out of the investment concerned.

[1179] Cl. Mem. on Juris., paras. 62, 114(viii); **CL-0143**, *Gavrilović v. Croatia*, paras. 192-193.

[1180] *See* Resp. Mem. on Juris., paras. 211 *et seq*.

[1181] Resp. Mem. on Juris., para. 212; **RL-0058**, *CMS v. Argentina*, para. 27.

[1182] Cl. Mem. on Juris., para. 130(i).

[1183] **RL-0058**, *CMS v. Argentina*, paras. 26-27.

> It follows that, in this context, questions of general economic policy not directly related to the investment, as opposed to measures specifically addressed to the operations of the business concerned, will normally fall outside the jurisdiction of the Centre. A direct relationship can, however, be established if those general measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts. What is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments.

658. This language partly tracks that of *MHS v. Malaysia*, referring to the ICSID Convention scope of jurisdiction as extending only to legal disputes (i.e., excluding non-legal disputes), and requiring an investor from one Contracting State in a dispute with another Contracting State. In *CMS v. Argentina*, the issue was that the dispute must arise directly out of the investment concerned. In both cases, in the view of this Tribunal, the reference is to the ICSID Convention as a system of adjudication for the enforcement of substantive rights. As to the source of substantive rights, as noted in paragraph 27 of the *CMS* prior decision, these derive from the "*specific commitments given to the investor in treaties, legislation or contracts*", in this case the ECT. Therefore, in so far as the question of a direct relationship is relevant, that is answered by reference to the substantive rights derived from the ECT.

659. Secondly, the prior decision in *Alcoa Minerals v. Jamaica* did concern a private company that had "*invested substantial amounts in a foreign State in reliance on an agreement with that state*", as the Respondent submits.[1184] However, as the Claimants point out, the dispute arose specifically pursuant to an agreement between the parties that provided contractually for ICSID arbitration. The excerpt provides the relevant facts as follows (emphasis added):[1185]

> In an agreement concluded in 1968 for a term of 25 years, Alcoa agreed with Jamaica that it would construct an alumina refining plant in Jamaica. Under the agreement, Jamaica would grant Alcoa long-term concessions for the mining of bauxite in Jamaica. The agreement contained a 'no further tax' clause according to which Jamaica would not impose on Alcoa's mining and refining operations any further, or other, taxes than those specifically provided in the agreement. ***The agreement also contained an arbitration clause referring to arbitration under ICSID any dispute arising under the agreement which the parties failed to settle amicably***.

[1184] Resp. Mem. on Juris., para. 213.

[1185] **RL-0059**, *Alcoa Minerals v. Jamaica*, p. 1.

660. Thirdly, in the prior award in *Mihaly v. Sri Lanka*, the Respondent submits that the tribunal found it was "*unable to accept as a valid denomination of 'investment', the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment*".[1186] This prior award gave rise to considerable discussion by the Claimants (as set out above). In essence, they seek to distinguish it from the current arbitration on the bases that (i) it involved pre-contractual activity specifically to obtain a contractual arrangement, (ii) it was subject to an express legal disclaimer, (iii) the activity was limited to exchange of letters, and (iv) the activity was conducted outside the host State.

661. The relevant reasoning in *Mihaly v. Sri Lanka* is as follows:[1187]

> In the absence of a generally accepted definition of investment for the purpose of the ICSID Convention, the Tribunal must examine the current and past practice of ICSID and the practice of States as evidenced in multilateral and bilateral treaties and agreements binding on States, notably the United States–Sri Lanka BIT. It is for the Tribunal to determine the meaning or definition of "investment" for this purpose as a question of law. Opinions of experts on the theory and practice of multinational corporations are not to be identified with the teachings of the most highly qualified publicists of the various nations, which as such constitute subsidiary means for the determination of rules of law. Only subject to Article 59 of the Statute of the International Court of Justice are judicial decisions to be considered as such subsidiary sources of law.
>
> The Tribunal concludes in regard to the three Letters of Intent, of Agreement and of Extension successively issued by and on behalf of the Government of Sri Lanka in the course of 1993 and 1994 that none of these Letters contains any binding obligation either on Sri Lanka or on the Claimant. As the Tribunal has already stated, in the circumstances of this case, they are not to be treated in any way as signifying acceptance by the host State, Sri Lanka, of such expenditures as constituting an investment within the sense of the [ICSID] Convention. There is no evidence which could contradict the contingent and non-binding character of the three Letters of Intent, of Agreement and of Extension.

662. The critical element of that reasoning, in the view of this Tribunal, is that the three Letters of Intent, Agreement and Extension issued by Sri Lanka did not contain "*any binding obligation either on Sri Lanka or on the Claimant*". On that basis, the tribunal determined

[1186] Resp. Mem. on Juris., para. 216; **RL-0060**, *Mihaly v. Sri Lanka*, para. 61.

[1187] **RL-0060**, *Mihaly v. Sri Lanka*, paras. 58-59.

that "*in the circumstances of this case*", they were not to be treated as expenditures constituting investment within the ICSID Convention.

663. The *Mihaly v. Sri Lanka* prior award is slightly more cryptic as to the source of the definition of "*investment*" pursuant to the relevant bilateral investment treaty. In this regard, it looked to other sources of law for "*extended meaning*" of "*investment*", but evidently against the suggestion that pre-investment in developing countries automatically would qualify, as below:[1188]

> The Tribunal is of the view that *de lege ferenda* the sources of international law on the extended meaning or definition of investment will have to be found in conventional law or in customary law. The Claimant has not succeeded in furnishing any evidence of treaty interpretation or practice of States, let alone that of developing countries or Sri Lanka for that matter, to the effect that pre-investment and development expenditures in the circumstances of the present case could automatically be admitted as "investment" in the absence of the consent of the host State to the implementation of the project. It should be observed that while the US-Sri Lanka BIT contains provisions regarding the definition of investment and conditions for its admission, they recognize the Parties' prerogative in this respect.
>
> The Tribunal is consequently unable to accept as a valid denomination of "investment", the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment. The only reference made by the Claimant to the BIT, in particular, Article II(2), is not to any extended definition of investment but to existing "investment" or investment *in esse* or in being, which is to be accorded "fair and equitable treatment". In the case under review, the Tribunal finds that the Claimant has not provided evidence of such an investment in being which qualifies for "full protection and security." …

664. Although Article 1 of the US-Sri Lanka bilateral investment treaty defines "*investment*" in some detail and not dissimilarly to the definition in the ECT,[1189] it would appear that the

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[1188] **RL-0060**, *Mihaly v. Sri Lanka*, paras. 60-61.

[1189] *See* US-Sri Lanka BIT, entered into force 1 May 1993 (available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2295/download), Art. 1(1)(a):

> 1. For the purposes of this Treaty,
>
> (a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:
>
> (i) tangible and intangible property, including rights such as mortgages, liens and pledges;
>
> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
>
> (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
>
> (iv) intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings, patentable inventions in all fields of human endeavour, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and
>
> (v) any right conferred by law or contract, and any licenses and permits pursuant to law.

tribunal in *Mihaly v. Sri Lanka* was seeking to extend that definition to encompass pre-investment expenditure, which the parties to that dispute had expressly provided did not give rise to any binding obligation.

665. Fourthly, in the prior award of *Zhinvali v. Georgia*, the Respondent relies on the finding that there was no "*investment*" within the meaning of the relevant investment protection law of the host State, "*because the 'development costs' … have not been shown to satisfy the definition of that term under the governing law of this case and, second, because the Government of Georgia did not otherwise agree or 'consent' to undertake State responsibility for those costs as a qualifying 'investment' …*".[1190]

666. The tribunal in *Zhinvali v. Georgia* discusses the prior award in *Mihaly v. Sri Lanka* in some detail in the context of the meaning of investment.[1191] It goes on to discuss the definition of "*investment*" in Georgian investment law as follows (without footnotes):[1192]

> As earlier mentioned, both Parties are in accord that the law of Georgia is to govern this case. The Tribunal must follow this choice, barring some incompatibility of that law with international law, under the "governing law" rules outlined in Part VI.C. Thus, the Tribunal must first determine whether any or all of the Claimant's purported expenditures qualify as an "investment" under the 1996 Georgia Investment Law. If these expenditures do not so qualify, then that is the end of the matter insofar as ICSID jurisdiction is concerned, unless that Georgia law is in some fashion violative of, or inconsistent with, international law, which proposition neither Party has alleged.

667. It follows from this, as submitted by the Claimants, that the scope of "*investment*" in *Zhinvali v. Georgia* was determined based on the underlying municipal investment law, which is similarly phrased to the US-Sri Lanka bilateral investment treaty definition and the ECT, not the ICSID Convention.[1193] The *Zhinvali* tribunal went on to consider the evidence of costs incurred by the claimant and the circumstances and context of those costs. It concluded that:

[1190] Resp. Mem. on Juris., para. 217; **RL-0061**, *Zhinvali v. Georgia*, para. 415.

[1191] *See* **RL-0061**, *Zhinvali v. Georgia*, paras. 343-349.

[1192] **RL-0061**, *Zhinvali v. Georgia*, para. 375.

[1193] **RL-0061**, *Zhinvali v. Georgia*, para. 415.

a. the evidence was lacking for the necessary expenditure ("*all we have is evidence of expenditures by ZDL's shareholders, and this evidence is more relevant to a claim for restitution rather than for unjust enrichment, at least in the absence of proof that the amount of the development costs incurred by the shareholders is in fair equation to the purported value of the benefit received by Georgia*", and "*what was provided are hotel and airfare chits, timekeeping records and other such materials of the shareholders, without the necessary linkage of those items to any 'intellectual property' valuation*", whilst "*the Claimant has failed to produce the necessary evidence of the monetary worth of any supposed 'intellectual properly' benefit received by the Respondent prior to the commencement of this arbitration*");[1194]

b. the underlying activity was subject to an "*exclusivity period*" during which "*the Respondent expressly insisted that all expenses involved in pushing the Project forward were for the Claimant's account*",[1195] and

c. "*the Tribunal* [saw] *the opposite of conduct implying consent because Georgia expressly denied any State responsibility for expenditures of the Claimant during this time period*".[1196]

668. Accordingly, the claimant in *Zhinvali v. Georgia* did not so much fail to meet a higher threshold for "*investment*" pursuant to the ICSID Convention Article 25(1) or otherwise, but rather failed to discharge its burden of proof to show that the qualifying investor had incurred expenditure, which was not subject to the express exclusivity period for which the parties agreed the claimant would cover its own costs.

669. Fifthly, in the prior award in *F-W Oil v. Trinidad and Tobago*, the Respondent relies on the tribunal having denied jurisdiction in respect of tender expenditures related to the preparatory works and the tribunal denied jurisdiction for lack for investment.[1197] Again, that tribunal focused on the definition of "*investment*" in the relevant investment treaty

[1194] **RL-0061**, *Zhinvali v. Georgia*, para. 386.
[1195] **RL-0061**, *Zhinvali v. Georgia*, para. 412.
[1196] **RL-0061**, *Zhinvali v. Georgia*, para. 412.
[1197] Resp. Mem. on Juris., para. 218; **RL-0062**, *F-W Oil v. Trinidad and Tobago*, para. 125.

(again similarly broad to the ECT) rather than the ICSID Convention. In this regard it noted that "[t]*he intention to establish a comprehensive and wide-ranging definition of what is to constitute an 'investment' is plain, and needs no further demonstration*", noting further in the footnote that:[1198]

> … the definition is so drawn that the vehicle through which an investment is made or operated itself becomes an "investment"; hence, for example, the reference to "a company" in sub-paragraph (d)(i). The intention was no doubt to ensure that an investment vehicle taking the form of a locally incorporated company did not find itself falling outside the nationality requirements in the accompanying definition of "covered investment", and this is readily understood, despite a certain element of artificiality that results from time to time … .

670. The tribunal further required, however, that "*the investor must show the existence of some form of legally enforceable right, or its equivalent*".[1199] It took the view that this "*should not be approached in a narrow technical way, but rather in the context of the intention animating the BIT and in the light of its terms*",[1200] elaborating as follows (emphasis added):[1201]

> [T]he notion of an "investment" ("covered investment"), the axis around which the operation of the BIT revolves, can only realistically be understood as referring to something in the nature of a legal right or entitlement. This appears clearly enough from the extensively itemized definition of "investment" …, each item in which is either a form of property or is expressed as a "right". It is admittedly the case that the definition … is on its own terms not exhaustive; it is expressed merely to "include" the forms of investment itemised on the list. The common thread is nevertheless so strong that the Tribunal is unable to conclude that the intention can have been to bring within the scope of the term claims other than those **based on proprietary or contractual rights**, which, in the Tribunal's view, corresponds in any event to the whole underlying notion of an "investment". Further weighty support for this interpretation of the BIT can be drawn from Articles II, III, IV & V, which lay down the main substantive protections to be accorded by each part to "covered investments", such as national and most-favoured-nation treatment, fair and equitable treatment, full protection and security, protection against arbitrary expropriation, freedom to make transfers, and so forth. It would be difficult, or even

[1198] **RL-0062**, *F-W Oil v. Trinidad and Tobago*, para. 124 and fn. 59.

[1199] **RL-0062**, *F-W Oil v. Trinidad and Tobago*, para. 124.

[1200] **RL-0062**, *F-W Oil v. Trinidad and Tobago*, para. 124.

[1201] **RL-0062**, *F-W Oil v. Trinidad and Tobago*, para. 125.

> impossible, to apply these standards in any meaningful way to claims falling short of actual proprietary or contractual rights.

671. Having limited claims to those based on proprietary or contractual rights, the tribunal applied this reasoning to the particular facts. Here, it focused on tender expenditure in the context of "[d]*isappointed expectations*" not being enough, and required "*some other ingredient such as an express or implied request to perform the work or make the expenditure*", recognising that "[c]*ompetitors for a project often expend work or deploy equipment and materials in advance to gain a tendering advantage or a flying start on the project once it is underway*".[1202] It went on to point out that the insurmountable hurdle in that case was that "[f]*rom the outset of the bidding process it had been made clear*" that "*the Terms of Bid provided that* [the Respondent's representative] *would not be responsible for costs or expenses incurred by bidders in connection with the preparation, submission and presentation of bid proposals*".[1203]

672. Therefore, the reasoning in *F-W Oil* ultimately brings it into line with the award in *Zhinvali v. Georgia*: a claim cannot be based on project expenditure that was excluded from liability.

673. The sixth and final prior award relied on by the Respondent in this regard is *Blusun v. Italy*, where it submits that the actual construction of power plants was necessary to consider an activity as investment.[1204] The Claimants rebut that there the tribunal nevertheless did find "*investments*" to exist under the ECT and that, even under the *Salini* criteria, "*the Claimants clearly had an investment for ICSID purposes*", including because after "*merely preparatory work*" is concluded and a process involving substantial resources is commenced, "*the project qualifies as an investment*", which the Claimants submit is "*the more accurate characterisation*" of their activities.[1205]

674. Accordingly, in those prior rulings relied on by the Respondent in support of a higher threshold pursuant to the ICSID Convention or otherwise in relation to preparatory or development work associated with an investment, tribunals denied the existence of an

[1202] **RL-0062**, *F-W Oil v. Trinidad and Tobago*, para. 141.

[1203] **RL-0062**, *F-W Oil v. Trinidad and Tobago*, para. 143.

[1204] Resp. Mem. on Juris., para. 219; **RL-0063**, *Blusun v. Italy*, para. 262.

[1205] Cl. Mem. on Juris., paras. 130(xi); **RL-0063**, *Blusun v. Italy*, paras. 262-263, 271.

investment where the host State had made it an express condition of the tender or bidding process that costs of that work would not be recoverable from the host State, or where the preparatory or development work was conducted solely in the hope of a contract or other right without more.

675. The Claimants refer to a multitude of additional prior awards, as set out in the summary of their case above. Specifically regarding the ECT, for example, the prior decision in *RREEF v. Spain* found that in so far as the "*Salini test*" criteria are "*additional to the definition contained in the ECT … there is no textual or other basis for adding them*", and:[1206]

> The definition of investment must be interpreted according to article 31 of the Vienna Convention on the Law of Treaties and not in accordance with tests, criteria or guidelines beyond the terms, the context or the object and purpose of the ECT. There is no test, set of criteria or guidelines that can or should be relied upon in international law to restrict or replace the definition that exists in the ECT. There is no reason to place any such test, set of criteria or guidelines on the language of Article 25 of the ICSID Convention.

676. The Respondent requests that the Tribunal prefer several non-ECT prior awards, including *Quiborax v. Bolivia*[1207] and *KT Asia v. Kazakhstan*,[1208] which consider an objective notion of "*investment*" and the application of the *Salini* criteria, which require, at a minimum, contribution, duration, and risk.[1209]

677. As a possible 'third way', the Claimants further acknowledge that in the prior award in *CMC v. Mozambique*, "*a common middle ground between the double-barrelled approach and the deferential approach has developed which involves the consideration of whether the definition of 'investment' under the relevant treaty does not exceed what is permissible under the ICSID Convention*",[1210] although they point out that they are unaware of "*a single*

[1206] **CL-0023**, *RREEF v. Spain*, Jurisdiction, para. 157.

[1207] **RL-0052**, *Quiborax v. Bolivia*, para. 212.

[1208] **CL-0163**, *KT Asia v. Kazakhstan*, para. 165.

[1209] *See Zaur Leshkasheli and Rosserlane Consultants Limited v. Republic of Azerbaijan*, ICSID Case No. ARB/20/20, Award, 21 March 2025, paras. 475-477.

[1210] Cl. Mem. on Juris., para. 69; **CL-0149**, *CMC v. Mozambique*, para. 193.

example of international arbitral practice where the definition of 'investment' in the ECT has been found to exceed what is permissible under the ICSID Convention".[1211]

678. Ultimately, given that the Tribunal's conclusion below is that the investment in the current arbitration would meet the criteria under each of those approaches, it is not necessary for it to wade into the debate concerning the existence of the so-called "*double-barrelled approach*".

679. Specifically as to the ECT requirement, a qualifying investment pursuant to the ECT must fall within the broad ECT Article 1(6) definition, which includes "*every kind of asset*" (not limited to but informed by those listed at Article 1(6)),[1212] provided it is associated with an Economic Activity in the Energy Sector (i.e., concerns the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products, which include electrical energy), then an asset associated with production of electrical energy through the development of an offshore wind farm may be a qualifying investment (if other requirements are met as discussed below).

b. Application of the "Investment" Definition to the Facts

680. For the reasons outlined above, the Tribunal has determined that a qualifying investment for an ECT claim must meet the investment criteria in ECT Article 1(6), and is not subject to a different or higher criteria pursuant to ICSID Convention Article 25(1), either through the application of a so-called "*Salini test*" or otherwise.

681. ECT Article 1(6) is not a meaningless threshold, and an investment must satisfy some important elements to qualify within that definition.

682. Even without the "*double keyhole*" (or "*double barrel*") approach advocated by the Respondent, the Claimants "*investment*" must:

[1211] Cl. Mem. on Juris, para. 69. *See also* footnote 949 above.

[1212] **CL-0151**, *Electrabel v. Hungary*, Jurisdiction, para. 5.47; **CL-0088**, *Petrobart v. Kyrgyzstan*, para. 105; **CL-0152**, *Energoalians v. Moldova*, para. 2.

a. constitute an "*asset, owned or controlled directly or indirectly by an Investor*", such as those listed at ECT Articles 1(6)(a) to (f) including property, companies, debts claims, intellectual property, returns and contractual rights;

   i. for Article 1(6)(b), constitute "*a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise*";

   ii. for Article 1(6)(d), constitute "*claims related to intellectual property rights or returns*";

   iii. for Article 1(6)(f), constitute a "*right conferred by law to undertake any Economic Activity in the Energy Sector, or conferred by contract or by virtue of any licences and permits granted pursuant to law*";

b. in all cases involve "*Economic Activity in the Energy Sector*", which is "*an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products (Article 1(5))*"; and

c. in all cases such "*Energy Materials and Products*", must be an item or items "*included in Annexes EM I or EM II*" (Article 1(4)), which do not "*mention offshore wind energy as energy materials or products*",[1213] but does include "*electrical energy*".[1214]

683. Based on the delimitation set out above, the First, Second and Third Claimants must evidence their investment in shares in the Fourth, Fifth and Sixth Claimants, and the Fourth, Fifth and Sixth Claimants must evidence their investment in intellectual property and/or rights conferred by law, which, in turn, must be shown to involve an economic activity concerning the production of electrical energy in Germany.

[1213] Resp. Mem. on Juris., para. 174.

[1214] Cl. Mem. on Juris., para. 74.

684. A temporal issue arises out of the individual Claimants' respective dates of incorporation and/or dates of alleged investments in Germany, based on the following:

a. the Consent Applications (the initial alleged investment decision) were submitted in June/July 2008 by the First Claimant's UK registered affiliate Mainstream Renewable Power (UK) Ltd, which is not a party to these proceedings;

b. the First Claimant was incorporated in Ireland in February 2008 and submits it had an "*indirect interest*" in Mainstream Renewable Power (UK)) Ltd, although has not submitted evidence of its shareholding (or other interest) at the date of the Applications;

c. Mainstream Renewable Power (UK) Ltd transferred the Consent Applications to the Fifth Claimant in July 2009, by which time the 2008 SeeAnlV had entered into force; and

d. the Fourth and Sixth Claimants were not incorporated until well after the 2012 SeeAnlV had entered into force, becoming the direct investors in March 2013.

685. The Tribunal does not consider this temporal issue to be determinative of the question of whether or not an investment existed for each Claimant. However, the timing of each Claimant's investment may have a bearing on the necessary elements of breach of the fair and equitable treatment standard, including the date on which each Claimant's alleged legitimate expectations should be assessed. Moreover, if relevant, it would also impact the establishment and valuation of any loss.

686. For the purpose of the existence of a qualifying investment, the First, Second and Third Claimants have satisfactorily evidenced their investment in shares in the Fourth, Fifth and Sixth Claimants at least from March 2013. There is no real dispute as to the fact that the shares exist. The Respondent's arguments that the First, Second and Third Claimants did not contribute to the value of the investment because (i) the First Claimant "*initiat[ed], coordinat[ed] and finance[ed]*" the activity,[1215] (ii) the Second Claimant only set up the

[1215] Resp. Mem. on Juris., para. 237.

Fourth, Fifth and Sixth Claimants after the activity was almost completed with their incorporation making "*no significant contribution to Respondent's economic development at all*",[1216] and (iii) the Third Claimant was completely inactive other than holding shares in the Second Claimant,[1217] are not relevant to the issue whether or not an investment in Germany in the form of shares exists. Instead, those points go to the timing, nature and value of that investment and, if necessary, assessment of any loss.

687. ECT Article 1(6) treats shares as qualifying investments and, therefore, in so far as the First, Second and Third Claimants held shares in the Fourth, Fifth and Sixth Claimants, they hold qualifying investments in the form of those shares.

688. As to the further requirement for an ECT qualifying investment to concern economic activity in the energy sector, provided the Fourth, Fifth and Sixth Claimants' economic activity concerned the production of offshore wind in Germany, then the First, Second and Third Claimants' shares in the Fourth, Fifth and Sixth Claimants will also qualify. In that regard, having carefully considered the Claimants' characterisation of the Fourth, Fifth and Sixth Claimants as the Consent Application holders (the Fifth from July 2009 and the Fourth and Sixth from March 2013), and as primary developers of the Projects, the Tribunal is satisfied that the Consent Application procedure and development was associated with economic activity in the energy sector in the form of production of electrical energy through offshore wind generation facilities. Although none of the Claimants ever intended to construct facilities or produce electrical energy, their business model was to develop the offshore wind farm Projects up to financial close in order to sell these ready for an owner/operator to construct and produce electrical energy for the German market.

689. According to the Respondent, this activity should not result in a qualifying investment, because – even without the alleged State measures – it would have "*never left the early stages; they were pre-investment activities only*", and only involved "[p]*reparatory measures for an investment, i.e. assessing whether the investment is possible and/ or will*

[1216] Resp. Mem. on Juris., para. 238.

[1217] Resp. Mem. on Juris., para. 239.

be made are an aliud *to the construction and operation of a power generation facility*".[1218] Having rejected the application of a so-called "*Salini test*" requiring an additional level of economic contribution in the host State beyond what is required to meet the ECT Article 1(6) definition, the Tribunal considers whether or not a qualifying investment within the ECT, in the economic activity of electrical energy, must involve the actual construction or operation of a power plant, as opposed to the development of a project for construction and operation to be sold at financial close (i.e., once all permitting, legal, technical, construction and finance requirements were in place).

690. In so far as the ECT investment protections exclude protection of any element of pre-investment activity (discussed below in the context of fair and equitable treatment) it is the protection that is excluded, not the activity, from the definition of investment. Provided an investment meets the requirements of ECT Article 1(6), it will be entitled to qualification as an investment. Nothing in ECT Article 1(6) narrows the phase in the investment cycle and, therefore, provided an investment results in a covered asset, investment in development is still investment.

691. In this regard, the Tribunal interprets the language of ECT Article 1(6), providing that a qualifying investment must be "***associated with*** *an Economic Activity in the Energy Sector*" as being broad in scope and application. In particular, the development of renewable energy infrastructure is associated with the economic activity of producing electrical energy. The nature of renewable infrastructure development, and particularly offshore wind, often involves different stakeholders undertaking different phases of early and late-stage development, construction and operation (and if required, decommissioning or repurposing). Therefore, the fact that the Claimants always intended to exit the investment prior to commencement of construction, and well before operation, did not mean that their pre-financial close development activity was not associated with the ultimate construction and operation with the meaning of ECT Article 1(6).

[1218] Resp. Mem. on Juris., para. 179.

692. As to the Respondent's separate argument that ECT Article 26(1) concerns only disputes arising out "*of investments already made and not of investments still in the making*",[1219] the Tribunal finds no such language in the wording of Article 26(1).

693. The Tribunal does find at ECT Article 1(6), read together with Articles 1(4) and 1(5), a comprehensive definition of "*investment*" with a number of critical elements that must be met. There must be an investment in economic activity in the energy sector, as defined. As set out above, the Tribunal is satisfied that different stakeholders may invest in different stages of the energy cycle, as well as at different phases of development of a particular project. Just as an investor in upstream energy related activity (traditionally coal, oil and gas nuclear exploration and production and potentially critical minerals and metal mining such as copper or lithium for renewables electricity generation and storage infrastructure) may be unrelated to the power plant owner/operator that utilises its resource, in the renewable sector (currently scaling up globally as States implement their commitments pursuant to the Paris Agreement (an instrument within the UNFCCC framework)), the developer also may be unrelated to the power generation facility owner/operator. The same is true of the engineering, procurement and construction ("**EPC**") contractor, which may construct the power generation facility but again be unrelated (save for its EPC contract) to the owner/operator. All of these stakeholders are potential investors in efficient production of energy in accordance with climate and environmental standards.

694. The evidence before this Tribunal (as discussed below) is that a fairly typical model for new offshore wind projects is for an independent developer to take on the project in the first instance. The investment may be substantial: the permitting, environmental and technical feasibility testing, infrastructure design, arranging financing (or at least achieving bankability) and putting in place EPC contracts can be a time-consuming and complicated process, requiring substantial specialist expertise. Investing in the development phase of a new offshore wind farm is plainly a qualifying investment under the ECT.

695. If and when a renewable development project reaches financial close (or late-stage development) an owner/operator will purchase the development investment and complete

[1219] Resp. Mem. on Juris., para. 180.

the construction and connection phases prior to commencing operation and electricity generation. The project development phase is not construction and operation pre-investment; it is project development phase investment. In the same way a tree nursery plants or grafts seedlings to sell to foresters in long-term forestry investment, the nursery invests in early stage trees that are expected to be grown into forests. The economics are different as between the tree nursery and the forestry investments, but for the purpose of a qualifying investment, different investors investing at different phases of a product cycle are still investors.

696. Accordingly, and in particular in the renewable sector, this Tribunal does not consider it to be consistent with the purpose of the ECT "*to promote long-term cooperation in the energy field*", or consistent with its Preamble "[r]*ecalling the United Nations Framework Convention on Climate Change … and other international environmental agreements with energy-related aspects*" and "[r]*ecognising the increasingly urgent need to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes*", to read down the scope of protection for renewable energy within the ECT, including but not limited to the particular nature or phasing and stages of renewable project development. The subsequent ICJ Advisory Opinion further reinforces the nature and role of climate change related obligations in international law, again militating against reading down the ECT scope of protection for renewables, which are critical to climate change mitigation.

697. The more problematic element of the *ratione materiae* jurisdiction objection arises in the context of ECT Article 1(6)(f), requiring "*rights 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*".[1220] According to the Respondent, the SeeAnlV did not confer such rights, as "*there was no automatic legal right to a permit*" following a Consent Application.[1221]

[1220] Resp. Mem. on Juris., para. 187.

[1221] Cl. Mem. on Merits, para. 54.

698. As set out in the factual chronology above, the first Offshore Installations Ordinance (SeeAnlV):

a. entered into force in early 1997;

b. was designed to streamline the regulatory approval process for the development of offshore wind farms;[1222] and

c. underwent several amendments prior to the Claimants submitting their Consent Applications to develop the Projects in June and July 2008, including to include at Section 3 the permit procedure outlining legal requirements for approval (or consent) for an offshore wind farm, which provided:[1223]

> Refusal of approval
>
> Approval shall be refused if the safety and ease of transport is compromised or the marine environment is endangered without this being prevented or compensated by a time limit, conditions or restrictions. There are grounds for refusal in particular when:
>
> 1. the operation or effect of shipping facilities and navigation signs;
>
> 2. the use of shipping lanes or airspace or shipping would be impaired,
>
> 3. there is a risk of pollution of the marine environment within the meaning of Article 1 (1) No. 4 of the United Nations Convention on the Law of the Sea of 10 December 1982 …; or
>
> 4. the migration of birds is endangered.
>
> Approval may not be refused if there are no grounds for refusal within the meaning of sentence 1. …

699. Between the first Consent Application (Horizont I) and the second and third Consent Applications, the Draft Spatial Planning Ordinance was published.

700. Shortly after the Consent Applications were submitted, on 26 July 2008, the 2008 SeeAnlV entered into force,[1224] which:

[1222] **SBT-0013**, 1997 SeeAnlV.

[1223] **C-0073**, 2008 SeeAnlV (see also 2006 SeeAnlV amendment).

[1224] **EH-0003 / RL-0114**, 2008 SeeAnlV.

a. also contained at Section 3 legal requirements for refusal of approval of an offshore wind farm;

b. introduced new grounds to refuse approval or consent, including incompatibility with spatial planning ordinance and other overriding public interests; and

c. excluded public participation (pursuant to the Administrative Procedure Act Section 73(5), the Environmental Impact Assessment Act Section 9(1) and the 2008 SeeAnlV Section (2a)) for pre-existing Applications.

701. At the time of the 2008 SeeAnlV, the Draft Spatial Planning Ordinance remained a draft for public submissions and review.

702. Against that legislative framework in June and July 2008, the threshold jurisdictional question for the Tribunal is whether or not the Consent Applications submitted under the 2008 SeeAnlV conferred any legal right on the relevant Claimants (the others being shareholders in the Claimants with the alleged rights). That is, whether or not the Consent Application constituted a right conferred by law or contract or by virtue of any licences or permits granted. Had the Consent Application been approved, the requirements of ECT Article 1(6)(f) plainly would have been met. But, at the time of the alleged measures, it remained a Consent Application.

703. The Respondent submits that the wording of 2008 SeeAnlV Section 3 "*makes it clear that there was no automatic legal right to a permit*".[1225] It further submits that "*the permit according to SeeAnlV clearly cannot be regarded as being granted in order to undertake an economic activity in the energy sector*", including on the basis that the German Constitutional Court subsequently found that it "*merely confirms that the project is compatible with the provisions for the protection of the interests jeopardized by the operation of the installation, i.e. that the conditions for approval are met*".[1226]

[1225] Resp. Mem. on Juris., para. 190.

[1226] Resp. Mem. on Juris., para. 191; **RL-0017 / C-0021**, BVerfG June 2020 Decision, para. 76.

704. If it were the case that the Claimants had no legal rights at all arising out of the Consent Applications made pursuant to the 2006 SeeAnlV, in the specific circumstances of this case it would be difficult to accept that they had a qualifying asset in the form of "*rights conferred by law or by virtue of any licences and permits*" pursuant to ECT Article 1(6)(f). That would leave them only with alleged IP rights, pursuant to ECT Article 1(6)(d), discussed below.

705. The Claimants and the Respondent both accept that the 2008 SeeAnlV provided a "*regulatory approval process for the construction and operation of offshore wind farms in the German* [EEZ]", whereby "*regulatory approval was granted by the BSH on a 'first come, first served' basis (the '**priority principle**') and an approval decision by the BSH granted the relevant developer exclusivity over a site*".[1227] The "*priority principle*" operates takes effect in the approval process; up until consent is granted it does not operate. As pointed out by the Respondent, the Claimants had to deal with "*competing players want*[ing] *to develop parts of their chosen sites*".[1228] On that basis, it submits, "[t]*he situation of insecurity continued to the end which Claimants willingly and knowingly accepted when they decided on their own accord to conduct those preparatory studies and analyses*".[1229]

706. According to the Claimants, the German Constitutional Court (BVerfG) provides some clarity as to the legal nature of the Claimants' pre-consent position, i.e., it "*recognised the procedural positions reached by Mainstream in relation to the Projects as being protected under the German Constitution*".[1230] The question for this Tribunal is whether or not any procedural positions were recognised by the German Constitutional Court, and fall within the meaning of Article 1(6)(f).

707. The Respondent is adamant that they do not. According to the Respondent, it "*never made any other specific commitments or created obligations for itself vis-à-vis Claimants regarding their project development activities*", never provided or entered into any "*written*

[1227] Request for Arbitration, paras. 28, 30-31.

[1228] Resp. Mem. on Juris., para. 226, referring to Cl. Mem. on Merits, fn. 159.

[1229] Resp. Mem. on Juris., para. 226.

[1230] Cl. PHB, para. 77(iii).

endorsement, contract or legally binding relationship" with the Claimants and gave "*no agreement or consent – neither 'consent (in the form of a permit)' nor otherwise – ... to receive or admit*" the Claimants' activity in relation to the Projects as an investment.[1231] In its view:

a. "*anyone could start with exploration; anyone was free to choose a site that the respective player was interested in developing*",[1232]

b. the Respondent "*did not hold a tender, or protect players against one another*" or "*give any guarantees of any sort to any of the interested players*", and

c. therefore the Claimants "*knew their position was not secured, but in a permanent state of competition, and hence that they acted on their own accord*".

708. It explains in particular that "*consent cannot be taken from*" the 2008 SeeAnlV, including because:[1233] (i) there were various grounds for refusal (Section 3 "*is only illustrative and not conclusive*"), (ii) there was no commitment by the Respondent to consider the activity an investment, (iii) "*the need for an offshore grid connection always has to be considered*", per the German Constitutional Court,[1234] (iv) the Claimants did not fulfil the grid connection requirements based on the 2008 EnWG Extension,[1235] and therefore (v) a private decision to make an investment in reliance on remarks by politicians and officials does not constitute the required consent, i.e., a "*right conferred by law to undertake any Economic Activity in the Energy Sector, or conferred by contract or by virtue of any licences and permits granted pursuant to law*".[1236]

709. The Claimants do not argue that the procedural positions recognised by the BVerfG *per se* constituted a right conferred by law within the meaning of ECT Article 1(6)(f). Rather,

[1231] Resp. Mem. on Juris., paras. 224-225.

[1232] Resp. Mem. on Juris., para. 226.

[1233] Resp. Mem. on Juris., para. 227.

[1234] **RL-0017 / C-0021**, BVerfG June 2020 Decision, para. 115 ("*The grid connection is not an incidental circumstance, but a central requirement for the operation of an offshore wind energy plant. The grid connection requirement considerably relativizes the significance of the permit granted under the old law, because this did not provide certainty with regard to a timely grid connection perspective*").

[1235] Resp. Mem. on Juris., para. 229.

[1236] Resp. Mem. on Juris., paras. 230-231.

their case is based on the *de facto* existence of actual consent; that is, that the 1997 SeeAnlV (and 2008 SeeAnlV) did not permit the BHS *not* to grant consent given that the Claimants had met all of the requirements for consent within the meaning of the relevant regulation. It is a question of expert evidence as to whether or not the Claimants would in fact have satisfied all of the requisite elements of the 2008 SeeAnlV. But even assuming that were established, a right conferred by law is not the same thing as an entitlement to a right to be conferred by law if certain future steps occur.

710. The question whether or not the Claimants' alleged procedural position gave rise to any form of property right is governed by German law. The German Constitutional Court (again, BVerfG) considered this and found in the negative. This finding is not inconsistent with the Court ordering that the Consent Application applicants be compensated for reports and other technical studies and materials that could be used subsequently.

711. As the question of the nature of the legal right in the Claimants' procedural position, it is a question of German law and was determined by the German courts; this Tribunal does not consider it to be open to it to revisit that question. Therefore, on balance it must conclude that the Claimants' procedural position that flowed from the Consent Applications does not amount to a protected investment within the meaning of the ECT Article (1)6)(f).

712. Regarding the intellectual property rights that the Claimants also claim to be assets based on Article 1(6)(d), these may be better characterised as further improvements on the Claimants' investment in the procedural position pursuant to the Consent Applications. But for the associated right, it would be difficult on the facts of this case to see those IP rights as giving rise to investment in an independent asset pursuant to ECT Article 1(6)(d). They were used to enhance and develop the Projects but were not, in themselves, an independent investment under the ECT.

713. Assuming for the purposes of this jurisdictional objection that the Projects had successfully proceeded to financial close, which on the Claimants' case would have occurred but for the Respondent's alleged breach of the ECT, the Claimants would have benefitted from these enhancements in the overall value of their assets. Leaving aside the value of the investment, the question as to jurisdiction *ratione materiae* is whether or not the

expenditure incurred in obtaining those 'procedural positions' (and developing them using intellectual property and structuring through shareholders) constitutes a qualifying investment. The Tribunal considers that they do not.

714. Although the Claimants submit that the Respondent "*attempts to attach an inordinately high threshold to what constitutes an 'investment'*",[1237] this is not an entirely clear-cut case. The "*right*" that the Claimants allege constitutes an asset is based on the Consent Applications, not consents, licenses or permits granted by the Government, and such Consent Applications were construed by the German courts to be procedural positions and nothing more.

715. Even taking into account the reality, including for renewables, that energy sector investment is "*long-term, high risk, capital intensive and highly dependent on the exercise of government's regulatory powers*",[1238] the Tribunal accepts that under the relevant 2006 legal and regulatory framework, the State implemented "*a consenting process which involves significant degrees of investment from investors, in terms of time, money, and expertise*" which required energy sector investors to take "*significant risk*" through "*significant investments of time, money, and expertise*".[1239] Nonetheless, the legal rights were not conferred until the Consent or approval was granted; here that did not occur.

716. In sum, the only investment asset is the shares in the Fourth, Fifth and Sixth Claimants.

717. To the extent that the Claimants' case is that it is entitled to protection for the "*unity*" of its investment based on those shares, being the aggregation of all steps relating to the Projects, given the Tribunal's position on the procedural position not constituting a legal right within the meaning of ECT Article 1(6)(f), and no other such *de facto* right existing on the basis that the Consent Application was expected to be granted by for the intervening measures, it is unclear how far this gets the Claimants. However, there is sufficient basis to proceed

[1237] Cl. Mem. on Juris., para. 53.

[1238] **CL-0043**, Wälde/Kolo, *Environmental Regulation*, p. 819.

[1239] Cl. Mem. on Juris., para. 55.

to the merits on the grounds that the operating entities in Germany and the shares in those entities constitute the necessary investment.

718. On that basis, the Tribunal rejects the jurisdictional objection *ratione materiae*.

C. JURISDICTION *RATIONE PERSONAE*

719. Finally, in relation to the jurisdictional objections, the Respondent argues that the Tribunal lacks jurisdiction *ratione personae* in respect of the Fourth, Fifth and Sixth Claimants because they do not meet the requirement of ICSID Convention Article 25(1) of having different nationalities to the host State. The Fourth, Fifth and Sixth Claimants are all companies incorporated in the Federal Republic of Germany and are therefore EU and German companies.

(1) The Respondent's Position

720. According to the Respondent, ICSID Convention Article 25(2)(b) requires investors to be of a different nationality, subject to an exception where there is specific agreement between the Parties to consider a domestic company as being a national of another State. It submits that the ECT must be applied to resolve the issue and there is no agreement in the ECT that the German-incorporated Fourth, Fifth and Sixth Claimants are nationals of another State.[1240]

721. It submits that the ECT Article 26 only covers disputes between a Contracting Party to the ECT and an investor of another Contracting Party, which the Fourth, Fifth and Sixth Claimants are not. As to Article 26(7), the Respondent argues:

a. it "*integrates the legal fiction contained in Art. 25 (2) (b) ICSID Convention into the ECT*", but only "*as an exception to the rule, this provision must be interpreted restrictively which means that the purpose of its introduction into the ECT must be observed*";[1241]

[1240] Resp. Mem. on Juris., paras. 241-243.

[1241] Resp. Mem. on Juris., para. 244.

b. it was introduced "*because many jurisdictions require foreign investors to build locally incorporated companies for being allowed to invest and setting up a business*",[1242] but that "[t]*here is no room for an application of this legal fiction to the fact scenario at hand*", because Germany "*does not require investors to channel their investments through companies incorporated in its jurisdiction*", and it "*adheres to the freedom of establishment contained in Art. 49 et seqq. TFEU*";[1243]

c. the Second Claimant chose to incorporate the Fourth, Fifth and Sixth Claimants "*in Germany, and in the territory of the EU*", and "*submitted itself as well as* [the Fourth, Fifth and Sixth Claimants] *to the jurisdiction of Respondent'*[s] *national court system*", which is "*a well-functioning and independent legal system which protects all claimants with valid claims*";[1244] and

d. any dispute with the Fourth, Fifth and Sixth Claimants "*is not only an intra-EU dispute, but also a purely domestic dispute – and therefore not covered by the ECT jurisdiction at all*".[1245]

722. For those reasons, the Respondent submits that the is no agreement within the meaning of ICSID Convention Article 25(2)(b) and therefore "*no diversity in nationality*" and "*no jurisdiction with regard to* [the Fourth, Fifth and Sixth Claimants]".[1246]

(2) The Claimants' Position

723. According to the Claimants, the Tribunal has jurisdiction *ratione personae* over the Fourth, Fifth and Sixth Claimants based on the ECT Article 26(7) and ICSID Convention Article 25(2)(b), because the Respondent, "*as a Contracting Party to the ECT, consented to the settlement of disputes between Germany and German investors controlled by investors of another Contracting Party relating to an investment of the latter in the area of*

[1242] Resp. Mem. on Juris., para. 245.
[1243] Resp. Mem. on Juris., para. 246.
[1244] Resp. Mem. on Juris., para. 246.
[1245] Resp. Mem. on Juris., para. 246.
[1246] Resp. Mem. on Juris., para. 247.

the former, which concern an alleged breach of an obligation of the former under Part III of the ECT".[1247]

724. The Claimants point out that the Respondent has taken an inconsistent position in this regard,[1248] having "*advanced two legally untenable positions*", namely:

a. in its submissions concerning its Rule 41(5) Application, that the Fourth, Fifth and Sixth Claimants "*are incorporated in Germany and, thus, are no investors [sic] of another State than the host State*",[1249] and "*were not entitled to protection under the ECT by claiming – incorrectly – that Mainstream had provided 'not one single shred of evidence that would establish Claimants No. 4 to 6 being Irish companies via control'*",[1250] and

b. in its Memorial on Jurisdiction, that the ECT Article 26(7) "*must*" be "*interpreted restrictively*",[1251] and "*should not apply in circumstances where the relevant Contracting Party does not 'require foreign investors to build locally incorporated companies for being allowed [sic] to invest and setting up a business'*",[1252] which the Claimants submit "*is not supported by international arbitral practice, academic commentary, or an interpretation of the ECT pursuant to the VCLT*".[1253]

725. The Claimants point out that the Respondent accepts that Ireland and Germany are Contracting Parties to the ECT (subject to the intra-EU jurisdiction objection above) and does not raise any validity or legitimacy objections concerning the Claimants' corporate

[1247] Cl. Mem. on Juris., para. 135.

[1248] Cl. Mem. on Juris., para. 136.

[1249] Cl. Mem. on Juris., para. 136(i), quoting Resp. Rule 41(5) Application, para. 2.

[1250] Cl. Mem. on Juris., para. 136(ii), quoting Resp. Reply on Rule 41(5), para. 55.

[1251] Cl. Mem. on Juris., para. 136(iii), quoting Resp. Mem. on Juris., para. 244. According to the Claimants:

> The Respondent seemingly is now aware of the evidence in the Request for Arbitration, which not only establishes that the Fourth, Fifth and Sixth Claimants all were owned and controlled by the First, Second and Third Claimants respectively, which are Investors with the nationality of Ireland, on the date when the Parties consented to submit the present dispute to arbitration and before a dispute between the Claimants and Germany arose, but also includes reference to Exhibits **C-0008**, **C-0011** and **C-0013**, which conclusively confirm this position.

Cl. Mem. on Juris., fn, 298.

[1252] Cl. Mem. on Juris., para. 136(iii), quoting Resp. Mem. on Juris., para. 245.

[1253] Cl. Mem. on Juris., para. 137; **CL-0017**, VCLT, Art. 31.

structure, so therefore "*it does not appear to be in dispute between the parties that on the date on which the parties consented to submit the dispute to arbitration, the Fourth, Fifth and Sixth Claimants were controlled by Investors of another Contracting Party of the ECT*".[1254]

726. The Claimants proceed to rely on prior rulings and commentary as follows:

a. *Sevilla Beheer v. Spain*: involved Spanish incorporated project companies owned and controlled by a Dutch company and a Spanish subsidiary (the latter fully owned and controlled by two Dutch-incorporated companies);[1255]

b. *Eskosol v. Italy*: involved an Italian incorporated company controlled by a Belgian-incorporated company where the tribunal concluded that Article 26(7) of the ECT[1256]

> sets forth two requirements […] for a host State company to be treated as a qualified foreign national for purposes of Article 25(2)(b) of the ICSID Convention. First, such company must have the host State nationality "on the date of [its] consent in writing" to ICSID, a requirement that was clearly satisfied by virtue of [the claimant's] Italian corporate nationality. Second and independently, the company must be "controlled by" investors of another Contracting Party "before a dispute between it and that Contracting Party arises".

c. *Watkins v. Spain*: involved Spanish incorporated claimants controlled by a Dutch-incorporated company;[1257] and

d. "[l]*eading commentators concur with this straightforward analysis*".[1258]

[1254] Cl. Mem. on Juris., para. 139.

[1255] Cl. Mem. on Juris., para. 141(i); **CL-0139**, *Sevilla Beheer v. Spain*, paras. 625-626.

[1256] Cl. Mem. on Juris., para. 141(ii); **CL-0178**, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020, para. 226.

[1257] Cl. Mem. on Juris., para. 141(iii); **CL-0046**, *Watkins Holding S.À.R.L and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020 ("***Watkins v. Spain***"), fn. 117.

[1258] Cl. Mem. on Juris., para. 142; **CL-0179**, K. Hobér, "*The EU-Russia Energy Dialogue: The Legal Dimension – with particular emphasis on the Energy Charter Treaty*" in 1(2-3) Journal of Eurasian Law, 2-3, 2008, Sec. 4.3.5.

727. The Claimants further submit that an interpretation of ECT Article 26(7) "*in accordance with Article 31 of the VCLT leads to the same conclusion*", based on:

a. the ordinary meaning of the terms, which shows that "*no good faith interpretation of its text suggests that the applicability of Article 26(7) of the ECT should be restricted only to Contracting Parties of the ECT which require the channelling of foreign investment through the incorporation of a locally-incorporated company*",[1259] as the Respondent's interpretation "*would depend on the Tribunal reading an exception into Article 26(7) … which is not included in its wording*", and that if the drafters "*intended to make such a differentiation between Contracting Parties which required the incorporation of a locally-incorporated company for foreign investment and Contracting Parties which did not, they would and could have done so explicitly*";[1260]

b. the context, as "[n]*othing elsewhere in the ECT (such as in its Preamble, annexes, or any other agreement or instruments connected with or relating to its conclusion) suggests that an exception should be inserted into the text of Article 26(7)*";[1261] and

c. the object and purpose, regarding which the Respondent has "*advanced no evidence to suggest that the object or purpose of Article 26(7) of the ECT was to only apply in relation to Contracting Parties where a locally-incorporated company was required as a matter of domestic law*".[1262]

(3) Tribunal's Reasoning and Analysis

728. The facts regarding the Respondent's third jurisdictional objection *ratione personae* are undisputed. The Fourth, Fifth and Sixth Claimants are German incorporated, wholly owned

[1259] Claimants Memorial on Jurisdiction, para. 143; **CL-0180**, *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, International Court of Justice, Judgment, 3 February 1994, para. 41; **CL-0181**, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, 3 August 2005 ("***Methanex v. USA***"), Part II, Chap. B, para. 22 ("*the text of the treaty is deemed to be an authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation*").

[1260] Cl. Mem. on Juris., para. 144.

[1261] Cl. Mem. on Juris., para. 145.

[1262] Cl. Mem. on Juris., para. 145.

subsidiaries of the First Claimant, which in turn is incorporated in Ireland. Ireland and Germany are both Contracting Parties to the ECT.

729. The jurisdictional dispute arises out of the interpretation of ICSID Convention Article 25(2)(b) and ECT Article 26(7).

730. ICSID Convention Article 25 provides as relevant as follows (emphasis added):

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
>
> …
>
> (b) any juridical person ***which had the nationality of the Contracting State party to the dispute*** on [the date on which the parties consented to submit the dispute to arbitration] and which, ***because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention***.

731. ECT Article 26(7) provides as follows (emphasis added):[1263]

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

732. The starting point for this analysis is ICSID Convention Article 25(1). As noted above at paragraphs 410 *et seq.* and 620 *et seq.*, the limited requirements for a qualifying investor pursuant to Article 25 are that there is a dispute between a Contracting State and a national of another Contracting State. That provision is further qualified by Article 25(2), which provides that a juridical person with the nationality of the host State, which due to foreign

[1263] **CL-0001 / RL-0084**, ECT, Art. 26(7).

control the parties have agreed should be treated as a national of another Contracting State, may be a qualifying investor.

733. The ECT Article 26(7) provides the requisite agreement for the purposes of ICSID Convention Article 25(2). It does so expressly and in clear and unequivocal terms. It says unambiguously that, for the purposes of Article 25(2)(b) of the ICSID Convention, a party registered in the host State that is controlled by a national of another Contracting State shall be treated as a national of the other Contracting State.

734. The Tribunal does not consider it necessary to apply the VCLT any further to this question of interpretation because the language is perfectly clear.

735. Nevertheless, were it to do so, it would agree with the Claimants that the ordinary meaning of the words of the relevant provisions, the context and the object and purpose militate against any other interpretation.

736. In particular, the Tribunal rejects the notion that there is an implicit and unspoken two-tiered application of ECT Article 26(7) that limits it only to those Contracting States with underlying municipal law requirements for locally incorporated companies and/or without a "*well-functioning and independent legal system which protects all claimants with valid claims*".[1264] The ECT applies equally to all Contracting Parties unless expressly stated otherwise and it would not bode well for States to support any argument as to differentiated application of bilateral and multilateral treaties based on the perceived functionality and independence of the host State's legal system.

737. The Tribunal therefore rejects the jurisdictional objection *ratione personae* regarding the Fourth, Fifth and Sixth Claimants.

V. SUBSTANTIVE MERITS CLAIMS (ECT ARTICLES 10(1) AND 10(13))

738. Having determined that the Tribunal has jurisdiction to consider the merits of the Claimants' claims for breach of the ECT, the Tribunal has accepted that the shares in the

[1264] Resp. Mem. on Juris., para. 246.

Fourth, Fifth and Sixth Claimants were a protected Investment, which the Claimants subsequently enhanced with further investment, including in the form of intellectual property. However, before proceeding to consider the alleged State measures and any impact such measures may have had on that Investment, or indeed any losses incurred as a consequence, it is important to reiterate the precise nature of the protected Investment found to exist in this arbitration.

739. Here, the Investment is limited in nature and scope. It is common ground that the Claimants' business model was to develop the Projects and sell at (or even prior to) financial close (i.e., once all approvals, permitting, technical and financial requirements were in place to proceed unimpeded with construction and operation). The assets associated with the investment for the First, Second and Third Claimants were limited to their shares in the Fourth, Fifth and Sixth Claimants. Therefore, the assets of the Fourth, Fifth and Sixth Claimants have an equity value to the First, Second and Third Claimants that does not exceed the value of those shares.

740. For the purpose of ascertaining whether or not the alleged State measures breached the fair and equitable treatment standard of protection and/or constituted expropriation, the investments or assets that must be affected are the shares.

741. The Tribunal now turns to the two substantive claims for State measures in breach of fair and equitable treatment (ECT Article 10) and expropriation without compensation (ECT Article 13) causing loss to that investment.

A. FAIR AND EQUITABLE TREATMENT (ECT ARTICLE 10(1))

742. The first substantive claim is made pursuant to ECT Article 10(1). Article 10(1) provides:[1265]

> (1) 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

[1265] **CL-0001 / CL-0084**, ECT, Art. 10(1).

> 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 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.

743. The Tribunal briefly summarises the Claimants' and the Respondent's positions below.

(1) The Claimants' Position

744. The Claimants allege that the Respondent breached the fair and equitable treatment standard and, in particular, breached the Claimants' legitimate expectations.[1266] In a nutshell, their complaint is that[1267]

> the Respondent fundamentally altered the legal framework governing the development of offshore wind farms in Germany and the conditions for the Claimants' investments and in doing so, the Respondent violated its obligation under Article 10(1) of the ECT.

a. Applicable Legal Standard

745. The Claimants' position as to the applicable legal standard is set out in their Memorial on the Merits, paragraphs 166 to 188, and in their Reply Memorial, paragraphs 349 to 386.

746. The Claimants invoke international legal obligations arising out of the ECT Preamble in relation to "*to the fight against climate change*":[1268]

> Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects… .

[1266] Request for Arbitration, paras. 26 *et seq*.

[1267] Request for Arbitration, para. 85.

[1268] Cl. Reply, para. 350; **CL-0001 / RL-0084**, ECT, Preamble.

747. In this regard they submit that, pursuant to VCLT Articles 31(1) and (2), "*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 and the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, its preamble*",[1269] in interpreting the ECT, "*the Climate Change Convention* [UNFCCC]*, under which the Kyoto Protocol and, latterly, the Paris Agreement were implemented, provides context against which to assess Germany's conduct with its international legal obligations*", including that:

a. UNFCCC Article 3(1) "*requires Contracting States to protect the climate system for the benefit of present and future generations of humankind*";[1270]

b. UNFCCC Article 3(3) "*requires Contracting States to take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects"*;[1271]

c. "[a]*s a 'developed country' party pursuant to Annex I of the Climate Change Convention, Germany is required to adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs*";[1272]

d. Kyoto Protocol Article 2(1)(a)(iv), "*in force at the time of Germany's reduction of its targets for offshore wind*", required the Respondent "*to promote and increase its use of renewable energy*", so when it "*sought to reduce offshore wind in light of the renewable energy levy and sought to bend to the lobbying of, in particular, the coal industry, it was under an obligation pursuant to the Kyoto Protocol to phase out exemptions and subsidies in greenhouse gas emitting sectors*";[1273]

[1269] Cl. Reply, para. 351.

[1270] Cl. Reply, para. 351(i); **CL-0257**, UNFCCC, Art. 3(1).

[1271] Cl. Reply, para. 351(ii); **CL-0257**, UNFCCC, Art. 3(3).

[1272] Cl. Reply, para. 351(iii); **CL-0257**, UNFCCC, Art. 4(2).

[1273] Cl. Reply, para. 351(iv); **CL-0260**, Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, Art. 2(1)(a)(iv).

e. ECT Article 19 requires the Respondent "*to strive to minimise the environmental impact of energy operations*";[1274] and

f. ECT Article 26(6) requires the Tribunal "*to decide the issues in dispute in accordance with the ECT and applicable rules and principles of international law*" and "[t]*his includes the Climate Change Convention*".[1275]

748. In further evidence submitted following the Hearing, the Claimants further relied on the ICJ Advisory Opinion on climate change.[1276]

749. The Claimants then set out their position as to the interpretation of ECT Article 10(1), as giving rise to a commitment to create a stable regulatory framework, as well as "*a number of separate and self-standing obligations*",[1277] breach of any one of which "*is sufficient to establish a breach of Article 10(1)*",[1278] including an obligation to accord fair and equitable treatment based on:[1279]

a. legitimate expectations of investors;

[1274] Cl. Reply, para. 352. **CL-0001 / RL-0084**, ECT, Art. 19(1), first sentence reads:

> In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall strive to minimize in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety. In doing so each Contracting Party shall act in a Cost-Effective manner.

[1275] Cl. Reply, para. 352.

[1276] **CL-0375**, International Court of Justice, *Obligations of States in Respect of Climate Change*, Advisory Opinion, 23 July 2025 ("**ICJ Advisory Opinion**").

[1277] Cl. Mem. on Merits, para. 168. *See also* Cl. Mem. on Merits, fn. 325; according to the Claimants:

> The Respondent is under an obligation to encourage and create stable conditions for investors whether the obligation is part of the fair and equitable treatment standard or whether it is autonomous" (**CL-0028**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018 [("***RREEF v. Spain*, Quantum**")], para. 314). Similarly, as noted in *Hydro v. Spain*, it is "clear that even without an express obligation to create stable, equitable and transparent conditions, that such an obligation would be included in the fair and equitable treatment standard" (**CL-0029**, *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020 [("***Hydro v. Spain***")], para. 548). The remainder of this Memorial proceeds on the basis that the obligations contained in the first sentence of Article 10(1) of the ECT form part of the Respondent's obligation to accord the Claimants' investments fair and equitable treatment.

[1278] Cl. Mem. on Merits, para. 171.

[1279] Cl. Mem. on Merits, para. 169; **CL-0030**, R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2012 (excerpt) ("**Dolzer/Schreuer, *Principles* (2012) (Claimants' excerpt)**"), p. 145.

b. proportionality;

c. transparency; and

d. good faith.

750. In relation to each, the Claimants maintained that breach "*need not necessarily arise out of individual isolated acts but can result from a series of circumstances*", and that the standard "*has also been found to apply to both acts and omissions*".[1280]

751. The Claimants' position on each of the alleged "*separate and self-standing obligations*" within ECT Article 10(1) is set out below.

i. ECT Article 10(1) "*Stable Conditions*"

752. First, the Claimants argue that that the first sentence of ECT Article 10(1) requires the Respondent:[1281]

a. "*to create stable, equitable, favourable and transparent conditions for Investments of Investors*"; and

b. to be read alongside the object and purpose of the ECT:

i. "*to catalyse economic growth by means of measures to liberalize investment and trade in energy*" (Preamble); and to

ii. "*promote long-term cooperation in the energy field, based on complementarities and mutual benefits"* (ECT Article 2).

753. This appears to be a claim as to the existence of a self-standing commitment to create such conditions, separate from fair and equitable treatment referred to in ECT Article 10(1)

[1280] Cl. Mem. on Merits, para. 170; **CL-0031**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 181; **CL-0034**, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 450; **CL-0035**, *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, para. 85; **CL-0032**, *Walter Bau AG v. Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009, para. 12.43; **CL-0033**, *AES v. Hungary*, para. 9.3.40.

[1281] Cl. Mem. on Merits, para. 168.

second sentence. This is certainly how it was understood by the Respondent and the Tribunal, therefore, maintains separation for the purpose of this Award.

754. Critically, the Claimants do not refute that States, having entered into bilateral and multilateral investment treaties, nevertheless continue to enjoy sovereign rights to regulate.[1282] However, they submit that this "*is to be assessed within the confines of the ECT, for present purposes mainly its Article 10, which protects investments against a State's use of their regulatory power in a manner that fundamentally alters the legal, regulatory and political framework applicable to existing investments*".[1283]

ii. Fair and Equitable Treatment and Legitimate Expectations

755. Secondly, the Claimants submit that the fair and equitable treatment standard in the ECT "*is widely recognised by international tribunals as being a broad and 'inherently flexible' standard that is to be adapted to the individual circumstances of each case*",[1284] citing to the prior award in *MTD v. Chile*, which they submit "*should be understood as requiring 'treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment'*".[1285]

756. They submit based on prior awards and decisions that:

a. observance of legitimate expectations of investors is described as the "*dominant element*" or "*major component*" of the standard,[1286] supported by international

[1282] Cl. Reply, para. 356, in response to Resp. C-Mem., paras. 494-529.

[1283] Cl. Reply, para. 356; **CL-0046**, *Watkins v. Spain*, paras. 521 ("*The Tribunal notes that Spain is entitled to make amendments to its regulatory regime but after having entered into the ECT, there are limitation*[s] *on its powers to alter the regulatory framework and it should not do so if such fundamental and radical changes would be unfair, unreasonable and inequitable, which would undermine an investor's legitimate expectation*") and 543; **CL-0058**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 ("***Parkerings-Compagniet v. Lithuania***"), para. 332. *See also* Cl. Mem. on Merits, paras. 179-180.

[1284] Cl. Mem. on Merits, para. 167; **CL-0026**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 ("***Total v. Argentina***"), paras. 107, 109.

[1285] Cl. Mem. on Merits, para. 167; **CL-0027**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 ("***MTD v. Chile***"), para. 113.

[1286] Cl. Mem. on Merits, para. 172; **CL-0037**, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 ("***Tecmed v. Mexico***"), para. 154; **CL-0038**, *EDF (Services) Ltd v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 216.

arbitral practice "*which has consistently determined that the protection of legitimate expectations forms an essential part of the … standard*";[1287]

b. *Saluka v. Czech Republic*:[1288] the tribunal stated:

> The "fair and equitable treatment" standard in Article 3.1 of the Treaty is an autonomous Treaty standard and must be interpreted, in light of the object and purpose of the Treaty, so as to avoid conduct of the Czech Republic that clearly provides disincentives to foreign investors. The Czech Republic, without undermining its legitimate right to take measures for the protection of the public interest, has therefore assumed an obligation to treat a foreign investor's investment in a way that does not frustrate the investor's underlying legitimate and reasonable expectations. A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on unjustifiable distinctions). In applying this standard, the Tribunal will have due regard to all relevant circumstances.

c. *Tecmed v. Mexico*:[1289] the tribunal found that the FET standard "*requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment*";

d. *Eiser v. Spain*:[1290] the tribunal stated that the FET standard "*necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments*"; and

e. *RREEF v. Spain*:[1291] the tribunal found that there was an obligation to "*certainly exclude[] any unpredictable radical transformation in the condition of the investments*";

[1287] Cl. Mem. on Merits, para. 172; **CL-0036**, *FREIF Eurowind Holdings Ltd. v. Kingdom of Spain*, SCC Case No. V 2017/060, Final Award, 8 March 2021, para. 448.

[1288] Cl. Mem. on Merits, para. 173; **CL-0039**, *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ("***Saluka v. Czech Republic***"), para. 309.

[1289] Cl. Mem. on Merits, para. 174; **CL-0037**, *Tecmed v. Mexico*, para. 154.

[1290] Cl. Mem. on Merits, para. 175; **CL-0022 / CL-0041**, *Eiser v. Spain*, para. 382.

[1291] Cl. Mem. on Merits, para. 175; **CL-0028**, *RREEF v. Spain*, Quantum, paras. 314-315.

757. According to the Claimants, protection of legitimate expectations "*provides comprehensive protection in that it secures the stable investment environment that investors aspire to*", which "*makes sense in the light of object and purpose of the ECT: the protection of legitimate expectations must be construed and applied in a way that enhances investment protection*", and further relying on various commentary in support,[1292] and well as a dissenting opinion in the prior award in *Wirtgen v. Czech Republic*,[1293] concludes:[1294]

> Therefore, when a State generates a legal and regulatory framework that encourages investors and upon which an investor relies, thus creating legitimate expectations, their later frustration breaches the fair and equitable treatment standard, regardless of the motives for any legislative or regulatory change and irrespective of any showing of bad faith.

758. The Claimants seek to establish that their position "*has widespread support in international arbitral practice*", citing to the following prior awards and decisions:[1295]

a. *Watkins v. Spain*:[1296] where the tribunal found that there is "*no burden on the part of the Claimants to prove bad faith or any ulterior motive on the part of Spain in enacting the various measures in order to determine whether the measures taken by Spain constitute a violation of FET standard*s", although "*[t]he Tribunal note[d] that Spain is entitled to make amendments to its regulatory regime but after having entered into the ECT, there are limitation[s] on its powers to alter the regulatory framework and it should not do so if such fundamental and radical changes would*

[1292] Cl. Mem. on Merits, paras. 175-177; **CL-0042**, I. Tudor, "*Chapter 2: The FET Standard, Part of the Body of General International Law*" in *The Fair And Equitable Treatment Standard in the International Law of Foreign Investment*, 2009, p. 103; **CL-0043**, Wälde/Kolo, *Environmental Regulation*, p. 819 (energy investments are "*long-term, high risk, capital intensive and highly dependent on the exercise of government's regulatory powers*"); **CL-0045**, R. Kopar, *Stability and Legitimate Expectations in International Energy Investments*, 2021 (excerpt), p. 141 (citing J. Salacuse, *The Law of Investment Treaties*, 2009, p. 254 ("*when a state has created certain expectations through its laws and acts that have led the investor to invest, it is generally considered unfair for the state to take subsequent actions that fundamentally deny or frustrate those expectations*")).

The Claimants also submit, "*According to Professor Dolzer, the state of the law in a host country prior to the investment being realised constitutes the framework upon which legitimate expectations can be built*": Cl. Mem. on Merits, fn. 333; **CL-0040**, R. Dolzer, "*Fair and Equitable Treatment: A Key Standard in Investment Treaties*" in 29(1) International Lawyer, 2005 ("**Dolzer, *FET***"), p. 103.

[1293] Cl. Mem. on Merits, para. 176; **CL-0044**, *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Dissenting Opinion of Gary Born, 11 October 2017 ("***Wirtgen v. Czech Republic*, Dissenting Opinion**"), para. 15 (it is "*commonplace and essential for states to be able to provide undertakings to private parties by way of 'general' legislative or regulatory instruments*").

[1294] Cl. Mem. on Merits, para. 178.

[1295] Cl. Mem. on Merits, para. 178; Cl. Reply, para. 360.

[1296] Cl. Mem. on Merits, fns. 340, 346; **CL-0046**, *Watkins v. Spain*, paras. 516, 521, 543.

be unfair, unreasonable and inequitable, which would undermine an investor's legitimate expectation";

b. *Eiser v. Spain*:[1297] the tribunal found that "*the Article 10(1) [ECT] obligation to accord fair and equitable treatment means that regulatory regimes cannot be radically altered as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment's value*";

c. *Novenergia v. Spain*:[1298] the tribunal stated, "*[t]he legitimate expectations of an investor has [sic] generally been considered to be grounded in the legal order of the host State as it stands at the time the investor acquires or makes the investment. Arbitral tribunals seized with the task of determining the relevant timing of the legitimate expectations of an investor have stressed that the legal framework of the host State as it existed at the time of making the investment is decisive for any legitimate expectations*";

d. *Masdar v. Spain*:[1299] according to the tribunal, "*an investor may be confident that (i) the legal framework in which the investment has been made will not be subject to unreasonable or unjustified modification*";

e. *Antin v. Spain*:[1300] the tribunal stated:

> [C]onsidering the context, object and purpose of the ECT, the Tribunal concludes that the obligation under Article 10(1) of the ECT to provide FET to protected investments comprises an obligation to afford fundamental stability in the essential characteristics of the legal regime relied upon by the investors in making long-term investments. This does not mean that the legal framework cannot evolve or that a State Party to the ECT is precluded from exercising its regulatory powers to adapt the regime to the changing circumstances in the public interest. It rather means that a regulatory regime specifically created to induce investments in the energy sector cannot be radically altered —i.e., stripped of its key features— as applied to existing

[1297] Cl. Mem. on Merits, para. 178(i); **CL-0022 / CL-0041**, *Eiser v. Spain*, para. 382.

[1298] Cl. Mem. on Merits, para. 178(ii); **CL-0047**, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018 ("***Novenergia v. Spain***"), para. 532.

[1299] Cl. Mem. on Merits, para. 178(iii); **CL-0048**, *Masdar v. Spain*, para. 484.

[1300] Cl. Mem. on Merits, para. 178(iv); **CL-0092**, *Antin Infrastructure Services Luxembourg S.à.r.l and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 ("***Antin v. Spain***"), para. 532.

investments in ways that affect investors who invested in reliance on those regimes;

f. *9REN v. Spain*:[1301] the tribunal found that "*there is no reason in principle why such a commitment of the requisite clarity and specificity cannot be made in the regulation itself where [as was the case] such a commitment is made for the purpose of inducing investment, which succeeded in attracting the Claimant's investment and one made resulted in losses to the Claimant*", concluding that the changes were "*fundamentally different from the framework that Spain promised and that induced the Claimant to invest*";

g. *Charanne v. Spain*:[1302] the tribunal determined that "*an investor has a legitimate expectation that, when modifying the existing regulation based on which the investment was made, the State will not act unreasonably, disproportionately or contrary to the public interest*";

h. *Murphy v. Ecuador*:[1303] the tribunal held that "*[a]n investor may hold legitimate expectations based on an objective assessment of the legal framework absent specific representations or promises made by the State to the investor*";

i. *Electrabel v. Hungary*:[1304] according to the Claimants, "*the tribunal established that a specific assurance is not an indispensable element of the legitimate expectations principle and that legitimate expectations can be based on a law*";

j. *Frontier v. Czech Republic*:[1305] according to the Claimants, "*the tribunal similarly confirmed that legitimate expectations may derive from the applicable legal framework*";

[1301] Cl. Mem. on Merits, para. 178(v); **CL-0049**, *9REN Holding S.à.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019 ("***9REN v. Spain***"), paras. 295, 302.

[1302] Cl. Mem. on Merits, para. 178(vi); **CL-0050**, *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. V 062/2012, Final Award, 21 January 2016, para. 514.

[1303] Cl. Mem. on Merits, para. 178(vii); **CL-0051**, *Murphy Exploration & Production Company – International v. Republic of Ecuador*, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, para. 248.

[1304] Cl. Mem. on Merits, para. 178(viii); **CL-0052**, *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015 ("***Electrabel v. Hungary*, Award**"), para. 155.

[1305] Cl. Mem. on Merits, para. 178(ix); **CL-0053**, *Frontier Petroleum Services Ltd. v. Czech Republic*, Final Award, 12 November 2010 ("***Frontier v. Czech Republic***"), para. 285.

k. *LG&E v. Argentina*:[1306] the Claimants cite the tribunal as finding that "*the stability of the legal and business framework in the State Party is an essential element of what is fair and equitable treatment*";

l. *PSEG v. Turkey*:[1307] according to the tribunal, investors should be able to rely upon "*an assessment of the state of the law and the totality of the business environment at the time of the investment*";

m. *CMS v. Argentina*:[1308] the tribunal found that the respondent State's measures "*did in fact entirely transform and alter the legal and business environment under which the investment was decided and made*";

n. *Glencore v. Colombia*:[1309] according to the tribunal, "*legal expectations can […] be created […] by the State's general legislative and regulatory framework: an investor may make an investment in reasonable reliance upon the stability of that framework, so that in certain circumstances a reform of the framework may breach the investor's legitimate expectations*";

o. *Parkerings-Compagniet v. Lithuania*:[1310] the tribunal stated, "*any businessman or investor knows that laws will evolve over time*" and that "[w]*hat is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power*"; and

p. *Strabag v. Germany*:[1311] according to the Claimants, that tribunal found that "*Germany's radical overhaul of its legal and regulatory framework applicable to*

[1306] Cl. Mem. on Merits, para. 178(x); **CL-0054**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 ("***LG&E v. Argentina***"), para. 124.

[1307] Cl. Mem. on Merits, para. 178(xi); **CL-0055**, *PSEG v. Turkey*, para. 255.

[1308] Cl. Mem. on Merits, para. 178(xii); **CL-0056**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 ("***CMS v. Argentina***"), para. 275.

[1309] Cl. Mem. on Merits, para. 178(xiii); **CL-0057**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, para. 1368.

[1310] Cl. Mem. on Merits, para. 179; **CL-0058**, *Parkerings-Compagniet v. Lithuania*, para. 332.

[1311] Claimants' Observations on *Strabag*, para. 2; **CL-0347**, *Strabag v. Germany*.

offshore wind, starting in 2012, breached its international legal obligations under the ECT in relation to the [c]laimants' investments in the [p]rojects".

759. The Claimants further argue that the "*Respondent's international legal obligations under Article 10(1) of the ECT mean that it has knowingly accepted limitations on its regulatory power, in particular, its ability to fundamentally alter the legal, regulatory and political framework applicable to existing investments*",[1312] relying on the prior award in *ADC v. Hungary* ("*a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries*", but at the same time "*by investing in a host State, the investor assumes the 'risk' associated with the State's regulatory regime*" and the investor "[takes] *that risk with the legitimate and reasonable expectation that they would receive fair treatment and just compensation and not otherwise*").[1313]

760. In their Reply, the Claimants refer specifically to additional prior rulings in the energy sector, reiterating their argument that the sector is "*highly dependent on the exercise of government's regulatory powers*",[1314] and framing the decisive questions as: "*(i) whether the framework on which the investor grounded its expectations contained a specific commitment on the part of the State, either because it was made to the investor directly or because it was put in place with the specific aim to induce foreign investments; and (ii) whether the investor relied on that commitment in making its investments*".[1315] To that end, they further rely on prior awards and decisions in:

a. *El Paso v. Argentina*: the tribunal decided:[1316]

> A reasonable general regulation can be considered a violation of the FET standard if it violates a specific commitment towards the investor. The Tribunal considers that a special commitment by the State towards an

[1312] Cl. Mem. on Merits, para. 180.

[1313] Cl. Mem. on Merits, para. 181; **CL-0059**, *ADC v. Hungary*, paras. 423-424.

[1314] Cl. Reply, para. 358; **CL-0043**, Wälde/Kolo, *Environmental Regulation*, p. 819.

[1315] Cl. Reply, para. 359. *See also* Cl. Mem. paras. 176-178; **CL-0040**, Dolzer, *FET*, p. 103; **CL-0044**, *Wirtgen v. Czech Republic*, Dissenting Opinion, para. 15; **CL-0256**, R. Dolzer, U. Kriebaum, C. Schreuer, "*Principles of International Investment Law*", 2022 ("**Dolzer/Kriebaum/Schreuer, *Principles* (2022) (second excerpt)**"), pp. 208-209; **CL-0210**, *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Principles of Quantum, para. 508.

[1316] Cl. Reply, para. 359; **RL-0173**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 ("***El Paso v. Argentina***"), paras. 375-377.

> investor provides the latter with a certain protection against changes in the legislation … . In the Tribunal's view, no general definition of what constitutes a specific commitment can be given, as all depends on the circumstances. However, it seems that two types of commitments might be considered "specific": those specific as to their addressee and those specific regarding their object and purpose.
>
> First, in order to prevent a change in regulations being applied to an investor or certain behaviour of the State, there can indeed exist specific commitments directly made to the investor … .
>
> Second, a commitment can be considered specific if its precise object was to give a real guarantee of stability to the investor. Usually general texts cannot contain such commitments, as there is no guarantee that they will not be modified in due course. However, a reiteration of the same type of commitment in different types of general statements could, considering the circumstances, amount to a specific behaviour of the State, the object and purpose of which is to give the investor a guarantee on which it can justifiably rely.

b. *Isolux v. Spain*: according to the tribunal, "*[a]rbitral 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*";[1317]

c. *Antin v. Spain*: for the tribunal, there was an "*obligation to afford fundamental stability in the essential characteristics of the legal regime relied upon by the investors in making long- term investments […] [which] means that a regulatory regime specifically created to induce investments in the energy sector cannot be radically altered— i.e., stripped of its key features— as applied to existing investments in ways that affect investors who invested in reliance on those regimes*";[1318]

[1317] Cl. Reply, para. 360(i); **CL-0258**, *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case No. V2013/153, Final Award, 17 July 2016 ("***Isolux v. Spain***"), para. 423.

[1318] Cl. Reply, para. 360(ii); **CL-0092**, *Antin v. Spain*, para. 532.

d. *9REN v. Spain*: the tribunal stated "[t]*here is no doubt that an enforceable 'legitimate expectation' requires a clear and specific commitment, but in the view of this Tribunal there is no reason in principle why such a commitment of the requisite clarity and specificity cannot be made in the regulation itself where (as here) such a commitment is made for the purpose of inducing investment, which succeeded in attracting the Claimant's investment and once made resulted in losses to the Claimant*". The tribunal concluded that Spain had made changes to its regulatory framework which were "*fundamentally different from the framework that Spain promised and that induced the Claimant to invest*";[1319]

e. *PV Investors v. Spain*: according to the Claimants, "*the tribunal found that investors could legitimately expect to receive a reasonable return on their investments based on the guarantee of a reasonable return enshrined in the regulatory framework applicable at the time of the claimants' investment, which was 'the regulatory framework's* leitmotiv*, the essential feature underpinning all of the instruments that were enacted through the years' and 'restricted the State's power to amend the framework and thereby guaranteed a level of stability of the conditions in which investors operated'*";[1320]

f. *Kruck v. Spain*: the tribunal majority referred to protection where the "*explicitly declared purpose of legislation is to invite investors to commit capital to projects in reliance upon guarantees of stability in a regulatory regime, specific commitments can be made by provisions in general legislation*" (i.e., "*RD 661/2007 was described in the Preamble to RD 1578/2008 as having established a new compensation framework 'for the purpose of achieving in 2010 the goals set in the 2005-2010 Renewable Energy Plan and the Spanish Energy Savings and Efficiency*

[1319] Cl. Reply, para. 360(iii); **CL-0049**, *9REN v. Spain*, paras. 295, 302.

[1320] Cl. Reply, para. 360(iv); **CL-0100**, *The PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14 (UNCITRAL), Final Award, 28 February 2020 ("***PV Investors v. Spain***"), para. 616.

Strategy', after previous regulatory regimes had failed to attract the necessary investment");[1321]

g. *Triodos v. Spain*: the tribunal found that Spain had made specific commitments in the regulatory framework in an attempt to meet "*its renewable energy targets under EU Directives as reflected in Spain's domestic renewable energy plans [and] to attract the necessary investment to achieve Spain's renewable energy targets*".[1322]

761. In their Reply, the Claimants further refer to:

a. "[p]*olitical statements taking the form of statutory commitments*" as "*additional evidence of Government policy applicable at the time of an investor's investment*",[1323] which they argue can "*form an integral part of the circumstances governing an investor's decision to invest*",[1324] and part of "*all circumstances existing at the time of the investment*", referring to the prior award in *Duke Energy v. Ecuador* (circumstances include "*not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State*");[1325]

b. events taking place after the investment being "*irrelevant for the purposes of assessing investors' legitimate expectations*",[1326] agreeing with the Respondent as to the relevant time to assess legitimate expectations (although disagreeing with its description of the tribunal's findings in *Mamidoil v. Albania* as flawed),[1327] noting

[1321] Cl. Reply, para. 360(v); **CL-0261**, *Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Quantum, 14 September 2022 ("***Kruck v. Spain*, Jurisdiction**"), paras. 189-190.

[1322] Cl. Reply, para. 361; **CL-0262**, *Triodos SICAV II v. Kingdom of Spain*, SCC Case No. 2017/194, Final Award, 24 October 2022 ("***Triodos v. Spain***"), para. 668.

[1323] Cl. Reply, paras. 362-363.

[1324] Cl. Reply, para. 362; **CL-0263**, *Eastern Sugar v. Czech Republic*, para. 244; **CL-0026**, *Total v. Argentina*, para. 118; **CL-0141**, *Cavalum v. Spain*, para. 432.

[1325] Cl. Reply, para. 363, referring to Resp. C-Mem., para. 562; **CL-0024**, *Duke Energy v. Ecuador*, para. 340.

[1326] Cl. Reply, paras. 364-365.

[1327] Cl. Reply, fn. 956, referring to Resp. C-Mem., para. 564. The Claimants argue that "*the tribunal dismissed the claimant's expectations not because the 'regulatory framework was inadequate' as Germany suggests …, but rather because they were based on an expectation of illegality, which is not protected under international law*"; **RL-0171**, *Mamidoil v. Albania*, para. 716 ("*Therefore, the Tribunal finds that the construction and the operation of the tank farm did not comply with Albanian law and were illegal. In the circumstances, Claimant is not entitled to rely on the perpetuation of its activities in illegal circumstances and cannot claim a violation of legitimate expectations with respect to the illegal operation of the tank farm*").

that subsequent changes or modifications in the legislative and regulatory framework "*cannot be taken into account for the purposes of determining the nature of an investor's expectations at the time of its investment*", citing *Gaspar v. Costa Rica*;[1328]

c. the role of due diligence in "*evaluating the nature of an investor's expectations at the time of its investment*", referring to the Respondent's agreement that "*investors are not required to undertake an extensive, all-encompassing due diligence*" and consideration of the threshold standard "*of what a prudent investor would reasonably have known about the applicable regulatory framework at the time of its investment*";[1329] and

d. the alleged obligation on States "*to enforce their laws and regulations, and to make serious and visible efforts in order to implement and enforce those laws and regulations*",[1330] citing to the prior award in *Zelena v. Serbia* (where the tribunal found that the claimant "*did have a right to expect […] serious and visible efforts at the implementation and enforcement of the relevant law*"), as that tribunal concluded:[1331]

> [A]s regards the implementation and enforcement of the Serbian ABP legislation by the Respondent, the Tribunal concludes that it was reasonable

[1328] Cl. Reply, para. 365; **CL-0259**, *Alejandro Diego Díaz Gaspar v. Republic of Costa Rica*, ICSID Case No. ABR/19/13, Award, 29 June 2022 ("***Gaspar v. Costa Rica***"), para. 368:

> The legitimate expectations relevant for assessing a breach of the fair and equitable treatment standard are in principle those generated at the time of making the investment, and not those generated during the life of the investment. In other words, in principle, the analysis of whether a possible frustration of the investor's legitimate expectations implies a breach of the fair and equitable treatment standard takes into account the conditions that the State offered to the investor and that the investor took into account when it decided to invest. However, the legal and regulatory framework applicable to the investment is always susceptible to evolve in response to new or changing circumstances, and an alteration thereto may be in breach of international law to the extent that, at the time of the investment, the investor had a reasonable expectation that it would not be changed in the way that it was.

[1329] Cl. Reply, para. 366, referring to Resp. C-Mem., para. 569; **CL-0209**, *SunReserve Luxco Holdings S.À.R.L, SunReserve Luxco Holdings II S.À.R.L and SunReserve Luxco Holdings III S.À.R.L v. Italian Republic*, SCC Case No. V2016/32, Final Award, 25 March 2020 ("***SunReserve v. Italy***"), para. 714; **CL-0200**, *Isolux v. Spain*, para. 781.

[1330] Cl. Reply, paras. 367-368.

[1331] Cl. Reply, para. 367; **CL-0264**, *Zelena N.V. and Energo-Zelena d.o.o Inđija v. Republic of Serbia*, ICSID Case No. ARB/14/27, Award, 9 November 2018 ("***Zelena v. Serbia***"), paras. 239, 267. *See also* Cl. Reply, para. 368; **RL-0184**, *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/14/29, Award, 5 March 2020 ("***Micula v. Romania (II)***"), paras. 369-371 (an investor was entitled to expect "*serious and visible efforts at the implementation and enforcement of the relevant law*" and the State had "*a sophisticated mechanism for the enforcement of its laws, a strategy of ensuring that enforcement is cost-effective and a structure for enforcement*").

> and legitimate for the Claimants to rely on a reasonable level of implementation and enforcement of the Serbian ABP legislation within a reasonable time and that these legitimate expectations were frustrated by the Respondent's conduct. Thus, the Respondent has breached its obligation, under Article 3(1) of the BIT, to accord fair and equitable treatment to the Claimants' investment.

762. In their Memorial on the Merits, regarding limits to a State's right to regulate (i.e., "*while legislative and regulatory changes are allowed, a host State should ensure the fundamental stability of the essential characteristics of the legal framework relied upon by investors in making long-term investments*", but that "[r]*adical amendments on those key characteristics that were relied upon by investors breaches the fair and equitable treatment standard*"), the Claimants refer to additional prior awards and decisions:[1332]

a. *Saluka v. Czech Republic*:[1333] the tribunal stated that changes should not "*manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination*";

b. *Novenergia v. Spain*:[1334] the tribunal found that the FET standard offered protection "*from a radical or fundamental change to legislation or other relevant assurances by a state that do not adequately consider the interests of existing investments already made on the basis of such legislation*", where economic consequences were "*drastic and unexpected in a manner that is contrary to the Kingdom of Spain's obligation to provide FET to investors*";

c. *RREEF v. Spain*:[1335] according to the Claimants, "*the tribunal had 'no hesitation' to find that Spain had acted in breach of its obligation to respect the principle of stability under Article 10(1) ECT due to the 'partly retroactive' nature of the challenged measures*";

[1332] Cl. Mem. on Merits, para. 182.

[1333] Cl. Mem. on Merits, para. 182; **CL-0039**, *Saluka v. Czech Republic*, para. 307.

[1334] Cl. Mem. on Merits, para. 182(i); **CL-0047***, Novenergia v. Spain*, paras. 654-655, 695.

[1335] Cl. Mem. on Merits, para. 182(ii); **CL-0028**, *RREEF v. Spain*, Quantum, para. 325.

d. *Foresight v. Spain*:[1336] protection "*from a radical or fundamental change in the legal or regulatory framework under which the investments are made*" and that "*the right to regulate must be subject to limitations if investor protections are not to be rendered meaningless*"; and

e. *Total v. Argentina*:[1337] the Claimants highlight the tribunal's finding that "[t]*he expectation of the investor is undoubtedly 'legitimate', and hence subject to protection under the fair and equitable treatment clause … when 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*".

763. The Claimants further rely on commentary that "*general international law recognizes the competence of state officials to bind their states by unilateral statements without regard to such internal authorizations*".[1338]

764. In their Reply, the Claimants make further submissions regarding ECT Article 10(1) protecting against "*fundamental and radical changes of the applicable framework at the time of the investment*",[1339] including that:

a. the Respondent appears to "*concede this by observing that protection against radical and fundamental changes acts as an exception to the host State's right to*

[1336] **CL-0060**, *Foresight Luxembourg Solar 1 S.À.R.L and others v. Kingdom of Spain*, SCC Case No. 2015/150, Final Award, 14 November 2018 ("***Foresight v. Spain***"), paras. 359, 364.

[1337] Cl. Mem. on Merits, para. 183; **CL-0026**, *Total v. Argentina*, paras. 117-118.

[1338] Cl. Mem. on Merits, para. 183; **CL-0061**, W. M. Reisman and M. Arsanjani, "*The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*" in 19:2 ICSID Review–Foreign Investment Law Journal, 2004, p. 338. The Claimants add that the "*ability of political statements to give rise to legitimate expectations has support in international practice*", referring to **CL-0027**, *MTD v. Chile*, para. 156; **CL-0062**, *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5 (UNCITRAL), Award, 19 September 2013, para. 4.770; **CL-0063**, *Biwater Gauff v. Tanzania*, para. 552.

[1339] Cl. Reply, paras. 369 *et seq*. *See also* Cl. Mem. on Merits, para. 178; **CL-0022 / CL-0041**, *Eiser v. Spain*, para. 382; **CL-0047**, *Novenergia v. Spain*, para. 532; **CL-0048**, *Masdar v. Spain*; **CL-0092**, *Antin v. Spain*, para. 532; **CL-0049**, *9REN v. Spain*, para. 302.

regulate in circumstances in which the investor relied on a specific commitment from the host State or otherwise induced legitimate expectations";[1340] and

b. they respond to the Respondent's arguments against such protection as follows:

i. limiting protection against radical changes to changes affecting "*operational investments*", to exclude "*projects that have not yet entered operations*"[1341] is meritless because (i) it is unsupported by ECT Article 1(6),[1342] and (ii) none of the prior awards relied on "*contain such a limitation*" (e.g., in *Eiser v. Spain*, "*the Article 10(1) obligation to accord fair and equitable treatment means that regulatory regimes cannot be radically altered as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment's value*", so that tribunal "*did not add a requirement that those investments be operational*", which "*would unduly restrict the protection afforded to investments in Article 10(1)*";[1343]

ii. the Respondent accepts that Article 10(1) "*does not provide investors with a guarantee of a regulatory freeze*" and that the Claimants "*could not have expected that the Projects would have been subject to the laws and regulations applicable in 2008*"– the Claimants reiterate that they, in making their investments in Germany, expected that any evolution of the framework would be "*in furtherance of any meeting targets set out in the 2002 Strategy rather than in frustration (and, ultimately, the unforeseeable abandonment) of them*";[1344]

iii. describing the Respondent's position that "*[t]here are simply no criteria upon which to assess what precisely would constitute 'radical change'*" and

[1340] Cl. Reply, para. 369, referring to Resp. C-Mem., para. 574.

[1341] Cl. Reply, para. 370, referring to Resp. C-Mem., para. 576.

[1342] Cl. Reply, para. 371(i). *See also* Cl. Reply, Sec. III.

[1343] Cl. Reply, para. 371(ii); **CL-0022 / CL-0041**, *Eiser v. Spain*, para. 382. *See also* **CL-0047**, *Novenergia v. Spain*, para. 532; **CL-0048**, *Masdar v. Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 484; **CL-0092**, *Antin v. Spain*, para. 532; **CL-0049**, *9REN v. Spain*, para. 302.

[1344] Cl. Reply, para. 372, referring to Resp. C-Mem., para. 578.

"*no objective standard for what constitutes 'radical changes'*" as misconceived against prior awards;[1345]

c. describing as "*inapposite to Germany*" the argument that "'*radical changes' may be deemed acceptable in exceptional circumstances such as that of countries transitioning from communist ruling*", introducing "*through the backdoor a defence of necessity*", which is "*of an exceptional nature and Germany has fallen far short of meeting its burden of proof*".[1346]

iii. Fair and Equitable Treatment and Proportionality

765. Thirdly, as to fair and equitable treatment and proportionality, the Claimants argue that a measure taken by a State is to be "*suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved*", which they interpret as meaning "*appropriately tailored to the pursuit of the legitimate policy objective with due regard for the consequences imposed on investors*" and not "*disproportionately harm*[ing] *those investments*".[1347]

766. The Claimants develop their position on proportionality in their Reply, submitting further as follows:

a. reiterating that the Respondent did not dispute the Claimants' standard that "*regulatory measures taken by States must be proportionate, namely the measure under scrutiny must be adequately tailored to the pursuit of a legitimate policy objective with due regard for the consequences of such measures on investors*";[1348]

[1345] Cl. Reply, para. 373, referring to Resp. C-Mem., para. 581; **CL-0022 / CL-0041**, *Eiser v. Spain*, para. 382.

[1346] Cl. Reply, para, 374, referring to Resp. C-Mem., para. 582.

[1347] Cl. Mem. on Merits, para. 187; **CL-0052**, *Electrabel v. Hungary*, Award, para. 179. *See also* **CL-0073**, *Cairn Energy plc and Cairn UK Holdings Limited v. Republic of India*, PCA Case No. 2016-7 (UNCITRAL), Award, 21 December 2020 ("***Cairn v. India***"), para. 1816 (the tribunal considered that retroactive application of legislation "*failed to balance, or at least adequately to balance, the Claimants' protected interest of legal certainty / stability / predictability on the one hand, and the Respondent's power to regulate in the public interest on the other*").

[1348] Cl. Reply, para. 384, referring to Resp. C-Mem., paras. 585, 587-588.

b. disagreeing with the Respondent that "*tribunals should systematically apply 'a presumption of legitimacy of State regulatory action' because of the high deference that should be afforded to states' right to regulate*";[1349]

c. confirming that the Claimants "*do*[ ] *not dispute that States benefit from a right to regulate*", but disputing that "*in balancing competing interests, States' right to regulate should be systematically favoured over the interests of investors*",[1350] arguing further that "*in some circumstances, such as the retroactive application of new regulatory measures, tribunals have shown particular respect for investors' pre-existing rights under the former regulatory regime when performing that balancing exercise*" – here the Claimants rely on the prior award in *Cairn v. India*, where retroactive taxation was found to be "*grossly unfair*":[1351]

> By retroactively applying, without a specific justification, a new tax burden on a transaction that was not taxable at the time it was carried out, the Respondent deprived the Claimants of their ability to plan their activities in consideration of the legal consequences of their conduct, in violation of the principle of legal certainty, which the Tribunal considers to be one of the core elements of the FET standard, and of the rule of law more generally.

iv. Fair and Equitable Treatment and Transparency

767. Fourthly, as to fair and equitable treatment and transparency, the Claimants argue that this is a "*key feature of the fair and equitable treatment standard: a State must act transparently and consistently*", as recognised in the first sentence of Article 10(1) relating to the fair and equitable treatment standard,[1352] which "*requires that any decisions or actions that affect an investor and their investments*

[1349] Cl. Reply, para. 385, referring to Resp. C-Mem., paras. 590-593.

[1350] Cl. Reply, para. 386, referring to Resp. C-Mem. para. 590.

[1351] Cl. Reply, para. 386; **CL-0073**, *Cairn v. India*, para. 1816.

[1352] Cl. Mem. on Merits, para. 184; **CL-0064**, *Cargill, Incorporated v. Republic of Poland*, UNCITRAL, Final Award, 29 February 2008, paras. 511, 517; **CL-0065**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (***Siemens v. Argentina***"), paras. 297-298; **CL-0066**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 ("***Rumeli v. Kazakhstan***"), para. 609; **CL-0067**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 ("***Plama v. Bulgaria***"), para. 178.

are: (i) carried out based on a legal framework that is readily known to the investor; and (ii) free from ambiguity and uncertainty".[1353]

768. The Claimants develop their position on transparency in their Reply, submitting further as follows:

a. reiterating reliance on "*the standard of transparency enshrined in the first sentence of Article 10(1) of the ECT, which requires that any decisions or actions that affect an investor and its investment be (i) carried out on the basis of a legal framework that is readily known to the investor and (ii) free from ambiguity and uncertainty*";[1354]

b. in response to the Respondent's argument that breach of transparency requires a very high threshold ("*a showing of a continuing pattern of non-transparent actions by a Government over time in which the State entirely disregarded the procedural rules that it must follow within a particular process and displayed a complete lack of transparency and candour*"),[1355] stating that:

i. such standard "*is truncated and ignores the stream of cases relevant to the present dispute*" which have found a State breach "*by failing to ensure that the legal and regulatory framework applicable to an investor's investment clearly set out all the relevant legal requirements for the purpose of initiating, completing and successfully operating the investment made*",[1356] including:

[1353] Cl. Mem. on Merits, para. 184; **CL-0030**, Dolzer/Schreuer, *Principles* (2012) (Claimants' excerpt), p. 149; **CL-0068**, *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013 ("***Micula v. Romania (I)***"), paras. 531-533; **CL-0037**, *Tecmed v. Mexico*, paras. 154-174; **CL-0069**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 ("***Waste Management v. Mexico***"), para. 98; **CL-0066**, *Rumeli v. Kazakhstan*, para. 583; **CL-0070**, *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, para. 660 ("*a lack of transparency may constitute a breach of the [ECT's fair and equitable treatment standard] independent of any consideration of legitimate expectations or stability*").

[1354] Cl. Reply, para. 375.

[1355] Cl. Reply, para. 376, referring to Resp. C-Mem., paras. 596-601.

[1356] Cl. Reply, para. 377.

1. *Metalclad v. Mexico*:[1357] the tribunal concluded that, in failing to grant a construction permit, the State "*failed to ensure a transparent and predictable framework for Metalclad's business planning and investment*", and it reasoned that

> all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.

2. *Tecmed v. Mexico*:[1358] the dispute involved a failure to replace an unlimited license with a licence of limited duration for the operation of a landfill and the tribunal found that an investor is entitled to expect

> the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that [the investor] may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations.

[1357] Cl. Reply, para. 378; **CL-0078**, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 ("***Metalclad v. Mexico***"), paras. 76, 99.

[1358] Cl. Reply, para. 379; **CL-0037**, *Tecmed v. Mexico*, para. 154.

3. *Gold Reserve v. Venezuela*:[1359] the tribunal determined, with respect to the State's refusal to sign formal authorisation documents to start the exploitation phase of a mining concession without justification:

> Respondent's failure to sign the Initiation Act despite Claimant's repeated requests without explaining the reasons for such inaction, rather reinforcing Claimant's expectation that such signature would be forthcoming once the proposed alternative access road had been accepted, amount to conduct evidencing (through acts and omissions) a lack of transparency, consistency and good faith in dealing with an investor.

ii. other prior awards found "*inconsistent behaviour from a State and its organs amount to a violation of the transparency requirement enshrined in the fair and equitable treatment standard*", as follows:[1360]

1. *Lauder v. Czech Republic*:[1361] the tribunal stated that "[t]*he minimum requirement is that the State not engage in inconsistent conduct, e.g. by reversing to the detriment of the investor prior approvals on which he justifiably relied. Such a requirement is independent of the State's domestic law, i.e. the obligation to provide fair and equitable treatment can be violated even if the State complied with the requirements under its domestic law*";

2. *Crystallex v. Venezuela*:[1362] according to the tribunal, "*in spite of the inconsistency between the Permit denial letter of 18 April 2008 and the 16 May 2007 letter (which had concluded that the Permit 'will be handed over'), the subsequent denial does not even attempt to explain the departure from the conclusions reached only a few*

[1359] Cl. Reply, para. 380; **CL-0116**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award, 22 September 2014 ("***Gold Reserve v. Venezuela***"), para. 591.

[1360] Cl. Reply, para. 381; **CL-0256**, Dolzer/Kriebaum/Schreuer, *Principles* (2022) (second excerpt), p. 207.

[1361] Cl. Reply, para. 381(i); **RL-0204**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 ("***Lauder v. Czech Republic***"), para. 290.

[1362] Cl. Reply, para. 381(ii); **CL-0125**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 ("***Crystallex v. Venezuela***"), paras. 598, 606.

months before by the same Ministry", with the claimant "*subjected to a 'roller-coaster' of contradictory and inconsistent statements from Venezuela's authorities*";

3. *Garanti Koza v. Turkmenistan*:[1363] the tribunal determined that "*inconsistency of behavior between one agency of the Turkmenistan Government, which had agreed to a system of payment based on the percentage of work completed, and other arms of the same Government that insisted that payment could only be made against invoices built up from costs, plus a limited profit margin, as required to conform to Smeta, would alone have been sufficient to call into question whether the Claimant had been treated fairly and equitably*".

v. Fair and Equitable Treatment and Good Faith

769. Fifthly, as to fair and equitable treatment and good faith, the Claimants argue in their Memorial on the Merits that that while "*it is not necessary to show bad faith*", "*a lack of good faith on the part of the State is an important consideration*", and "[i]*nternational arbitral practice confirms that good faith is inherent in fair and equitable treatment*".[1364] The Claimants reiterate these points in their Reply but they do not add to them.[1365]

b. Facts Relating to the Claimants' Expectations[1366]

770. The Claimants' starting point for legal, regulatory and political framework applicable to its investments is the 2002 Offshore Wind Strategy, which they submit "*set ambitious*

[1363] Cl. Reply, para. 381(iii); **CL-0254**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016 ("***Garanti Koza v. Turkmenistan***"), para. 382.

[1364] Cl. Memorial on Merits, para. 186; **CL-0030**, Dolzer/Schreuer, *Principles* (2012) (Claimants' excerpt), pp. 156, 158; **CL-0071**, *Lemire v. Ukraine*, para. 254; **CL-0053**, *Frontier v. Czech Republic*, para. 301; **CL-0072**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 ("***Jan de Nul v. Egypt***"), para. 185; **CL-0024**, *Duke Energy v. Ecuador*, para. 341; **CL-0037**, *Tecmed v. Mexico*, para. 153 ("*the commitment of fair and equitable treatment … is an expression and part of the bona fide principle recognised in international law*"); **CL-0069**, *Waste Management v. Mexico*, para. 138 ("*A basic obligation of the State … is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means*").

[1365] Cl. Reply, paras. 382-383.

[1366] This section summary is based primarily on the Claimants' Post-Hearing Briefs, which summarise key evidence and earlier arguments following oral testimony.

targets for the expansion of offshore wind" and "*underpinned the legal and regulatory framework which incentivised Mainstream to invest in Germany*".[1367] They submit that the 2002 Offshore Wind Strategy:

a. set "*targets for the development of offshore wind*", stating, "[i]*n the long term, i.e. by 2025 or 2030, about 20,000 to 25,000 megawatts of installed capacity are possible (coastal sea and EEZ) if economic viability is achieved*";[1368]

b. had as its "*primary objective*" to establish "*the greatest possible legal and planning certainty*" for the development of offshore wind, giving BMU a mandate to "*develop and implement a targeted strategy for resolving existing conflicts of protection and use and for accelerating the approval procedures*", and "*successive German coalition Governments reflected the cross-party, cross-societal support for offshore wind*";[1369]

c. "*was foundational*", being "*carefully considered and designed to inform Germany's policy, and therefore its legislative agenda, on the swift expansion of offshore wind*";[1370]

d. "*an overriding principle which informed the rest of the framework*";[1371] and

e. "*not legally binding*", but "*underpinned the legal and regulatory framework for offshore wind on which Mainstream relied when it invested*".[1372]

771. The Claimants further submit in their expert opinion evidence:[1373]

> Investors are more concerned by the perceived political commitment to renewables than whether or not any targets are binding. … Investors have generally received non-binding offshore wind targets in Germany positively, as they provide a sense of direction and long-term planning for the industry.

[1367] Cl. PHB, paras. 9 *et seq.*

[1368] Cl. PHB, para. 9; **R-0009**, 2002 Offshore Wind Strategy, p. 7.

[1369] CL. PHB, para. 10; **R-0009**, 2002 Offshore Wind Strategy, p. 2; Tr. Day 1, 149:25–150:18.

[1370] Cl. PHB, para. 11.

[1371] Cl. PHB, fn. 8.

[1372] Cl. PHB. 11.

[1373] Cl. PHB, para. 12; Brattle Second Expert Report, para. 129.

Against that, the Claimants argue that "[i]*t was reasonable for Mainstream to rely on the targets because they remained in place over successive German Governments between 2002-2014*".[1374]

772. The Claimants acknowledge that the EEG was designed to promote renewable energy "*in order to help this technology to grow rapidly and work without subsidies*",[1375] but maintain that this was not inconsistent with their "*expectation that the legal, regulatory and policy framework would remain supportive of the swift expansion of offshore wind*", and their expectation that "*had the Projects developed in accordance with their anticipated timeline, they would have benefitted from FiTs*", because:

a. the 2002 Offshore Wind Strategy long-term targets of 20,000 to 25,000 MW "*by 2025 or 2030*" were subject to "*economic viability* [being] *achieved*";[1376]

b. based on the Stakeholder Conference, the Claimants "*expected the Projects to be commissioned by 2019 and 2020*" (or 2015 in the Consent Applications);[1377]

c. "[n]*o evidence has been led to suggest that offshore wind would have developed to the extent that no subsidies were required by either of those dates*";[1378] and

d. "*thanks to the EEG, as part of this strategy to introduce the renewable energies, this kind of energy production is to be promoted, in order to help this technology to grow rapidly and work without subsidies*", so the Claimants expected they would develop the Projects "*during this time of growth, where financial support was still available*".[1379]

[1374] Cl. PHB, para. 12; Tr. Day 8, 88:25–89:2.
[1375] Cl. PHB, para. 13; Tr. Day 1, 218:8-9.
[1376] Cl. PHB, para. 13(i); **R-0009**, 2002 Offshore Wind Strategy, p. 7.
[1377] Cl. PHB, para. 13(ii); **C-0092**, Horizont I Application, p. 13.
[1378] Cl. PHB, para. 13(iii).
[1379] Cl. PHB, para. 13(iv); Tr. Day 1, 218:5-9.

773. In response to the Respondent's position that the 2002 Offshore Wind Strategy sought to balance "*environmental and ecological aims of the expansion of offshore wind against its economic viability*",[1380] the Claimants further submit that:

a. "*economic viability needs to price in negative and positive externalities*";[1381]

b. "*to the extent that these aims are competing, they must be seen in their context at the time of* [the Claimants'] *investments*", as "[p]*olicy drivers will have different weighting over time*";[1382] and

c. at the time of their investment "[t]*he energy transition and the expansion of offshore wind was Germany's focus*".[1383]

774. In response to the Respondent's position that the Project sites were not within the "*suitability areas*" contained in the 2002 Offshore Wind Strategy,[1384] the Claimants submit that:

a. "[t]*his did not mean that it was foreseeable that projects not located therein were considered unlikely to be developed as a result*";

b. Ms. Nemitz (albeit in 2015) "*specifically informed Mainstream that, under the pre-overhaul framework, 'a realisation of projects in Zone 3 would have been necessary for the realisation of the objective of generating up to 25 GW from offshore wind energy by 2030'*";[1385]

[1380] Cl. PHB, para. 14, citing, for example, Tr. Day 1, 215:12-217:13.

[1381] Cl. PHB, para. 14.

[1382] Cl. PHB, para. 14. The Claimants refer to the testimony of Mr. Slark (that in 2008 and 2009, "*there would have been a lot less debate*" about balancing the environmental aims of the 2002 Offshore Wind Strategy as against its economic viability [Tr. Day 8, 94:24-25]) and Dr. Nolte (that the 2002 Offshore Wind Strategy was "*putting forward the importance of offshore wind energy for energy transition, and makes it obvious that it's supposed to be a major thing to fight against global climate change*" [Tr. Day 3, 5:19-22]).

[1383] Cl. PHB, para. 14.

[1384] Cl. PHB, para. 15, referring to **RD-0001**, Resp. Opening Statement, slide 39.

[1385] Cl. PHB, para. 15; **C-0125**, Letter from BSH to Fourth, Fifth and Sixth Claimants, 24 March 2015, p. 6.

c. "*this had been Mainstream's understanding from the beginning*", including in February/March 2009, when the Board Report noted that:[1386]

> The Horizont sites are still not in a designated area – which has however no impact of [*sic*] the development/consent process at this stage. However it is much likely [*sic*] that "one day" the Horizont area will be a designated area. Germany has set ambitious targets for offshore (25GW by 2025/2030). To reach them nearly all possible locations will be finally used for offshore. It is thus only a question of time when also Horizont will be in one of the designated areas. The risk to be completely excluded from a designated area is relatively low.

775. The Claimants' case in the arbitration is that in order to meet the targets in the 2002 Offshore Wind Strategy, the Respondent "*needed to incentivise investment and it did so by implementing a favourable legal and regulatory framework*".[1387]

776. Specifically, at the time of making the original investment (i.e., submitting the Consent Applications for the Projects), the Claimants allege that there was "*a favourable legal framework in place for the development of offshore wind farms*",[1388] based on the:

a. 2006 SeeAnlV, which was the "*regulatory approval process for the construction and operation of offshore wind farms in the German* [EEZ]", whereby "*regulatory approval was granted by the BSH on a 'first come, first served' basis (the '**priority principle**') and an approval decision by the BSH granted the relevant developer exclusivity over a site*";[1389]

b. 2006 EnWG, as amended by the 2006 Act on the Acceleration of Planning Procedures for Infrastructure Projects, to shift responsibility for constructing and operating the gird connection between offshore wind farm substations and the nearest grid connection point on land ("**Offshore Grid Connection Line**") to the TSO;[1390]

[1386] Cl. PHB, para. 15; **C-0098**, February/March 2009 Mainstream Board Report, p. 2, fn. 1.

[1387] Cl. PHB, paras. 16 *et seq*.

[1388] Request for Arbitration, para. 27.

[1389] Request for Arbitration, para. 30.

[1390] Request for Arbitration, para. 32.

c. 2007 EEG as amended on 7 November 2007, which set out the "*financial subsidy concept, involving the provision of stable fixed-feed-in tariffs, for renewable energy projects in Germany*";[1391] and

d. 2004 ROG (Federal Spatial Planning Act), extending spatial planning to the EEZ.[1392]

777. In turn, they put considerable weight on the 2002 Offshore Wind Strategy, which provided that the sources of law provided the "*favourable*" elements that came to be characterised in the course of the Claimants' oral and written submissions as the: (i) "*Consenting Regime*", (ii) "*Grid Connection Regime*"; (iii) "*Economic Incentives*" and (iv) "*Spatial Planning Regime*".

778. In essence, according to the Claimants, the Respondent "*organised its legal and regulatory framework in three main 'buckets'*", which they argue "*were designed to incentivise investment and they did incentivise Mainstream*".[1393] The "*specific legal and regulatory instruments that inform each 'bucket' at the time of each business decision by Mainstream to invest in Germany*"[1394] are set out in the Table at pages 15-17 of the Claimants' Post-Hearing Brief and the key parameters of each are described by the Claimants as follows:

a. the Consenting Regime legal requirements were contained in the 2006 SeeAnlV Section 3, which set out the legal requirements for approval (or consent) for an offshore wind farm, known as the "*permit procedure*", with additional draft instruments as follows:[1395]

i. the 2008 SeeAnlV (adopted but not in force at the date of the Consent Applications) applied upon entry into force on 26 July 2008 (which had differences that the Claimants say "*are immaterial*", because:

[1391] Request for Arbitration, paras. 35.

[1392] Cl. PHB, p. 15, Table.

[1393] Cl. PHB, para. 27; **CD-0001**, Cl. Opening Statement, slides 34-37; Tr. Day 1, 19:24–23:7; Tr. Day 9, 164:25–165:14. *See also* Cl. Reply, Sec. II.A.2.

[1394] Cl. PHB, para. 28.

[1395] Cl. PHB, para. 28(i)(a).

1. "[b]*oth provided for a legal right to consent if the legal requirements were met*";[1396]

2. "*BSH's role was limited to checking whether the legal requirements for consent were met*", and "[i]*f they were, it could not refuse consent*";[1397] and

3. "[a]*ny 'discretion' held by the BSH under the SeeAnlV 2008 was procedural only*");[1398]

ii. the 2008 Draft Spatial Planning Ordinance (published but not adopted at the date of the Consent Applications), which the Claimants say "*stood no chance of being implemented and, even if it had been, would have amounted only to 'consent delayed' rather than 'consent refused'*",[1399] including because:

1. the BSH published the Draft Spatial Planning Ordinance without "*coordinating with the Federal Ministry of Transport*";[1400]

2. Dr. Wustlich in 2007 stated that any exclusion effect for OWF planning was "*only likely to be the case if sufficient areas are earmarked for wind energy to achieve the targets envisaged in the Federal Government's offshore strategy*", and such "'*exclusion effect' would have made it impossible for the targets in the 2002 Strategy to be met*", as "*acknowledged in the explanatory memorandum to the eventual Spatial Planning Ordinance*", further noting that "*the SeeAnlV did not contain an exclusion clause which*

[1396] Cl. PHB, para. 28(i)(a), referring to Resp. Rej., para. 154. *See also* Hofmann Second Expert Report, paras. 54 *et seq*. (addressing the non-discretionary nature of the BSH's decision-making); **CD-0001**, Cl. Opening Statement, slide 34; Tr. Day 3, 13:12–14:4 and 20:55–21:14.

[1397] Cl. PHB, para. 28(i)(a). *See also* Hofmann Second Expert Report, para. 59 ("*By providing an illustrative list of examples for these two grounds for refusal, Section 3 second sentence SeeAnlV 2008 does not grant the BSH discretion to find additional grounds for refusal beyond the two grounds enumerated in Section 3, first sentence SeeAnlV 2008*").

[1398] Cl. PHB, para. 28(i)(a).

[1399] Cl. PHB, para. 28(i)(b).

[1400] Cl. PHB, para. 28(i)(b)(1); **C-0219**, Offshore Wind Industry Alliance 2008 Position Paper, p. 1; Tr. Day 8, 104:5–105:1.

would make possible the refusal of approval due to spatial planning objectives",[1401] although "*the BSH published it anyway*";[1402]

3. the Federal Ministry of Transport "*'expected' that the Draft Spatial Planning Ordinance would be heavily criticised by the offshore wind sector, and even noted that the draft had not been socialised with the coastal States bordering Germany*";[1403] and

4. the Consent Applications "*demonstrated that the likely impact of the Draft Spatial Planning Ordinance, if it had passed, would have been 'consent delayed' rather than 'consent refused'*", the Projects "*would have been necessary for the targets in the 2002 Strategy to have been met*",[1404] and even if consent were delayed, the Claimants expected "*other incentives would remain in the future*";[1405]

b. the Grid Connection Regime requirements were contained in the 2006 EnWG Section 17(2a), which provided that:

i. "*the responsible TSO should construct a grid connection by the time an OWF was ready for commissioning*";[1406]

ii. if the Respondent "*had genuinely held*" the view that "*the right to an individualised grid connection under section 17 (2a) EnWG 2006 was idealistic and not to be taken seriously*", then "*it would not have enacted section 17 (2a) of the EnWG 2006*";[1407]

[1401] Cl. PHB, para. 28(i)(b)(2); **EH-0049**, G. Wustlich, "*The Law of Wind Energy in Transition Part 2: Wind Energy at Sea*" in Journal of Environmental Law, 2007, p. 3; **C-0219**, Offshore Wind Industry Alliance 2008 Position Paper, p. 2; **RL-0137**, Explanatory Memorandum to the Draft Spatial Planning Ordinance, Sec. 5. The Claimants note, "*The version of the Spatial Planning Ordinance that did pass similarly noted that the spatial plan was based on the 2002 Offshore Wind Strategy, highlighting that, even though it was a policy document, Germany based its regulations on the targets*": Cl. PHB, fn. 50.

[1402] Cl. PHB, para. 28(i)(b)(3).

[1403] Cl. PHB, para. 28(i)(b)(4); **C-0222**, Ministry of Transport, 2008 Internal Note.

[1404] According to the Claimants, "*This was confirmed by the BSH*": Cl. PHB, fn.54; **C-0125**, Letter from BSH to Fourth, Fifth and Sixth Claimants, 24 March 2015, p. 6.

[1405] Cl. PHB, para. 28(i)(b)(5); **C-0093**, Horizont II Application, pp. 11-12; **C-0094**, Horizont III Application, pp. 11-12.

[1406] Cl. PHB, para. 28(ii)(a); **RL-0125**, 2006 EnWG.

[1407] Cl. PHB, para. 28(ii)(a), referring to Resp. C-Mem., para. 231. *See also* CL. Reply, paras. 71, 74.

iii. the Respondent's witness, Dr. Wustlich, "*who was involved in drafting section 17 (2a)*" confirmed that:[1408]

1. he, and others, "*were of the firm belief that this arrangement would relieve the offshore sector of a multi-billion-euro risk*";[1409]

2. "*section 17 (2a) was a positive change*" and his view in 2009 that "*the BNetzA Position Paper would resolve some of the practical issues*";[1410]

3. the BMU Paper:[1411]

- "*described section 17 (2a) as a 'substantial improvement'*";

- "*revealed that Germany exaggerated the extent to which the practical problems with the grid connection regime were known prior to the BNetzA Position Paper*";

- "*posited that only a 'moderate upgrade' of the network would be required*"; and

- "*sought to incentivise investors with this messaging*";

c. the Economic Incentives were contained in the FiTs in the EEG, which according to the Claimants:[1412]

i. "*consistently improved from 2004 until the EEG was amended as a result of Germany's change in its political commitment to offshore wind in 2014*";[1413] and

[1408] Cl. PHB, para. 28(ii)(b)(1).
[1409] Cl. PHB, para. 28(ii)(b)(2); Wustlich Witness Statement, para. 38.
[1410] Cl. PHB, para. 28(ii)(b)(2); Tr. Day 4, 28:5-25.
[1411] Cl. PHB, paras. 28(ii)(b)(3)-(4); **C-0306**, BMU Paper, pp. 6, 11.
[1412] Cl. PHB, para. 28(iii)(a).
[1413] Cl. PHB, para. 28(iii)(a); Tr. Day 4, 34:13-36:19.

ii. in response to the Respondent's argument that "*because FiTs were not available until commissioning, it was unreasonable for Mainstream to rely on the availability of economic incentives*", they submit that this:[1414]

iii. "*ignores the fact that FiTs were created to encourage experienced developers like Mainstream to incur the time-consuming and costly exercise of developing an OWF, because those developers would know that if economic viability was not (yet) reached by commissioning, they would receive economic incentives*";[1415] and

iv. "[w]*ithout such assurances of economic incentives, developers simply would not have incurred the costs of development. Germany knew this, which was why it offered economic incentives*".

779. At the same time as asserting that they were entitled to the stability of the "*favourable legal framework*" in place at the time of the June and July 2008 Consent Applications, the Claimants also seek to rely on further protection provided by subsequent changes to that stable framework, insofar as they were favourable to it. In this regard, in their Reply Post-Hearing Brief, the Claimants rely on commentary by Professors Schreuer and Kriebaum (emphasis added):[1416]

> A foreign investor may be presumed to know the general regulatory framework … at the time it first embarks upon the investment. But it is not only the framework existing at that early stage that can create legitimate expectations. ***If there are favourable changes to the legal framework during the establishment or during the lifetime of the investment, this may also create legitimate expectations which will be protected if the foreign investor relies on them in subsequent business decision*** [*sic*].

780. The Claimants point out that the authors acknowledge that an investor typically makes important decisions not only when taking a first step towards an investment, but also at a later stage, and that "*legitimate expectations must be examined for each stage at which a decisive step is taken*" in relation to that investment. Therefore, they submit that their

[1414] Cl. PHB, para. 28(iii)(b).

[1415] Cl. PHB, para. 28(iii)(b).

[1416] Cl. Reply PHB, para. 37; **CL-0366**, Schreuer/Kriebaum, *Legitimate Expectation*, pp. 273-274.

legitimate expectations should be assessed at the date of original investment, and upon further business decisions at various times in the course of investment,[1417] and that the Respondent "*acknowledges that legitimate expectations evolve over time as further business decisions are made to invest*".[1418]

781. The Claimants' case is that "[t]*he purpose of protecting legitimate expectations is to enable an investor to make rational business decisions relying on the representations*",[1419] and:

a. "*an investor may be presumed to know the general legal and regulatory framework prevalent in a State at the time it first embarks upon the investment*";[1420]

b. "*favourable changes in the course of an investment can also create legitimate expectations … protected if relied upon in a subsequent business decision*";[1421] and

c. the Claimants' "*legitimate expectations evolved as* [they] *made further business decisions in relation to the Projects*".[1422]

782. Given that the vast majority of the Claimants' capital expenditure occurred following the Consent Applications (with the Application payment of EUR 25,000 each), it is necessary for the Claimants to show that they relied on the favourable changes to the framework in the course of their investment up until 1 January 2012. In this regard, they submit in closing that at each step the investments "*were made in the legitimate expectation of the framework that existed at the time when those investments were made*".[1423] They claim to have "*relied on a regime that incentivised investors: consent if the legal requirements were met, a grid connection available at commissioning, and economic incentives*".[1424]

783. Regarding the investment business decisions from the date of the Consent Applications to the alleged State measures on 1 January 2012, the Claimants produce the following table

[1417] Cl. PHB, para. 81; Cl. Reply PHB, para. 38.
[1418] Cl. Reply PHB, para. 36, referring to Resp. PHB, para. 69.
[1419] Cl. PHB, para. 81.
[1420] Cl. PHB, paras. 30, 81.
[1421] Cl. PHB, paras. 31, 81.
[1422] Cl. PHB, paras. 33, 82.
[1423] Cl. PHB, para. 82; Tr. Day 9, 169:4-9.
[1424] Cl. PHB, para. 82.

in their Post-Hearing Brief, which they submit sets out "*the business decisions which formed Mainstream's investments and against which Mainstream's legitimate expectations must be assessed*",[1425] beginning with the Consent Applications and culminating in documents submitted to the BSH on 22 December 2009.[1426]

[1425] CL. Reply PHB, para. 38.

[1426] Cl. PHB, pp. 15-16.

Key:

- Non-binding/policy
- Law/regulation in force
- Law/regulation adopted but not yet in force
- Law/regulation issued in draft but not (yet) adopted

DATE	BUSINESS DECISION	OFFSHORE WIND TARGET	CONSENTING REGIME		GRID CONNECTION REGIME		ECONOMIC INCENTIVES		SPATIAL PLANNING REGIME
27 June 2008	Submission of Application for the Horizont Project (**C-0092**) **Financial investment**: EUR 25,000 application fee	2002 Strategy: 20-25 GW by 2025/2030 (**EH-0010**)	SeeAnlV 2006, section 3 (**C-0073**)	SeeAnlV 2008, section 3 (adopted on 15 July 2008 to enter into force on 26 July 2008) (**Response to RfB**, footnote 162)	TSOs obliged to construct a grid connection under section 17 (2a) EnWG by commissioning if construction begun before 31 December 2011 (**RL-0125**)	Amendment to EnWG to extend the application of section 17 (2a) EnWG to projects that were under construction by 31 December 2015 (**C-0215**)	EEG 2004 (**C-0077**)	Draft EEG 2008 (**EH-0024**) (adopted on 25 October 2008 (**C-0078**) and entered into force on 1 January 2009 as EEG 2009	Federal Spatial Planning Act (extended spatial planning to EEZ) (**RL-0117**) The SeeAnlV and the 2002 Strategy contained special suitability areas, but these had no steering effect on projects located outside them (Day 2, 1:24-25)
11 July 2008	Submission of Applications for the Horizont Ost and West Projects (**C-0093**, **C-0094**) **Financial investment**: EUR 50,000 application fees								Draft Spatial Planning Ordinance with exclusion effect (**RL-0122**) (published on 30 June 2008)
4 September 2008	Board approval for EUR 590,000 for development expenditure (**C-0096**) **Financial investment**: EUR 590,000		SeeAnlV 2008 (**RL-0114**)						
February/March 2009	Board approval for EUR 1.95 million of development expenditure (**C-0098**) **Financial investment**: EUR 1.95 million				TSOs obliged to construct a grid connection under section 17 (2a) EnWG by commissioning if construction begun before 31 December 2015 (**RL-0128**)		EEG 2009 (improvement of FiTs from EEG 2004) (**C-0078**)		Draft Spatial Planning Ordinance without exclusion effect (**C-0098**, p. 2)

30 April 2009	Application Conference for the Projects (**C-0097**) **Financial investment**: "sweat equity" in preparing presentations on the Projects, in terms of employee time/legal advice[79]								
June 2009	Board approval for EUR 2 million on geotechnical studies (**C-0090**) **Financial investment**: EUR 2 million		SeeAnlV 2008 (**RL-0114**)	Draft SeeAnlV 2009 published (19 June 2009) with proposed tendering (**RL-0124**)					
22 December 2009	Mainstream submits relevant documents to the BSH for consent (**C-0001**) **Financial investment**: "sweat equity" in preparing the various consenting documents and corresponding with the BSH. Total expenditure (excluding overheads) by October 2009: EUR 3.9 million (**C-0091**, p. 50)		SeeAnlV 2008 (**RL-0114**) (Draft SeeAnlV 2009 not adopted following opposition from offshore wind industry (Second Prall Witness Statement, para. 42)		TSOs obliged to construct a grid connection under section 17 (2a) EnWG by commissioning if construction begun before 31 December 2015 (**RL-0128**)	BNetzA Position Paper provides that a grid connection must be established as early as possible, but at the latest within a period of 30 months after certain non-binding criteria met by the developer (**R-0008**)			Spatial Planning Ordinance (no exclusion effect) (entered into force on 21 September 2009) (**SBT-0061**)
2010-2011	Continued undertaking of studies and investigations as required to demonstrate meeting of legal requirements for consent **Financial investment**: EUR 2 million (see		SeeAnlV 2008 (**RL-0114**)	Draft SeeAnlV 2012 sent to stakeholders on 15 August 2011 (**SBT-0222**) (adopted on 15 January 2012)	31 December 2015 cut-off for construction of grid connection under EnWG disposed with (2011) (Counter-Memorial, para. 278)	BNetzA Position Paper updated to provide more detailed rules on grid connections (January 2011) (**SBT-0048**)	EEG 2009 (**C-0078**)	EEG 2012 (adopted on 28 July 2011) (**C-0148**)	

784. According to the Claimants, based on the adopted laws, the radical overhaul of the framework was not foreseeable prior to 22 December 2009, and their decisions from that time "*were either a continuation of previous activities or were taken still with the genuine expectation of consent being forthcoming if the legal requirements were met*".[1427]

785. As to foreseeability, the Claimants submit that "[i]*t was not foreseeable when* [they] *invested that, in the time between the Applications and the Stakeholder Conference, these valuable incentives would be removed, or that the Projects would be terminated*".[1428] In relation to their perseverance after initial changes, they submit that:

a. "*when the possible grid connection date was pushed well into the future,* [they] *did so at the very least in the expectation that consent would be received if the legal requirements for it were met (which they were)*";[1429] and

b. they "*persevered with the Projects up to and after the Stakeholder Conference because* [they] *retained a genuine expectation of consent (even if the grid connection regime had changed) and because of* [their] *commitment to the Projects and to Germany*".[1430]

786. As to the nature of the work conducted from 2008 to 2013, according to the Claimants, they "*made numerous business decisions to invest in Germany through the development of the Projects in reliance on the favourable legal, regulatory, and policy framework*", including in particular their business decisions to:[1431]

a. submit the 27 June 2008 Consent Application for Horizont, "*following* [their] *due diligence, including the Business Plan and the various fact-finding meetings in May 2008*", accompanied by a fee of EUR 25,000;[1432]

[1427] CL. Reply PHB, para. 39(i). *See also* Cl. Reply, paras. 83 *et seq*.

[1428] Cl. PHB, para. 82.

[1429] Cl. PHB, para. 83.

[1430] Cl. Reply PHB, para. 39(ii).

[1431] Cl. PHB, paras. 35 *et seq*. *See also* the timeline at **CD-0001**, Cl. Opening Statement, slides 21-24.

[1432] Cl. Reply PHB, para. 35(i); Nolte Third Witness Statement, para. 27; **C-0092**, Horizont I Application (submitted by Mainstream Renewable Power (UK) Ltd.).

b. submit two 11 July 2008 Consent Applications for Horizont Ost and Horizont West, "*on the basis of* [their] *due diligence, including* [their] *analysis of (a) whether the Draft Spatial Planning Ordinance would be implemented; and (b) if so, what its impact on the Projects would be*", accompanied by a fee of EUR 50,000;[1433]

c. seek board approval on 4 September 2008, for EUR 590,000 for development expenditure of the Projects for the 2009 financial year;[1434]

d. seek board approval in February/March 2009, for EUR 1,950,000 for development expenditure, to fund "*various surveys and studies that had to be submitted to the BSH to show that the legal requirements for consent were met*", which was after the Respondent had "*announced that the 'exclusion effect' in the Draft Spatial Planning Ordinance would be deleted in December 2008*";[1435]

e. prepare for, attend and present at the Application Conference on 30 April 2009;[1436]

f. set out in June 2009, the different geotechnical studies that they had invested in and approve a EUR 2 million expenditure,[1437]

g. submit on 22 December 2009, "*documents containing evidence that the legal requirements for consent were met to the BSH*";[1438] and

h. individual economic activities and business decisions from 22 December 2009 to the 5 March 2013 Stakeholder Conference including to:

[1433] Cl. PHB, para. 35(ii); Nolte Third Witness Statement, para. 27; **C-0093**, Horizont II Application (submitted by Mainstream Renewable Power (UK) Ltd.); **C-0094**, Horizont III Application (submitted by Mainstream Renewable Power (UK) Ltd.).

[1434] Cl. PHB, para. 35(iii); **C-0096**, September 2008 Mainstream Board Report, p. 1. This expenditure request was approved: *see* **C-0098**, February/March 2009 Mainstream Board Report, p. 1. According to the Claimants, "*The Sunk Costs Analysis reveals that Mainstream incurred little expenditure in 2008, totalling only approximately EUR 80,000 in addition to the Application fees*".

[1435] Cl. PHB, paras. 35(iii)-(iv); **C-0098**, February/March 2009 Mainstream Board Report, pp. 1-2. This approval was granted: *see* **C-0090**, June 2009 Mainstream Board Report, p. 1.

[1436] Cl. PHB, para. 35(iv); Schwencke Witness Statement, para. 51; **C-0097**, Minutes of April 2009 Application Conference.

[1437] Cl. PHB, para. 35(vi); **C-0090**, June 20009 Mainstream Board Report, p. 2.

[1438] Cl. PHB, para. 35(vii); **C-0001**, 2013 Stakeholder Conference Minutes, pp. 1-2. *See also* Cl. Reply, para. 276(vii).

i. conduct further surveys and studies in relation to the Projects throughout 2010 and 2011 (e.g., "*environmental surveys were required to be undertaken for two years without any interruptions*");[1439]

ii. update on 5 December 2012, documents previously submitted on 22 December 2009 as a result of the 2012 SeeAnlV;[1440]

iii. invest in December 2012 in "*further studies on the 'feasibility and additional cost of the deployment of Jack-up vessels (and floating installation) in Horizont' in order to 'support the sales process' for the asset*";[1441] and

iv. attend and present at the 5 March 2013 Stakeholder Conference (by which time the "*board paper dated 21 May 2013 stated that Mainstream had invested EUR 6.1 million (excluding overheads) in the Projects*").[1442]

787. In their Post-Hearing Brief, the Claimants further argue that the Respondent's "*witnesses and experts admitted at the Hearing that the Projects had done everything to receive consent*",[1443] against the SeeAnlV regime, which they maintain:

a. "*entailed a legal right (or 'non-discretionary entitlement') to consent if the requirements were met*";[1444]

b. if they "*successfully demonstrated that the Projects met the legal requirements, then consent would and should be forthcoming*";[1445] and

[1439] Cl. PHB, para. 35(viii)(a); Sunk Costs Analysis; **C-0091**, 15 December 2009 Board Paper, p. 53.

[1440] Cl. PHB, para. 35(viii)(b); **C-0001**, 2013 Stakeholder Conference Minutes, pp. 2-3. *See also* Cl. Reply, para. 276(x).

[1441] Cl. PHB, para. 35(viii)(c); **C-0057**, 18 December 2012 Board Paper, p. 46.

[1442] Cl. PHB, paras. 35(viii)(d)-(e); **C-0110**, 21 May 2013 Board Paper, p. 63. *See also* Cl. Reply, para. 276(xii).

[1443] Cl. PHB, paras. 36 *et seq*.

[1444] Cl. PHB, para. 36; Tr. Day 1, 20:14–21:1.

[1445] Cl. PHB, para. 37, referring to Resp. C-Mem., para. 317. *See also* Cl. Reply, para. 127.

c. consent could only be refused "*if the safety and efficiency of navigation is impaired or the marine environment endangered or the requirements of spatial planning or other overriding public interests oppose an approval*".[1446]

788. The Respondent's evidence the Claimants rely on includes:

a. Dr. Nolte's testimony:[1447]

i. that "[t]*he applicant submits documents which deal with the legal prerequisites*", which the BSH checks "*with a view to the legal prerequisites, as per the [SeeAnlV]*", based on BSH Standards "*provid*[ing] *for what has to be done, what has to be done when, for subsoil biology and construction*", the BSH itself having the role "*to make sure, including through the BSH Standards, that developers were given clear guidance as to how their projects could demonstrate the legal requirements for consent*";[1448]

ii. confirming that "*by the end of 2012, Mainstream had done everything required at least for their documents to be discussed at a Stakeholder Conference*";[1449]

iii. agreeing that "*if a Stakeholder Conference proceeded without any complaints, it would be very unusual for consent not to be granted*";[1450]

iv. "admitting that "*at the time of the Stakeholder Conference, only on two occasions had a project reached the Stakeholder Conference stage and not then received consent. Both of those projects did not receive consent due to environmental concerns which were not present with the Projects*";[1451]

[1446] Cl. PHB, para. 38, referring to Nolte Third Witness Statement, para. 10.

[1447] Cl. PHB, para. 42(i).

[1448] Cl. PHB, para. 39; Tr. Day 3, 26:19–32:3. According to the Claimants, "*Dr. Nolte further admitted that the BSH Standards intended to 'provide legal, planning and investment security'*": Cl. PHB, fn. 112; Tr. Day 3, 30:6–30:14.

[1449] Cl. PHB, para. 42(i)(a); Tr. Day 3, 53:6-9.

[1450] Cl. PHB, para. 42(i)(b); Tr. Day 3, 55:25–56:9.

[1451] Cl. PHB, para. 42(i)(c); Tr. Day 3, 57:14-19.

v. agreeing that "*by the time of the Stakeholder Conference, the risk of another project developing the Project sites faster than Mainstream and benefiting from the priority principle was 'merely theoretical'*";[1452]

vi. agreeing that "*aside from the post-Stakeholder Conference work, there was nothing else raised at the Stakeholder Conference which would suggest that the Projects did not meet the legal requirements for consent*";[1453] and

vii. admitting that "*the relevant follow-up work was carried out and 'it was confirmed that the helicopter corridor, the service operation vessel and the export cable did not infringe the legal requirements for consent'*",[1454] despite refuting the Claimants' position that such work was "*not necessary for consent*";

b. Ms. Nemitz's testimony:

i. agreeing that "*while it may not be certain that stakeholders will not raise issues at a stakeholder conference, it is correct that the public announcement of a stakeholder conference means that any serious issues could be raised in advance of its holding*";[1455]

ii. confirming that "*the development freeze did not prevent the Stakeholder Conference from being held, and that if the site of the substation and the route of the export cable could be resolved, the development freeze could be lifted, and it would not have been a barrier to consent*";[1456]

c. Mr. Slark's testimony:

[1452] Cl. PHB, para. 42(i)(d); Tr. Day 3, 62:13-18.

[1453] Cl. PHB, para. 42(i)(e); Tr. Day 3, 63:19–64:1.

[1454] Cl. PHB, para. 42(i)(f); Tr. Day 3, 73:11–83:1.

[1455] Cl. PHB, para. 42(ii)(a); Tr. Day 3, 140:22–141:5.

[1456] Cl. PHB, para. 42(ii)(b); Tr. Day 3, 149:24–150:7. The Claimants add that the "*route of the export cable was agreed on 16 May 2013*": Cl. PHB, fn. 126; Parties' Joint Agreed Chronology, 11 September 2023 ("**Agreed Chronology**"), p. 18; **C-0116**, Minutes of meeting between the Claimants, TenneT and BSH, 16 May 2013.

i. agreeing that "*under the applicable framework at the time that Mainstream began developing the Projects, if a developer could show that its project met the legal requirements for consent, the BSH would not have discretion to refuse consent*";[1457]

ii. agreeing that "*as surveys and studies demonstrating that the legal requirements for consent were completed with positive results, risks in relation to obtaining consent are gradually resolving throughout that process*";[1458] and

iii. admitting that "*one of the priority areas in the 2002 Strategy was located in what later became known as Zone 4 – further from the shore than the Projects*";[1459] and

d. Mr. Neupert's and Mr. Stoever's expert opinion testimony that:

i. did not challenge that "*the post-Stakeholder Conference work related to the helicopter corridor study and the service operation vessel was not an obstacle to the issue of consent*";[1460] and

ii. could not "*point to a regulation which would require this work to be performed to meet the legal requirements for consent in the SeeAnlV*".[1461]

789. Against that, the Claimants reiterate in their Post-Hearing Brief that they had "*conducted the various surveys and studies which were required to demonstrate that the legal requirements for consent were met and submitted them to the BSH on 22 December 2009*", the BSH had "*confirmed that those documents were formally complete on 1 June 2010*", and the Claimants were "*required to submit further documentation as a result of the change from the 'permit procedure' to the 'planning*

[1457] Cl. PHB, para. 42(iii)(a); Tr. Day 8, 85:1-25.
[1458] Cl. PHB, para. 42(iii)(b); Tr. Day 8, 86:16–87:4.
[1459] Cl. PHB, para. 42(iii)(c); Tr. Day 8, 14:25-16:11.
[1460] Cl. PHB, para. 42(iii)(a); Tr. Day 6, 200:25–201:5.
[1461] Cl. PHB, para. 42(iii)(b); Tr. Day 6, 201:6–209:24.

approval procedure' through the amendment to the SeeAnlV in 2012 and did so on 5 December 2012".[1462]

790. Regarding the legitimacy of the Claimants' expectations, they submit in their Post-Hearing Brief that they expected that the Respondent "*would not terminate the Projects due to a decline in political commitment to offshore wind*", or "*take steps to frustrate the development of the Projects*", on the basis that the Respondent had:[1463]

a. "*demonstrated its commitment to the swift expansion of offshore wind with the targets in the 2002 Strategy*";

b. "*sought to incentivise investors, including by developing a legal and regulatory framework to give legal and planning certainty and to remove certain risks*";

c. established a framework that "*was expansion-driven, aimed at ensuring that more OWFs could and would be developed, rather than reducing the number of developments or making it harder to develop*";[1464] and

d. from which "[l]*aws and regulations were likely to develop and evolve*" and "*developments to the law would further the legal certainty and security of existing investments rather than terminate them*".[1465]

791. The Claimants rely on the prior award in *9REN v. Spain* that "*an enforceable 'legitimate expectation' requires a clear and specific commitment*", which may "*be made in the legal and regulatory framework where such a commitment is made for the purpose of inducing investment, which succeeded in attracting* [the Claimants'] *investment and, once made, resulted in losses to* [them]".[1466] The Claimants submit that the Respondent's "*legal,*

[1462] Cl. PHB, para. 40; Tr. Day 3, 146:18-23; Agreed Chronology, p. 12; **C-0001**, 2013 Stakeholder Conference Minutes, pp. 1-2; **C-0313**, Email from [redacted] to Mr. Tilman Schwencke, 4 June 2010, p. 3; **C-0001**, 2013 Stakeholder Conference Minutes, p. 3. According to the Claimants, "*The BSH had previously carried out a "cursory perusal" of those documents and had confirmed on 29 November 2012 that the documents appeared suitable for discussion at a Stakeholder Conference*": Cl. PHB, fn. 115; **NN-0012**; Letter from BSH to Mr. Tilman Schwencke, 29 November 2012.

[1463] Cl. PHB, paras. 24 *et seq*.

[1464] Cl. PHB, para. 25.

[1465] Cl. PHB, para. 26; Tr. Day 1, 26:9-17.

[1466] Cl. PHB, para. 84; **CL-0049**, *9REN v. Spain*, para. 295.

regulatory and policy framework was clear and specific, and was also designed to induce investors", and they so invested.[1467]

792. They further dismiss the Respondent's "*attempt to self-criticise by painting the legal and regulatory framework as inadequate is incorrect*", noting in their Opening Statement at the Hearing that:[1468]

> If you accept that Germany devised a legal framework to incentivise long-term investment, Germany cannot absolve itself from responsibility for engendering legitimate expectations of investors by virtue of hindsight bias. Germany clearly did not implement a framework that it knew would not work. And investors cannot be blamed for relying on it. This would pervert the very notion of Rechtsstaat.

793. In their Reply Post-Hearing Brief, having said they had described their expectations "*at an overarching, and macro, level*" in their Post-Hearing Brief, the Claimants reiterate that the evidence demonstrates that they "*invested, and continued to invest, on the basis of* [their] *expectation that the legal, regulatory and policy framework would not be radically overhauled*", that the Respondent "*had specifically designed that framework to incentivise long-term investment*", and that their expectations were legitimate because:[1469]

a. by becoming a Contracting Party to the ECT, the Respondent "*expressly limited its right to regulate – which henceforth could only be exercised within the confines of the ECT*";[1470]

b. "[l]*egitimate expectations can be based on specific commitments contained in the legal, regulatory and policy framework*";[1471]

c. the Respondent "*made a consistent policy commitment through the 2002 Strategy, which had been maintained by several Governments, and which had been used in*

[1467] Cl. PHB, para. 84; **CD-0001**, Cl. Opening Statement, slides 40-41; **C-0045**, Business Plan, pp. 1, 5; **C-0096**, September 2008 Mainstream Board Report; Schwencke Second Witness Statement, paras. 25-26, 54.

[1468] Cl. PHB, para. 84; Tr. Day 1, 16:24; **CD-0001**, Cl. Opening Statement, slide 46.

[1469] Cl. Reply PHB, paras. 40-41.

[1470] Cl. Reply PHB, para. 41(i); **CD-0001**, Cl. Opening Statement, slide 78. According to the Claimants, "*The Respondent's PHB would appear to soften Germany's previous position and recognise that the right to regulate must be exercised within the confines of its international legal obligations*": Cl. Reply PHB, fn. 117, referring to Resp. PHB, para. 65.

[1471] Cl. Reply PHB, para. 41(ii); **CD-0001**, Cl. Opening Statement, slide 79.

documents such as the BMU Paper to incentivise investment", which if "*designed to be transitory, … would not have attracted investment*";[1472]

d. in response to the Respondent's argument that "*Claimants could never expect regulatory standstill*", the Claimants reiterate that they "*on numerous occasions … confirmed that* [they] *did not expect a regulatory freeze*";[1473]

e. while stressing the SeeAnlV amendments, the Respondent "*neglect*[s] *to acknowledge that the legal right to consent was a constant until the SeeAnlV 2012*", and its "*attempt to suggest that the SeeAnlV 2008 gave the BSH substantive discretion is incorrect and inconsistent with its arguments in this Arbitration*", as "[a]*ny 'discretion' under the SeeAnlV 2008 was procedural only*";[1474]

f. regarding the Respondent's reliance on the Draft 2009 SeeAnlV, Mr. Schwencke "*noted that there was a good chance that the ordinance would not be adopted*";[1475]

g. TenneT's letter of 7 November 2011 first made clear "*that the grid connection right under section 17 (2a) EnWG would be amended*", but regarding "*the practical problems with that regime,* [the Respondent] *must bear responsibility for incentivising investment on the basis of it*";[1476]

h. regarding HVDC grid connection technology, "*Mr Schampers and Mr Hellmund testified that the BNetzA Position Paper purported to address the issues caused by that technology*";[1477] and

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[1472] Cl. Reply PHB, para. 41(iii). *See also* Cl. Reply, para. 398.

[1473] Cl. Reply PHB, para. 41(iv), referring to Resp. PHB, para. 71; **CD-0001**, Cl. Opening Statement, slide 44.

[1474] Cl. Reply PHB, para. 41(v), referring to Resp. PHB, paras. 74 *et seq. See also* Cl. First PHB, para. 28(i). The Claimants assert that the Respondent "*admits (again) that the 2008 SeeAnlV contained a non-discretionary entitlement to obtain consent*": Cl. Reply PHB, fn. 123, referring to Resp. PHB, para. 80.

[1475] Cl. Reply PHB, para. 41(vi); Tr. Day 2, 94:1 *et seq*.; **C-0223**, Paper presented at Mainstream Board of Directors meeting, 28 July 2009, p. 2. According to the Claimants, "*Had the Draft SeeAnlV 2009 entered into force, it would have contained transitional provisions meaning that sufficiently advanced projects would not have been subject to tender. Mainstream considered itself able to put the Projects in a position to benefit from the transitional provisions if it had passed*": Cl. Reply PHB, fn. 127; Schwencke Second Witness Statement, fn. 85.

[1476] Cl. Reply PHB, para. 41(vii).

[1477] Cl. Reply PHB, para. 41(viii), referring to Resp. PHB, para. 94; Schampers/Hellmund Expert Report, para. 206; Tr. Day 6, 147:1-9.

i. regarding alleged evidence that "*proves*" that "*from the beginning*" there was consensus that the grid connection regime was inadequate, "[t]*he Hearing showed that this claim is false, as seen in the BMU Paper*".[1478]

c. The Claimants' Reliance on Expectations

794. As to their reliance on legitimate expectations when investing in Germany, in their Reply Post-Hearing Brief the Claimants argue further that:[1479]

a. the Respondent's claim that the Claimants "*did not rely on the regulatory framework when making their business decisions*" and that "*[b]oth Claimants' as well as Respondent's witnesses and experts confirmed this*", was based on Mr. Hellmund's response to a Tribunal question, whereby he confirmed that "*an advisor would know about a change* [to the SeeAnlV] *when it was published*", but he did not admit that the Claimants "*did not rely on the regulatory framework*" and was "*not even a witness to Mainstream's business decisions*";[1480]

b. the Claimants' Business Plan "*identified Germany's attractive and stable regulatory environment and strong political support for offshore wind (including through the targets in the 2002 Strategy) as being two of Mainstream's 'three key reasons' for entering the German market*";[1481]

c. the Consent Applications summarised their "*expectations that the framework conditions for offshore wind would facilitate the meeting, rather than the frustration, of the targets in the 2002 Strategy*";[1482] and

d. in the February/March 2009 Board Report, the Board "*committed to invest nearly EUR 2 million in the Projects*", specifically noting that "*[r]isks regarding the new planning rule [i.e., the Draft Spatial Planning Ordinance] have been minimized*

[1478] Cl. Reply PHB, para. 41(ix), referring to Resp. PHB, para. 95.

[1479] Cl. Reply PHB, paras. 42-43.

[1480] Cl. Reply PHB, para. 42, referring to Resp. PHB, para. 66; Tr. Day 6, 155:18–156:21.

[1481] Cl. Reply PHB, para. 43(i); **C-0045**, Business Plan, p. 1.

[1482] Cl. Reply PHB, para. 43(ii); **CD-0001**, Cl. Opening Statement, slide 45; **C-0092**, Horizont I Application, Sec. 2.1; **C-0093**, Horizont II Application, p. 12.

through the announcement of a deletion of the 'exclusion effect' in December 2008, which means that the consent process can be continued", which the Claimants submit demonstrates the "*evolution*" of their legitimate expectations as "*positive changes to the legal, regulatory and policy framework in Germany influencing Mainstream's decision to invest further in the Projects*".[1483]

d. Alleged Breach of the Claimants' Expectations

795. As to alleged breach of the Claimants' expectations, based on the standard set out above, in their Reply the Claimants submit that the Respondent's conduct "*not only destroyed the value of* [their] *investments, but it also frustrated Germany's ability to effectively combat climate change through the expansion of offshore wind*", referring in particular to the ECT Preamble in "*relation to the fight against climate change*".[1484]

796. It is the Claimants' case that the Respondent's "*commitment to expanding offshore wind in order to meet its domestic and international obligations to combat climate change stalled in the lead-up to the 2013 Federal Election*", and its "*radical overhaul of the legal, regulatory and political framework applicable to investments in offshore wind in Germany such as* [the Claimants'] *was not taken in order to protect the climate, or to prevent the causes of climate change*", and instead its policy[1485]

> played back into the hands of those who seek to harm the environment and who contribute to climate change, by making Germany's energy policy more dependent on conventional energy sources, including in particular coal. Germany's conduct must in particular be assessed in light of whether it was really seeking to promote or increase the use of offshore wind energy.

797. In their Post-Hearing Briefs, the Claimants summarise their position as to how the Respondent's alleged failure to enforce and subsequent decision to radically overhaul the applicable legal, regulatory and political framework allegedly frustrated the Claimants' legitimate expectations. The Claimants further summarise their position as follows:[1486]

[1483] Cl. Reply PHB, para. 43(iii); **C-0098**, February/March 2009 Mainstream Board Report, p 2.

[1484] Cl. Reply, paras. 349-350; **CL-0001 / RL-0084**, ECT, Preamble.

[1485] Cl. Reply, para. 353.

[1486] Cl. PHB, paras. 85-89. *See also* Cl. Reply paras. 410 *et seq*.

a. key to their expectations was that the framework "*would not be overhauled in a manner that would frustrate meeting the targets in the 2002 Strategy*";[1487]

b. the Respondent's "*decision to radically overhaul the applicable framework frustrated* [the Claimants'] *legitimate expectations: despite having done everything required to secure consent, consent was not forthcoming as a result of Germany's reduction of the targets for offshore wind, as admitted by the BSH*";[1488]

c. the Respondent's conduct was "*contrary to its previous commitment to offshore wind which it advertised to investors and incentivised* [the Claimants] *to invest*";[1489].

d. the Respondent's measures "*were taken with a single aim: to slow the expansion of offshore wind*", following the 2013 Federal Election and "*culminat*[ing] *in the WindSeeG, which terminated the regulatory approvals process for the Projects*", frustrating the Claimants' legitimate expectations "*based on Germany, for years, representing that OWFs would receive consent if they met the legal requirements and then be developed in a favourable environment*";[1490]

e. the "*overhaul*" manner and success "*can be seen in how it amended the three 'buckets' which formed the parameters*" of the framework:[1491]

   i. **SeeAnlV**: on 1 January 2012, the "*'permit procedure' in the SeeAnlV 2008 was replaced with a 'planning approval procedure' in the SeeAnlV 2012*", and on 24 March 2015, the BSH informed the Claimants it "*would be exercising its discretion – under the SeeAnlV 2012 – not to grant consent*

[1487] Cl. PHB, para. 85.

[1488] Cl. PHB, para. 85; **C-0125**, Letter from BSH to Fourth, Fifth and Sixth Claimants, 24 March 2015, p. 6.

[1489] Cl. PHB, para. 85.

[1490] Cl. PHB, para. 86. *See also* Cl. Reply, para. 411.

[1491] Cl. PHB, para. 87.

'for the moment' because of the significantly increased length of time before the Projects could expect a grid connection";[1492]

ii. **EnWG**: on 28 December 2012, the 2012 EnWG entered into force, "*replac*[ing] *the previously existing individual entitlement to the construction of a grid connection at commissioning with an entitlement to non-discriminatory allocation of available capacities*",[1493] which "*provided that the construction of offshore grid connection lines would be controlled by the TSOs" and "carried out according to the O-NEP and the BFO*"; and

iii. on 2 March 2013, a "*draft O-NEP 2013 was published" providing for grid connection of "'clusters' located in Zones 1 and 2 by 2023 and for Zone 3 by no later than 2033*", as "*reflected in the O-NEP 2013, which was published and entered into force on 19 December 2013*"; and

iv. **WindSeeG**: in 2015 the new WindSeeG:[1494]

1. "*dispensed with FiTs*";

2. "*terminated the regulatory approvals process for the Projects, which were excluded from the limited transitional provisions*"; and

3. included transitional provisions "*designed to lack teeth for any projects outside of Zones 1 and 2 specifically to reduce the number of OWFs under development, despite the previous inducements*".

798. The Claimants characterise the WindSeeG as "*the final nail in the coffin for the Projects*".[1495] This is summarised in the last three rows of their summary chart as follows:[1496]

[1492] Cl. PHB, paras. 87(i), (iii); **RL-0119**, 2012 SeeAnlV; **C-0125**, Letter from BSH to Fourth, Fifth and Sixth Claimants, 24 March 2015. See also Cl. Reply, paras. 165 *et seq.*

[1493] Cl. PHB, para. 87(ii); **C-0105**, 2012 EnWG; **C-0107**, First Draft O-NEP 2013. *See also* Cl. Reply, paras. 167-173.

[1494] Cl. PHB, para. 87(iv). *See also* Cl. Reply, paras. 186-198.

[1495] Cl. PHB, para. 87(iv). *See also* Cl. Reply, paras. 86, 186, 416.

[1496] Cl. PHB, p. 17.

DATE	BUSINESS DECISION	OFFSHORE WIND TARGET	CONSENTING REGIME	GRID CONNECTION REGIME		ECONOMIC INCENTIVES	SPATIAL PLANNING REGIME	
	above)							
5 December 2012	Update of documents as a result of SeeAnlV 2012 (**C-0001**) **Financial investment**: total financial investment in the Projects of EUR 5.9 million (excluding overheads) by end 2012 (**C-0057**, p. 46)		SeeAnlV 2012 (**RL-0119**)	31 December 2015 cut-off for construction of grid connection under EnWG disposed with (2011) (Counter-Memorial, para. 278)	BNetzA Position Paper updated (January 2011) (**SBT-0048**) Draft EnWG 2012 (draft published on 24 September 2012 (**EH-0025**)	EEG 2012 (further improvements to FiTs) (**C-0148**)	Spatial Planning Ordinance (no exclusion effect) (**SBT-0061**)	Draft BFO (draft published on 20 June 2012 and adopted on 22 February 2013) (**RL-0146**, p. 10)
December 2012	Further investment in studies to support the sales process for the Projects (**C-0057**) **Financial investment**: EUR 51,440 (see Sunk Costs Analysis)			EnWG 2012 adopted (20 December 2012) (**C-0227**)	EnWG 2012 enters into force (28 December 2012) (**C-0105**), providing that construction of offshore grid connection lines would be controlled by the TSOs and carried out according to the O-NEP and the BFO			
5 March 2013	Stakeholder Conference (**C-0001**) **Financial investment**: "sweat equity" in preparing for and presenting the Projects at the Stakeholder Conference[80]		SeeAnlV 2012 (**RL-0119**) (minor changes were made to the SeeAnlV in 2013 which did not relate to the legal requirements for consent)	EnWG 2012 (**C-0105**)	Draft O-NEP 2013 published on 2 March 2013 (**C-0107**)		BFO (**RL-0146**)	

799. They deny that any of the changes to the aforementioned framework were foreseeable when they invested in "*development of the Projects*", claiming to have made their investments "*in reliance on a framework that would continue to evolve in favour of the expansion, rather than the restriction of offshore wind*".[1497]

800. The Claimants argue that when the Respondent "*overhauled the framework, it frustrated* [their] *legitimate expectations*" due to the following:[1498]

a. they "*could no longer expect consent even if* [they] *met the legal requirements*";

b. they "*would no longer be entitled to a grid connection when it was ready*", instead having "*the grid connection that* [they] *could be entitled to pushed decades into the future*"; and

c. "*BSH's discretion and the grid connection regime combined to refuse the Projects consent 'for the moment' until they were ultimately terminated by the WindSeeG*".

801. In sum, the Claimants' case is that:[1499]

a. the aforementioned "*radical overhaul, which had at its root the political decision to no longer give the same support to the expansion of offshore wind*",

b. "*frustrated* [the Claimants'] *legitimate expectations*",

c. "*in circumstances where Mainstream had invested in reliance on the previous framework*",

d. because the "*essential characteristics of the previous framework, designed to induce enough investment to meet the targets, were uprooted, and replaced,*

[1497] Cl. Reply, paras. 88-122; Cl. PHB, para. 88; **CD-0001**, Cl. Opening Statement, slides 48-49.

[1498] Cl. PHB, para. 88.

[1499] Cl. PHB, para. 89; **CD-0001**, Cl. Opening Statement, slides 83-85.

ultimately, with a system that would prevent the Projects from being realised".

802. The Claimants submit further in their Reply Post-Hearing Brief that:

a. the Respondent "*seeks a* renvoi *to domestic law in order to define what is meant by a 'radical' change to a legal and regulatory framework*", but it is irrelevant "*whether or not 'radical' is 'a defined term under German law'*", as international law not German applies (again relying on prior awards);[1500]

b. in response to the argument that "*it is possible under German law to create 'a completely new legal regime'*", the Respondent "*misses the point*" because any "*radical overhaul of the applicable framework*" had to be done "*within the confines of its international legal obligations*";[1501] and

c. the Respondent did not "*mention the key political context surrounding its radical overhaul of the framework*" and "*offers no defence to the points raised … as to the political circumstances which precipitated Germany's radical overhaul of the applicable framework*".[1502]

(2) The Respondent's Position

803. The Respondent's position is that it did not violate the obligations of the first sentence of ECT Article 10(1), because it "*legally exercised its right to regulate and offered stable, equitable, favorable and transparent conditions at all times*",[1503] and therefore did not violate the fair and equitable treatment or impairment standards of Article 10(1).

[1500] Cl. Reply PHB, para. 44, referring to Resp. PHB, para. 111; **CD-0001**, Cl. Opening Statement, slides 83-85.

[1501] Cl. Reply PHB, para. 45, referring to Resp. PHB, para. 111.

[1502] Cl. Reply PHB, para. 46.

[1503] Resp. PHB, para. 65. The Respondent refers to **C-0306**, BMU Paper, "*as well as the publication of different drafts and their discussion, e.g., the Draft Spatial Planning Ordinance* [as] *expression of transparency*": Resp. PHB, fn. 103.

a. Applicable Legal Standard

804. The Respondent sets out its first submissions as to the ECT Article 10(1) standard of protection in its Counter-Memorial,[1504] focusing on the State's right to regulate,[1505] submitting that it rightfully exercised its right to regulate, did not breach the fair and equitable treatment standard pursuant to Article 10(1), and did not violate the non-impairment standard of Article 10(1), developing its general legal arguments in more detail in its Rejoinder.[1506]

i. ECT Article 10(1) "*Stable Conditions*"

805. First, the Respondent addresses the Claimants' apparent claim that ECT Article 10(1) first sentence created a separate and stand-alone commitment to create stable conditions for Investment (among other things).

806. The Respondent starts by characterising the sovereign right to regulate as "*one of the most fundamental rights any State enjoy*s". Against that, it submits that ECT Article 10(1) first sentence:[1507]

a. "*is not a self-standing standard of stability that an investor could rely on because it does not contain a binding obligation for the host State for the post-investment phase*";

b. "*only has programmatic character as it informs and defines the fair and equitable treatment … standard in the second sentence*"; and

c. "*is not a stabilization clause, restricting a host state's right to regulate*".

807. According to the Respondent, the right to regulate lies "[a]*t the heart of the present dispute*", being "*not only a prominent attribute of every sovereign state*", but

[1504] Resp. C-Mem., paras. 493-595.
[1505] Resp. C-Mem., para. 493.
[1506] Resp. Rej., paras. 463-573.
[1507] Resp. C-Mem., para. 494.

"*generally to be considered a true corollary of sovereignty*",[1508] and "*a fundamental precondition for any state's pursuit of public interests*", without which "*states would be unable to effectively pursue any public interests, because they would lack the most basic instruments for that purpose*", "*sovereignty would be rendered practically meaningless*" and "*states would lack the means of actually manifesting any of their constitutionally mandated policy objectives*".[1509] It characterises regulation as "*the primary instrument in the pursuit of any public interest, be it of environmental, social, cultural or other nature*", referring to the prior decision in *Cavalum v. Spain* that "*the regulatory authority of the host state to make and change its laws and regulations to adapt to changing needs, including fiscal needs, subject to respect for specific commitments made*".[1510]

808. In particular, the Respondent submits that the right to regulate:

a. affords States "*wide discretion with regard to the type of needs they want attend to, or put differently, their choice of public interest*", including "*to change and amend existing legal framework, even if the change results in the deterioration of the individual situation for one the actors involved*";[1511]

b. assumes that "*sovereignty has a prominent role to play in economic activities, within and outside the state, as this is also a public interest*", being the "*foundation of economic regulations*", ensuring "*parity and fairness in markets, because there is an inherent relationship between sovereignty and development*", and needing to "*align, balance and harmonize different public interests, enjoying discretion*";[1512]

[1508] Resp. C-Mem., para. 495; **RL-0159**, *Invesmart B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 ("***Invesmart v. Czech Republic***"), para. 498; **CL-0141**, *Cavalum v. Spain*, para. 424; **RL-0160**, A. Rajput, "*Chapter 6: Regulatory Freedom as Customary International Law*" in *Regulatory Freedom and Indirect Expropriation in Investment Arbitration*, 2018 ("**Rajput, *Regulatory Freedom***"), p. 104; **RL-0161**, *Legal Status of Eastern Greenland*, Permanent Court of International Justice, Judgment, 5 April 1933, p. 48 ("*Legislation is one of the most obvious forms of the exercise of sovereign power*").

[1509] Resp. C-Mem., para. 496; **RL-0162**, A. Titi, "*The Right to Regulate in International Investment Law*" in 10 Studies in International Investment Law, 2014, p. 99; SBT Expert Report, paras. 179 *et seq.*

[1510] Resp. C-Mem., para. 497; **CL-0141**, *Cavalum v. Spain*, para. 429.

[1511] Resp. C-Mem., para. 498; **RL-0160**, Rajput, *Regulatory Freedom*, p. 131.

[1512] Resp. C-Mem., para. 499; **RL-0160**, Rajput, *Regulatory Freedom*, p. 104; SBT Expert Report, paras. 183 *et seq*.

c. in relation to investment protection treaties, while they "*obviously also serve to protect investors from arbitrary regulation*", prior tribunals recognised that:[1513]

> International investment treaties were never intended to do away with their signatories' right to regulate. As found in *Saluka* … notwithstanding the breadth of its prohibition against expropriation and the absence of an express regulatory power exception, Article 5 imports into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order. This is common sense.

d. "*allows states to regulate matters within their sovereign territory freely, as long as they have not entered into public international law obligations that prevent them from exercising said right in a particular manner*", so is "*not excluded but supported by investment treaties*", as recognised in prior awards;[1514] and

e. as a "*core facet*[] *of a state's sovereignty*", is "*part of the 'framework' within which the Contracting Parties undertook to promote the development of an efficient energy market through the conclusion of the ECT*", forming "*part of the context of the ECT*", requiring interpretation of the ECT "*to take into account a host state's right to regulate as part of a contextual interpretation in accordance with Art. 31 (2)(a) VCLT*".[1515]

809. As set out above in the Tribunal's summary of the Claimants' position, they do not challenge the existence of the State's right to regulate. It is the exercise of that right in a manner that accords with the ECT protections that they take issue with. In this

[1513] Resp. C-Mem., para. 500; **RL-0159**, *Invesmart v. Czech Republic*, para. 498.

[1514] Resp. C-Mem., paras. 501-502; **RL-0160**, Rajput, *Regulatory Freedom*, p. 104; **CL-0058**, *Parkerings-Compagniet v. Lithuania*, para. 332; **CL-0100**, *PV Investors v. Spain*, para. 569 (referring to ECT Article 2 and Preamble, "*Within the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic cooperation,* [the signatories] *undertake to promote the development of an efficient energy market throughout Europe*").

[1515] Resp. C-Mem., para. 503; **CL-0100**, *PV Investors v. Spain*, para. 569.

regard, the Respondent makes the following three main interpretation points concerning ECT Article 10(1) first sentence:

a. it "*does not create a binding obligation of regulatory stability, neither with regard to the treatment of investments once established nor with regard to the benefit of the investor*",[1516] as it:

   i. deals with "***making*** *and promotion of investments*", it creates no binding obligation "*post-investment phase, i.e., once an investment has been made*";[1517]

   ii. is supported by ECT Article 1(8) defining "*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*";[1518]

   iii. only obligates facilitation and making best efforts for pre-investment phase ("*shall encourage*" and "*shall create*, "*with a view to establishing favorable conditions for future investments*"), with possible breach if a State "*promotes legislation actively discouraging foreign investment*", but "t*his would be a breach to be remedied between the Contracting Parties only, and not in an investor-state arbitration*";[1519] and

   iv. "*does not provide private investors with a right to bring an action against the host State that did not create an environment favorable to investment*", as ECT Article 26 "*requires that an investment has already been made*";[1520]

[1516] Resp. C-Mem., para. 505.
[1517] Resp. C-Mem., para. 506 (emphasis added by the Tribunal).
[1518] Resp. C-Mem., para. 507 (emphasis original).
[1519] Resp. C-Mem., para. 508.
[1520] Resp. C-Mem., para. 509.

b. only has "*programmatic character*" and "*does not constitute a binding obligation for a host State during the post-investment phase*",[1521] in that:

i. it "*inform*[s] *and elucidat*[es] *the meaning of the post-investment obligations only*", but establishes no "*obligation of its own*";[1522]

ii. "*is not a substantive norm … from which an investor during the post-investment phase could derive any rights*";[1523]

iii. "*once an investment has been made,* [it] *no longer directly applies, but only has programmatic character*", based on "*the programmatic, informative and introductory nature*" of its wording ("*in accordance with the provisions of this Treaty*"), which "*cannot be read by itself to be creating investor's rights*";[1524]

iv. "*stable […] conditions*" are "*the ones prescribed in the ECT's substantive provisions*", i.e., ECT Article 10(1) second sentence ("***Such conditions** shall include a commitment to accord **at all times** to Investments of Investors of other Contracting Parties fair and equitable treatment*"), and third sentence ("*[s]uch **Investments** shall also enjoy the **most constant** protection and security*");[1525] and

v. the stability referred to "*pertains to the stable, i.e., steady and unchanging guarantee of FET treatment as well as protection and security*", is "*of mere referential character*" and "*does not contain a substantive content of its own*", as supported by its absence from the rest of the ECT (i.e., no definition or description of "*what constitutes*

[1521] Resp. C-Mem., para. 510.

[1522] Resp. C-Mem., para. 511.

[1523] Resp. C-Mem., para. 511.

[1524] Resp. C-Mem., paras. 511-512.

[1525] Resp. C-Mem., paras. 512-514 (emphasis added by the Respondent); **RL-0163**, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Award, 25 January 2021 ("***BayWa v. Spain***"), para. 458.

'stable conditions' for the purpose of the first sentence of Art. 10 (1) ECT");[1526]

c. is not a stabilization clause restricting the right to regulate, in that it:

i. "*does not contain any element of rigidity*" (the "*encourage and create stable […] conditions*" language "*does not prescribe regulatory stasis*");[1527]

ii. based on prior awards, "*reference made to 'stable conditions' in the first sentence of Art. 10 (1) ECT does not constitute a stabilization clause*", and "[t]*o suggest otherwise is not only unconvincing of itself, but it also contradicts the basic presumption that, barring any indication to the contrary, states do not dispose of their sovereignty lightly, thus,* in dubio mitius";[1528]

iii. one cannot "*presume that states are willing to be restricted in their sovereign right to regulate without clear evidence of such intent*", especially for "*broad and ambiguous clauses containing undefined terms like 'stable conditions'*", which "[i]*f ascribed substantive content, such clauses could mean any and everything*", making it "*impossible for the Contracting Parties to delineate their legal obligations or the areas where their right to regulate is constrained*";[1529]

[1526] Resp. C-Mem., paras. 515-516.

[1527] Resp. C-Mem., para. 517; **RL-0164**, *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Award, 18 December 2020 ("***RWE v. Spain***"), paras. 448 *et seq*.; **CL-0029**, *Hydro v. Spain*, para. 553 ("*Stability is linked to the Investor's legitimate expectations that the legal framework will not be arbitrarily changed and that commitments will be observed. But it does not mean that an investor is protected from any change. The obligation has a relatively high threshold, and the emphasis is on the subversion of the legal regime*").

[1528] Resp. C-Mem., para. 519; **CL-0033**, *AES v. Hungary*, para. 9.3.29; **CL-0141**, *Cavalum v. Spain*, paras. 406 *et seq*.; **CL-0029**, *Hydro v. Spain*, para. 555; **RL-0165**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 ("***Continental Casualty v. Argentina***"), para. 258 ("*it would be unconscionable for a country to promise not to change its legislation as time and needs change*", and "[s]*uch an implication as to stability in the BIT's Preamble would be contrary to an effective interpretation of the Treaty; reliance on such an implication by a foreign investor would be misplaced and, indeed, unreasonable*").

[1529] Resp. C-Mem., para. 519.

iv. "*it leads to contradictory results*", i.e., it would "*hinder*[] *... the purpose of the ECT of 'creating' suitable conditions for investors*", which "*necessarily implies supplanting existing legislation*";[1530]

v. "[a] *statement of such generality lacks precision and specificity and leads nowhere, in particular not to the assumption of a breach of an international agreement*", ignoring that "*the energy sector includes the sector of renewable energies*",[1531] which:

1. "*not only refers to new forms of energy and new technologies, but also to a novel field of law*";[1532]

2. has "*novelty of the underlying technology*" and "*pressing need for a quick expansion of renewable energies in light of accelerating climate change*";[1533]

3. "*is characterized by a need for continuous evolution of the legislative framework*";[1534] and

4. means "*any policy and regulation for an emerging technology can never be set in stone, as it must be possible to adapt the law as the sector develops and matures*";[1535] and

vi. VCLT Article 31(1) interpretation in light of the object and purpose of the treaty, requires ECT Article 10(1):

1. for object, "*be interpreted with these characteristics of the renewable energy sector in mind*", i.e., to "*take heed of states'*

[1530] Resp. C-Mem., paras. 522-523.
[1531] Resp. C-Mem., para. 524.
[1532] Resp. C-Mem., para. 524.
[1533] Resp. C-Mem., para. 525.
[1534] Resp. C-Mem., para. 525; SBT Expert Report, paras. 37, 68; Slark Expert Report, paras. 16 *et seq*.
[1535] Resp. C-Mem., para. 525; Slark Expert Report, para. 94.

right to amend and improve their respective regulatory frameworks";[1536]

2. for purpose, "*creating favorable conditions for investments in the energy sector is balanced against the host state's right to regulate*", referring to the prior award in *SunReserve v. Italy*:[1537]

> The importance of the host State's sovereignty and its right to regulate is recognized in the International Energy Charter, when it mentions the "sovereignty of each State over its energy resources, and its rights to regulate energy transmission and transportation within its territory".

3. ECT Article 2 sets out the Treaty's objective and purpose, whereby "*sovereignty of host states and their right to regulate need to be taken into account in any interpretation*".[1538]

810. On those grounds, the Respondent argues that ECT Article 10(1) first sentence "*does not accord a potential investor any substantial rights which it could invoke in arbitral proceedings*" and "*does not contain any substantive obligations on the part of the Contracting Parties post-investment, from which a private investor could derive rights, either*".[1539] It maintains that it "*has always encouraged and created stable, equitable, favorable and transparent conditions for investors from both other Contracting Parties and EU Member States within the meaning of the first sentence*",

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[1536] Resp. C-Mem., para. 525.

[1537] Resp. C-Mem., para. 526; **CL-0209**, *SunReserve v. Italy*, para. 685.

[1538] Resp. C-Mem., para. 525; **CL-0141**, *Cavalum v. Spain*, paras. 418 *et seq.*; **RL-0025 / RL-0167**, *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 14 September 2020 ("***ESPF v. Italy***"), para. 418; **CL-0029**, *Hydro v. Spain*, para. 555; **CL-0100**, *PV Investors v. Spain*, para. 570; **CL-0209**, *SunReserve v. Italy*, para. 685; **CL-0102**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019 ("***OperaFund v. Spain***"), para. 485; **CL-0067**, *Plama v. Bulgaria*, para. 177; **CL-0201**, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20 (UNCITRAL), Award, 15 May 2019, para. 497; **CL-0202**, *Photovoltaik Knopf Betriebs-GmbH v. Czech Republic*, PCA Case No. 2014-21 (UNCITRAL), Award, 15 May 2019, para. 494; **CL-0203**, *I.C.W. Europe Investments Limited v. Czech Republic*, PCA Case No. 2014-22, (UNCITRAL), Award, 15 May 2019, para. 539; **CL-0153**, *Europa Nova v. Czech Republic*, para. 580; **CL-0211**, *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021 ("***Silver Ridge v. Italy***"), paras. 413 *et seq.*; **CL-0206**, *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 6 August 2019 ("***Belenergia v. Italy***"), para. 572; **RL-0164**, *RWE v. Spain*, paras. 448 *et seq*.

[1539] Resp. C-Mem., para. 528.

that the reforms at the heart of this arbitration "*were aimed at improving investment conditions for investors*", that it "*adheres to the rule of law, applying all regulations and laws without differentiation to those within its jurisdiction*", and that it "*not only created an investor-friendly environment, but also treated all existing investments fairly and equitably*", within the meaning of ECT Article 10(1).[1540]

811. In its Rejoinder, the Respondent further argues concerning the fair and equitable treatment standard, that:[1541]

a. specific commitments not to change the legislative framework are required for regulatory continuity;

b. legitimate expectations must be assessed against all relevant circumstances existing at the time of the making of the investment;

c. there is no obligation to give preference to enforcement over the right to regulate;

d. ECT Article 10(1) does not include a self-standing prohibition of radical change; and

e. the concept of proportionality requires a balance between investor interests and competing public interest, transparency has a high threshold for violation, and good faith is not a recognised criterion, in the context of ECT Article 10(1).

812. Although it expressly invoked a "*pressing need for a quick expansion of renewable energies in light of accelerating climate change*",[1542] as a basis for its subsequent change in regulatory framework, the Respondent subsequently took the position that the ICJ Advisory Opinion, which expressly clarifies State obligations in international law regarding climate change, "*is of no relevance to these arbitration proceedings*".

[1540] Resp. C-Mem., para. 529.
[1541] Resp. Rej., paras. 461-573.
[1542] Resp. C-Mem., para. 525.

ii. Fair and Equitable Treatment and Legitimate Expectations

813. Secondly, the Respondent disputes that the fair and equitable treatment standard could be based on legitimate expectations arising from the legislative and regulatory framework,[1543] submitting that:

a. "[a]*ny general reliance on a regulatory framework is insufficient to qualify as a legitimate expectation, since a regulatory framework is always subject to change*",[1544]

b. any commitment giving rise to a legitimate expectation must be "*clear, specific, and aimed at the respective individual investor*";[1545]

c. "[s]*ome host States provide what some tribunals call a stabilization clause within the regulations that an investor seeks to rely on*", putting "*investor interests ahead of public interest*" if "*no specific commitment were needed*",[1546] and

d. this is neither the purpose of ECT Article 10(1) nor "*the content of the FET standard*" as the Claimants appear to recognise in requiring "*specific commitment on the part of the State*".[1547]

814. The Respondent proceeds to set out its arguments as to the primary requirements for specific commitments to give rise to legitimate expectations in the context of the fair and equitable treatment standard:

a. the specific commitment must be binding in its form and content:[1548]

[1543] Resp. Rej., para. 464, referring to Cl. Reply, para. 358.

[1544] Resp. Rej., para. 464; **RL-0165**, *Continental Casualty v. Argentina*, para. 258; **CL-0039**, *Saluka v. Czech Republic*, para. 305.

[1545] Resp. Rej., para. 465. *See also* Resp. C-Mem., paras. 537 *et seq*.

[1546] Resp. Rej., para. 465.

[1547] Resp. Rej., para. 466, referring to Cl. Reply, para. 359.

[1548] Resp. Rej., paras. 468-470.

i. "*conduct must adhere to a specific format pursuant to the State's rules and laws*" (i.e., "*a casual verbal statement by a public figure cannot be accorded the same weight as a formal assurance issued by the competent authority directed explicitly to the investor, or a contract signed by the investor and the competent authority*");[1549]

ii. investors "*must know*" a statement was not of a binding nature if the "*specific form required by the applicable law*" is not used and there is no "*contractual agreement of any sort*";[1550]

iii. the "*form of a supposed specific commitment is of significant importance*", relying on the prior decision in *Total v. Argentina*:[1551]

> [T]he limits of the proper invocation of "legitimate expectations" in the face of legislative or regulatory changes […] has been based on a weighing of various elements pointing in opposite directions. On the one hand, the form and specific content of the undertaking of stability invoked are crucial. No less relevant is the clarity with which the authorities have expressed their intention to bind themselves for the future. Similarly, the more specific the declaration to the addressee(s), the more credible the claim that such an addressee (the foreign investor concerned) was entitled to rely on it for the future in a context of reciprocal trust and good faith.

iv. "*general legislation* a fortiori" and "*policy statements and mere general policies aimed at inviting investments*", even if "*flanked by affirmative statements made by public authorities*", do not suffice;[1552]

[1549] Resp. Rej., para. 468.

[1550] Resp. Rej., para. 468. The Respondent adds, "*An example for such a contractual agreement of a binding nature is the public law contract concluded between Respondent and energy providers on 25 March 2021, based on the German Atomic Energy Act, by which the German Constitutional Court's December 2016 Decision as well as the German Constitutional Court's decision dated 29 September 2020 also regarding the Federal Republic of Germany's nuclear phase-out, were implemented*": Resp. Rej., fn. 894.

[1551] Resp. Rej., para. 469; **CL-0026**, *Total v. Argentina*, para. 121; *See also* **CL-0058**, *Parkerings-Compagniet v. Lithuania*, paras. 334 *et seq*.

[1552] Resp. Rej., para. 470; **CL-0055**, *PSEG v. Turkey*, para. 243; **RL-0165**, *Continental Casualty v. Argentina*, paras. 252 *et seq*.

b. legitimate expectations cannot arise out of the legal framework alone, based on prior awards:[1553]

i. *El Paso v. Argentina*:

1. the substantive facts differ fundamentally (i.e., entities in El Paso "*were already fully operating and engaged in the generation and sale of electricity*");[1554]

2. the tribunal explained that a host State commitment is specific "*if its precise object was to give a real guarantee of stability to the investor*", and a "*real guarantee of stability*" must have been made "*to the investor*":[1555]

> Usually general texts cannot contain such commitments, as there is no guarantee that they will not be modified in due course. However, a reiteration of the same type of commitment in different types of general statements could, considering the circumstances, amount to a specific behaviour of the State, the object and purpose of which is to give the investor a guarantee on which it can justifiably rely.

3. the tribunal stated that "*FET cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilisation clauses specifically granted to foreign investors with whom the State has signed investment agreements*";[1556]

[1553] Resp. Rej., paras. 471-490.

[1554] Resp. Rej., fn. 899.

[1555] Resp. Rej., para. 472; **RL-0173**, *El Paso v. Argentina*, para. 377.

[1556] Resp. Rej., para. 473; **RL-0173**, *El Paso v. Argentina*, para. 368; *see also* para. 394 ("*The Tribunal cannot however consider that any rule or even a clear commitment embodied in a general piece of legislation or regulation – as in Decree No. 1589/1989 – is in itself a special commitment towards the foreign investors, as such a conclusion would again immobilise the legal order and prevent any adaption to circumstances. These items might only raise reduced expectations which do not guarantee complete stability and have to be analysed in relation to other undertakings and with due regard to all circumstances*").

4. the tribunal further cited to the prior award in *Parkerings-Compagniet v. Lithuania*:[1557]

> It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a *stabilisation* clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.

5. regarding behaviour that may be "*a special commitment on behalf of the State, creating 'reasonable legitimate expectations' for foreign investors*", the tribunal cited to the prior award in *Continental Casualty v. Argentina*, referring to "*specificity of the undertaking*", deciding that "*political statements [...] create no legal expectations*", "*general legislative statements [...] 'engender reduced expectations'*", "*contractual undertakings by governments*" could create more legitimate expectations, and:[1558]

> It considers that special commitments have to be carefully analysed as a coherent behaviour from the State, the purpose of which was to have the foreign investor expect that it would be protected against overly drastic changes.

ii. *Micula v. Romania (II)*, according to the Respondent "*also confirms that general statements or general legislation does not amount to a commitment that binds the host State*";[1559]

[1557] Resp. Rej., para. 474; **RL-0173**, *El Paso v. Argentina*, para. 368, citing **CL-0058**, *Parkerings-Compagniet v. Lithuania*, para. 332.

[1558] Resp. Rej., paras. 475-476; **RL-0173**, *El Paso Energy v. Argentina*, paras. 378-379, citing **RL-0165**, *Continental Casualty v. Argentina*, para. 261.

[1559] Resp. Rej., para. 477; **RL-0184**, *Micula v. Romania (II)*, para. 362.

iii. prior awards involving Spain "*can be clearly distinguished on the facts and do not support Claimants' position*", and "*involved existing and operating installations*",[1560] including:

1. *Antin v. Spain*:[1561] where the tribunal found:

> This does not mean that the legal framework cannot evolve or that a State Party to the ECT is precluded from exercising its regulatory powers to adapt the regime to the changing circumstances in the public interest. It rather means that a regulatory regime specifically created to induce investments in the energy sector cannot be radically altered —i.e., stripped of its key features— as applied to existing investments in ways that affect investors who invested in reliance on those regimes.

2. *PV Investors v. Spain*:[1562] the tribunal stated:

> The scheme of incentives provided under RD 436/2004 was first modified by RD 2351/2004 and RD 1454/2005, and eventually replaced first by RDL 7/2006761 and subsequently by RD 661/2007. The latter affected existing facilities registered under RD 436/2004, in spite of the rule contained in Article 40.3 of RD 436/2004.

3. *Kruck v. Spain*:[1563] the tribunal confirmed:

> RD 661/2007 contained express assurances that its fixed tariffs would apply to qualifying, registered PV facilities for a fixed period, and that changes to the regulatory regime would not apply to facilities already registered.

[1560] Resp. Rej., para. 478.

[1561] Resp. Rej., para. 479; **CL-0092**, *Antin v. Spain*, para. 532.

[1562] Resp. Rej., para. 480; **CL-0100**, *PV Investors v. Spain*, para. 594.

[1563] Resp. Rej., para. 481; **CL-0261**, *Kruck v. Spain*, Jurisdiction, para. 190.

4. *Triodos v. Spain*:[1564] the tribunal emphasized the necessity of "*existing facilities under prior remuneration regimes*";

5. *9REN v. Spain*:[1565] according to the Respondent, the tribunal "*referred to the exact date when the investment was made to confirm that its findings only applied to existing and not just planned investment*";

6. *Isolux v. Spain*:[1566] in that case, according to the Respondent, the claimants acquired shares in a company operating 34 solar plants and the tribunal reached the same conclusion as the *9REN* tribunal;

iv. further in the prior rulings involving Spain:

1. the change in law or regulation "*concerned existing and operating facilities that had already benefited from a remuneration regime*", compared to the current situation where "*Claimants never had more than a potential prospect of earning money, on the condition that they fulfilled all the requirements, i.e. obtained Approval and the releases and*

[1564] Resp. Rej., para. 482; **CL-0262**, *Triodos v. Spain*, paras. 685 *et seq*.:

> The Arbitral Tribunal considers three factors to be of relevance: (i) the purpose of Spain's representation to PV investors in RD 661/2007 and RD 1578/2008; (ii) Spain's conduct with respect to existing facilities under prior remuneration regimes; and (iii) Spain's position with respect to future facilities not covered by its representations in RD 661/2007 and in RD 1578/2008. The following paragraphs discuss each of these factors in turn.
>
> …
>
> In RD 661/2007, Spain provided an option, through a transitional provision, for the preservation of benefits that had been granted under prior regulatory regimes when it amended those regimes through subsequent regulation. … These provisions created a grandfathering option for existing producers in general, but replaced the remuneration regime for PV generators with a new mechanism that was pro- moted as predictable and transparent.

[1565] Resp. Rej., para. 482; **CL-0049**, *9REN v. Spain*, para. 294 ("*It is true that the Claimant's projects proceeded in stages with the first stage under RD 661/2007 and the second [much smaller] stage under RD 1578/2008 but the investment was made (according to Mr. Giuliani's testimony) on 23 April 2008. Mr. Giuliani's statement was not successfully challenged on cross-examination*").

[1566] Resp. Rej., para. 482; **CL-0258**, *Isolux v. Spain*.

were able to construct and finally obtain commissioning of their Horizont Projects",[1567]

2. all are "*characterized by a specific commitment*" by Spain, which was "*contained inter alia in Art. 44 (3) of Spanish Royal Decree RD 661/2007, which promised that any future tariff revisions '[…] **shall not affect** facilities for **which the deed of commissioning shall have been granted prior to** 1 January of the second year following the year in which the revision shall have been performed'*";[1568]

3. there was "*an explicit undertaking, a 'promise' by the Spanish State in its legislation to not modify the tariff regime as applied to existing investments*", not a "*general 'regulatory regime' favorable to investors*" (i.e., *Isolux v. Spain*: rules that "*are put in place with a specific aim to induce foreign investment*", but applied to foreign and domestic so claim for fair and equitable treatment violation was dismissed);[1569] and

4. these cases contrast with Germany's offshore wind framework, which "*did not have the 'specific aim to induce foreign investment'*" and "*was designed to regulate the entire offshore wind energy sector*", applying "*to all actors in the EEZ*" and "*was established to regulate the matters in the German EEZ and any further measures were taken with the specific aim of allowing for an orderly and efficient expansion*

[1567] Resp. Rej., para. 484.

[1568] Resp. Rej., para. 485; **CL-0092**, *Antin v. Spain*, paras. 95, 549; **CL-0029**, *Hydro v. Spain*, para. 110**; CL-0049**, *9REN v. Spain*, para. 87; **CL-0100**, *PV Investors v. Spain*, para. 194; **CL-0261**, *Kruck v. Spain*, Jurisdiction, para. 174; **CL-0262**, *Triodos v. Spain*, para. 471.

[1569] C Resp. Rej., paras. 486-488, referring to Cl. Reply para. 360; **CL-0258**, *Isolux v. Spain*, para. 772 (the Respondent notes that the Claimants submitted **CL-0258** with only para. 775 translated into English; it submits its additional translation of these paragraphs, and para. 815, as **R-0296**).

of the German offshore wind energy sector",[1570] and was subject to notice of change;[1571]

c. prior awards "*overwhelmingly confirm*[] *Respondent's position that a specific, legally binding assurance on behalf of the host State is needed for the expectation of a regulatory standstill to be legitimate*"; [1572]

i. *Methanex v. USA*:[1573] according to the Respondent, the tribunal made clear that "*State liability for regulatory measures requires the breach of specific commitments, irrespective of whether the underlying claim is one of FET or expropriation*";

ii. *Venezuela Holdings v. Venezuela*:[1574] the tribunal confirmed that "[l]*egitimate expectations may result from specific formal assurances given by the host state in order to induce investment*";

iii. *Glamis Gold v. USA*:[1575] according to the Respondent, the tribunal "*stressed the requirement of a 'quasi-contractual' specific commitment*";

iv. *PSEG v. Turkey*:[1576] the tribunal stated:

> Neither does the Tribunal find merit in the Claimants' argument that the investment was actively requested by the Turkish Government. True enough, the whole BOT policy was built on the premise that foreign investments would be

[1570] Resp. Rej., para. 489; SBT Expert Report, para. 195; Wustlich Witness Statement, paras. 66-67.

[1571] Resp. Rej., para. 490; SBT Expert Report, para. 68; Falk Witness Statement, paras. 24, 34; Wustlich Witness Statement, para. 14.

[1572] Resp. Rej., para. 491.

[1573] Resp. Rej., para. 492; **CL-0181**, *Methanex v. USA*, Part IV, Chapter D, p. 4, para. 8.

[1574] Resp. Rej., paras. 492-493; **RL-0169**, *Venezuela Holdings and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014, para. 256.

[1575] Resp. Rej., para. 494; **RL-0170**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 ("***Glamis Gold v. USA***"), para. 766.

[1576] Resp. Rej., para. 495; **CL-0055**, *PSEG v. Turkey*, para. 243. The Respondent adds, "*The fact that the parties in* [PSEG] *had negotiated for several years against the backdrop of various policy changes strengthens the Respondent's interpretation. After all, one would assume that a specific commitment is (at most) less important in the context of a long-standing bilateral relationship, compared to cases such as the one at hand, where no such relationship existed between the Parties*": Resp. Rej., fn. 928.

> needed, encouraged and welcome, but this was a matter of general policy that did not entail a promise made specifically to the Claimants about the success of their proposed project.

v. *Micula v. Romania (I)*:[1577] the tribunal determined that "*for a state to violate the fair and equitable treatment standard by changing the regulatory framework, the investor must have received a legitimate assurance that the relevant laws and regulations would not be changed*";

vi. *Metalpar v. Argentina*:[1578] the tribunal extensively discussed prior awards including *Tecmed v. Mexico*, *ADC v. Hungary* and *PSEG v. Turkey* and, according to the Respondent, "*explicitly identified the existence of specific commitments as the common denominator that gave rise to legitimate expectations*";

d. political statements cannot constitute legally binding commitments:[1579]

i. "*Claimants ignore core principles of democracy, which apply to Respondent as a democratic State*",[1580] as "*enshrined in Art. 20 (1) German Constitution*", with "*the principle of separation of powers*", whereby:[1581]

1. "*politicians and public authorities have no authority under the German Constitution* per se *to make legally binding commitments regarding legislative measures to investors*", and "*are not in a position to issue binding commitments regarding regulatory continuity of the law on their own, i.e. without being authorized by a law that has been adopted by*

[1577] Resp. Rej., paras. 496-497; **CL-0068**, *Micula v. Romania (I)*, para. 673.

[1578] **RL-0172**, *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, *ad hoc*, Award on the Merits, 6 June 2008, para. 185.

[1579] Resp. Rej., paras. 500-508.

[1580] Resp. Rej., para. 500.

[1581] Resp. Rej., para. 501.

the legislative power in accordance with a specific process provided for by the German Constitution"; and

2. the German Federal Government "*is authorized to draft bills and suggest initiatives as well as discussion in the* Bundestag", and "*cannot obligate the German legislator, i.e. the parliament* Bundestag *or the representative organ of the* Länder*, the* Bundesrat *to enact a specific law or refrain from adopting specific amendments to existing legal provisions*";[1582]

3. "*exclusive legislative competence of the parliament is part of the democratic order of the German Constitution*";[1583]

ii. the Claimants' "*cryptic allegation of political statements giving rise to legitimate expectations*",[1584] is unsupported by prior jurisprudence including:

1. *Cavalum v. Spain*:[1585] the tribunal in this case did not deal with political statements (it instead referred to "*statutory commitment*" in reference to *Enron v. Argentina*);

2. *Enron v. Argentina*:[1586] the tribunal only discussed regulatory framework in general and did not address political statements;

[1582] Resp. Rej., para. 501.

[1583] Resp. Rej., para. 502.

[1584] Resp. Rej., para. 503, referring to Cl. Reply, para. 362 and fn. 952.

[1585] Resp. Rej., para. 504; **CL-0141**, *Cavalum v. Spain*.

[1586] Resp. Rej., para. 504; **RL-0299**, *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 ("***Enron v. Argentina***"), para. 265 (*"The Tribunal observes that it was in reliance upon the conditions established by the Respondent in the regulatory framework for the gas sector that Enron embarked on its investment in TGS. Given the scope of Argentina's privatization process, its international marketing, and the statutory enshrinement of the tariff regime …*").

3. *Total v. Argentina*:[1587] the tribunal stressed that representations to the specific investor to serve as basis for legitimate expectations;

4. *El Paso v. Argentina*:[1588] the tribunal explicitly referred to the lack of the "*specificity of the undertaking*" to hold that "*political statements can create no legal expectations*", thus reflecting "*the general standard of political statements not creating legitimate expectations*";

5. *Mamidoil v. Albania*:[1589] the tribunal held:

> However, assurances must be made if they are to be legally relevant. This is not a frivolous matter as it may have important consequences. The person to whom an assurance is to be imputed must be aware of the consequences of his or her actions, and the person who wants to rely on it must reasonably discern the commitment. A representation, even by conduct, must therefore amount to a clear and identifiable commitment, which is attributable to the person who makes the representation, and which is reasonably conveyed to the addressee. The Tribunal agrees with *Continental v. Argentina* and *El Paso v. Argentina*, where the tribunals found that "[p]*olitical statements* […] *create no legal expectations*.

6. *White Industries v. India*:[1590] the tribunal stated:

> [J]urisprudence highlights that, to create legitimate expectations, State conduct needs to be specific and unambiguous. Encouraging remarks from

[1587] Resp. Rej., para. 504; **CL-0026**, *Total S.A. v. Republic of Argentina*, para. 118.

[1588] Resp. Rej., paras. 505-506; **RL-0173**, *El Paso v. Argentina*, paras. 378, 395, 556 *et seq*. *See also* **CL-0055**, *PSEG v. Turkey*, para. 243; **RL-0165**, *Continental Casualty v. Argentina*, paras. 252 *et seq*.; **CL-0142**, *Infracapital v. Spain*, para. 570; **RL-0300**, *Pawlowski AG and Projekt Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021, para. 638 ("*Even if it is assumed* arguendo *that the Mayor of Uhříněves made specific promises to the protected investor that the Zoning Plan Change would be procured (*quod non*), such conduct would still not give rise to a legitimate expectation, because it would have been rendered by an authority incompetent to make such a commitment*").

[1589] Resp. Rej., para. 506; **RL-0171**, *Mamidoil v. Albania*, para. 643.

[1590] Resp. Rej., para. 507; **RL-0168**, *White Industries v. India*, para. 10.3.7.

> government officials do not of themselves give rise to legitimate expectations. There must be an 'unambiguous affirmation' or a 'definitive, unambiguous and repeated assurances'. The conduct must be targeted at a specific person or identifiable group.

e. legitimacy must be assessed at the time the alleged investment is made:[1591]

   i. future changes to the regulatory framework are not irrelevant for the purposes of assessing the investor's legitimate expectations, but "*legitimate expectations can only be formed on the basis of the investor's knowledge and background of information at the time*";[1592]

   ii. prior awards support this, including:

      1. *Gaspar v. Costa Rica*:[1593] the tribunal confirmed that a legal and regulatory framework is "*always susceptible to evolve in response to new or changing circumstances*", with legitimate expectations of regulatory standstill if and to the extent "*at the time of the investment, the investor had a reasonable expectation that it would not be changed the way it was*" (the Respondent notes that in the present case the Claimants requested a special commitment from the host State regarding regulatory standstill);

[1591] Resp. Rej., paras. 509-516.

[1592] Resp. Rej., para. 509, referring to Cl. Reply, paras. 364 *et seq*. The Respondent clarifies:

> Claimants allege agreement between the Parties regarding the "*relevant time at which Mainstream's expectations are to be assessed*". If and to the extent that Claimants, in making this statement, are trying to conjure an agreement between the Parties that Claimants made an investment, this statement must be dismissed as false. Respondent wishes to point out that there was no agreement between the Parties regarding the qualification of Claimants' activities related to the Horizont Projects as investment. The Horizont Projects never left the pre-investment stage.

Resp. Rej., fn. 942.

[1593] Resp. Rej., para. 510; **CL-0259**, *Gaspar v. Costa Rica*, paras. 368, 375 *et seq*. The Respondent points out that the Claimants submitted **CL-0259** with only para. 376 being translated into English. Since the Respondent quotes different paragraphs of **CL-0259**, it attaches an additional translation of these paragraphs as **RL-0301**.

2. *Belenergia v. Italy*:[1594] the tribunal held:

> Like the *Isolux* tribunal, this Tribunal does not require a full and extensive due diligence by the investor. Rather, the Tribunal has considered whether Belenergia's alleged expectations are reasonable considering the information that a "prudent" investor had to know about Italian PV regulatory framework at the time of the investment. In other words, an investor cannot legitimately expect that the legal and regulatory framework will not change when any prudent investor could have anticipated this change before making its investment.

3. *Parkerings-Compagniet v. Lithuania*: the Respondent cites this case in support of its argument that "*should an investor fail to undertake a due diligence with regard to regulatory risks, it cannot have formed any legitimate expectations with respect to the regulatory framework*", and "*if and to the extent that the regulatory framework is undergoing significant transitions and developments, investors cannot form any serious expectation of regulatory continuity and claim that subsequent changes were not in the cards to inform their legitimate expectations*";[1595]

4. *Genin v. Estonia*: in the Respondent's view, this case supports its claim that where the investment concerns "*new areas of activities previously not properly regulated, such as the development of a completely new industry sector like the offshore wind energy sector in the German EEZ*", then

[1594] Resp. Rej., para. 511; **CL-0206**, *Belenergia v. Italy*, para. 584.

[1595] Resp. Rej., para. 512; **CL-0058**, *Parkerings-Compagniet v. Lithuania*, para. 334.

"*investors must be aware of the likelihood of legislative adaptations*";[1596]

5. *Chemtura v. Canada*:[1597] the Respondent cites to this case to make the argument that in addition to the "*duty to examine existing regulations and regulatory risk, investors must familiarize themselves with existing administrative practices of the host State*", and if they "*fail to do so, they cannot claim that their legitimate expectations have been frustrated if administrative practices by the host State's authorities negatively impact their investments*";

f. no obligation to enforce existing laws before making use of the right to regulate:[1598]

i. a sovereign State is "*free to adapt its existing laws and regulations to new realities and is not obliged to first enforce the existing ones*";[1599]

ii. as to the prior awards:

1. *Zelena v. Serbia*:[1600] in the Respondent's view, this case is distinguishable "*on the facts as well as on the question of law*", as the claimants "*built and operated a rendering plant specialized in the collection and processing of hazardous animal waste*", operated in a field that was "*very small without much legal competition*" and they were "*operating outside of the law*", where the claimants had received a "*guarantee letter*" from the competent ministry, "*an individual promise*

[1596] Resp. Rej., para. 513; **RL-0175**, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 348.

[1597] Resp. Rej., para. 516; **RL-0177**, *Chemtura Corporation v. Government of Canada*, *ad hoc*, Award, 2 August 2010, para. 149. *See also* Resp. C-Mem., paras. 563, 572.

[1598] Resp. Rej., paras. 517-527.

[1599] Resp. Rej., para. 517.

[1600] Resp. Rej., paras. 518-520; **CL-0264**, *Zelena v. Serbia*, paras. 5, 37, 120, 133, 136, 264 *et seq*., 486.

by the ministry that it would adopt a 'zero tolerance policy'" towards non-compliance, and a "*common agreement*" regarding enforcement for the claimants' benefit, which despite all being for the claimants' benefit, were not "*sufficient assurance amounting to a breach*", "*based solely on the fact that there were several market players in non-compliance with the laws of the host State but operating outside the law and thus illegally*";

2. *Micula v. Romania (II)*:[1601] the Respondent points out that the tribunal did not find violation for lack of enforcement of the host State's own laws and the dispute was also related to illegal activities only (the host State "*enacted tax laws on the production of spirits, including penalties applicable to alcohol manufacturers, with the intent to curb the expansion of a black market for spirits*"), there was "*no specific representation made vis-à-vis claimants to enforce these laws*", and it was undisputed that the State "*had undertaken some action to*

[1601] Resp. Rej., paras. 521-522; **RL-0184**, *Micula v. Romania (II)*, paras. 208 *et seq*., 319 *et seq*., 371 *et seq*. The Respondent also cites **RL-0184**, *Micula v. Romania (II)*, paras. 361-362:

> In the view of the Tribunal, the key question in this case is whether there was anything on which the Claimants' expectations could be based, so that the alleged omission or failure of the Respondent could be treated as a basis for liability. The Parties agree that there was no specific representation by the Respondent, although they differ on whether legitimate expectations relied on by a party have to be based on a specific representation.
>
> The Tribunal agrees with the Claimants that there does not have to be a specific representation and that legitimate expectations can arise from a State's acts or conduct. However, to borrow the language used by Schreuer and Kriebaum, which the Claimants cite with approval, what are the "general or specific assurances given by the host State" on which the Claimants rely? The acts or conduct upon which the Claimants rely are either acts of general legislation or specific actions taken by the Respondent relating to the enforcement of their taxation legislation – requiring tax stamps to be affixed to containers of alcohol, requiring alcohol producers to register and report, developing a tax code. None of these measures was specific in its application to the Claimants. These actions, together with the general market condition at the time that the Claimants entered the market for spirits in Romania created, the Claimants argue, an expectation that the Respondent would continue to enforce its taxation laws relating to spirits.

and para. 364*:*

> However, the Tribunal has difficulty seeing the precision in the expectation asserted by the Claimants that would give it some clear content to which liability could be attached. An expectation that a state will enforce its laws is of a high degree of generality, even if it were restricted to an expectation that a state would enforce its tax laws or taxation relating to alcohol.

enforce the laws, but it was not enough in the eyes of claimants and the black market for spirits was growing", yet the tribunal found that "*there had not been an absolute obligation for the host State to enforce the laws*" as it "*had not made an individual promise, express or implicit, to claimants to enforce the laws to claimants' benefi*t" (and the question of changing laws was never raised);

iii. the facts in both *Zelena* and *Micula* "*significantly differ from the present case*", so are of limited value (i.e., "*Claimants never built and operated any OWF*", had not "*obtained an Approval as the prerequisite for any further steps to start building an OWF*", and "*operated in an industry with a lot of competition*", there was "*no issue of potential competitors operating outside the law*", all investors "*faced the same hurdles*" and any "*potential investor and applicant for an Approval did not benefit from any protection against competing actors until their application was considered approvable, which in any event could never be before the Stakeholder Conference had been held and possibly even only a long time after said Stakeholder Conference had been held*", neither "*competing developers*" nor the TSO acted "*outside of the law*", and illegal activity was not an issue;[1602]

iv. the prior awards in *Zelena* and *Micula* "*do not address the same question of law*" as in the present case, which is "*whether a host State must first enforce its existing laws under any circumstances before being allowed to make use of its right to regulate*", and instead

[1602] Resp. Rej., paras. 523-524; Nemitz Second Witness Statement, para. 14; Nolte Third Witness Statement, para. 19, 25; Wustlich Witness Statement, para. 32; Slark Second Expert Report, para. 75 (describing the priority principle as being "*first past the post*").

addressed "*whether a host State is obliged to combat illegal activities*";[1603] and

v. here the Respondent was "*not obliged to keep the individualized grid connection system for all eternity – especially since it had become clear early on that the source of problems with the individualized grid connection system did not lie with the TSOs not wanting to comply with their obligations, but with their inability to comply*" so "*enforcement efforts would not have changed anything*" (and the Respondent "*did not ignore the TSOs' request for support*", but rather "*took the concerns of market participants regarding the persistent grid connection problems seriously and resolved the problem*" ("[w]*ithin the System Change 2012, Respondent introduced an explicit liability provision as well as a cost-allocation mechanism establishing clear rules regarding the apportionment of compensation payments, i.e. the liability of end consumers for such delays*")));[1604]

g. there is no self-standing protection in ECT Article 10(1) against "*radical changes or alterations of the applicable regime at the time of [the] investment*":[1605]

i. the ECT contains no self-standing prohibition of "*radical*" changes to the applicable regulatory framework;[1606]

ii. prior awards demonstrate that "*protection against 'radical' changes under Art. 10 (1) ECT is limited to changes affecting existing investments*" and not to projects in "*early development or even pre-*

[1603] Resp. Rej., para. 526.

[1604] Resp. Rej., para. 527.

[1605] Resp. Rej., paras. 528-538, referring to Cl. Reply, paras. 369 *et seq*.

[1606] Resp. Rej., para. 529. *See also* Resp. C-Mem., paras. 573 *et seq*.

investment stage and in any event have not yet become operational":[1607]

1. *Eiser v. Spain*:[1608] the Respondent acknowledges that Spain "*did not add a requirement that those investments be operational*", however:

    a. the thermosolar plants subject to the dispute were operational;

    b. investment in the thermosolar plants in 2007 was when "*the Spanish regulatory system provided for a very generous feed-in tariff*";

    c. the regulatory changes were enacted after the investor successfully completed the regulatory approval process and the solar power plants been commissioned, therefore the tribunal found:

> [T]he Article 10(1) obligation to accord fair and equitable treatment means that regulatory regimes cannot be radically altered as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment's value.

    d. the finding "*applies to already operational investments which are then sweepingly deprived of specific benefits after the investor had already successfully cleared all regulatory hurdles and started operating*"; and

[1607] Resp. Rej., para. 529.

[1608] Resp. Rej., paras. 530-532; **CL-0022 / CL-0041**, *Eiser v. Spain*, paras. 109 *et seq*., 121, 139 *et seq*., 382.

e. contrary to the Claimants' assertions, the reasoning is not applicable in the present case because "*projects which have already entered operations may well harbor the legitimate expectation that the conditions of the project's operation will not be changed*", but "*early-stage development projects which have not even received the necessary Approval cannot legitimately expect that the legal system applicable at their inception will be frozen during the many years it may take for them to enter operation*";

2. *Watkins v. Spain*:[1609] according to the Respondent, "*there simply are no objective criteria to determine what would constitute a 'radical' change*" and "*'radicalness' is at best an additional requirement to a violation of the FET standard*", as the Watkins tribunal held:

> Spain is entitled to make amendments to its regulatory regime, but after having entered into the ECT, there are limitations on its powers to alter the regulatory framework and it should not do so if such fundamental and radical changes would be unfair, unreasonable and inequitable … .

therefore "*radicalness*" of change "*is not a violation […]in its own right, but rather only if it meets the further conditions of being unfair, unreasonable and inequitable*";

3. *OperaFund v. Spain*:[1610] according to the Respondent, the Claimants' argument that a "*radical*" regulatory change involves stripping a regime of its "*key features*", is unspecific and ambiguous and "*tribunals have traditionally required additional elements for a breach of the FET standard through legislative intervention*"; it is not enough that a change was

[1609] Resp. Rej., para. 533; **CL-0046**, *Watkins v. Spain*, para. 521. *See also* Resp. C-Mem., para. 580.

[1610] Resp. Rej., paras. 535-536, referring to Cl. Reply, para. 373(ii); **CL-0102**, *OperaFund v. Spain*, para. 510.

"*abrupt, fundamental or comes as a surprise to the investor*" nor if it was "*unreasonable and frustrated a legitimate expectation of the investor*", but as the *OperaFund* tribunal noted:

> When addressing the extent of such a change [to the regulatory regime], the issue of whether the Spanish measures aimed at tackling the tariff crisis were reasonable becomes particularly relevant. Mere reliance on an existing legislative framework may not be a sufficient element for claiming breach of legitimate expectations.

4. a "*specific commitment on behalf of the State to the investor is generally necessary before a change to the regulatory regime can be considered unreasonable or 'radical'*", as "*confirmed by all of the decisions cited by Claimants in support of their argument*" – there was "*a specific commitment by* [Spain] *to investors in its solar energy sector, i.e. Art. 44 (3) of the Royal Decree RD 661/2007*", with "*an explicit commitment … not to modify the tariff regime as applied to existing investments*".[1611]

815. The Respondent proceeds to address the Claimants' second, third and fourth fair and equitable treatment claims on the basis of proportionality, transparency and good faith, all of which it argues are misrepresented by the Claimants.[1612]

iii. Fair and Equitable Treatment and Proportionality

816. Thirdly, as to fair and equitable treatment and proportionality, the Respondent submits that the Claimants' analysis "*misunderstands the required balancing test of investor interests against competing public interests*" and accuses the Respondent of

[1611] Resp. Rej., paras. 537-538; **CL-0022 / CL-0041**, *Eiser v. Spain*, para. 113; **CL-0047**, *Novenergia v. Spain*, para. 103; **CL-0048**, *Masdar v. Spain*, para. 463(v)(e); **CL-0092**, *Antin v. Spain*, para. 95; **CL-0049**, *9REN v. Spain*, para. 14(c). *See also* Resp. C-Mem., paras. 575, 581.

[1612] Resp. Rej., paras. 539-573.

favouring its right to regulate above the interests of investors, while requesting that the Tribunal show "*'particular respect for investors' pre-existing rights' with regard to retroactive measures*".[1613] The Respondent states that the Claimants fail to engage with the prior awards cited by the Respondent save for *Cairn v. India*, which is irrelevant because:[1614]

a. it is neither an ICSID nor ECT case (it was administered under UNCITRAL Arbitration rules), dealing with questions arising out of the UK-India BIT; and

b. it is distinguishable on the facts, as the regulatory changes had "*real retroactive effect*", i.e., they "*regulate*[d] *facts that have already been concluded in the past*" (in that case the State enacted law to tax sales of assets already concluded at the time of enactment, which at the time of transfer were not taxable).

817. According to the Respondent, laws with "*quasi-retroactive effect*", regulating "*facts, rights or legal relationships that have arisen in the past but still continue to exist*", such as the WindSeeG, "*are something different*".[1615] They are "*generally permissible because a State must be able to intervene in matters of life that have not yet been completed to fulfil its democratic responsibility for the general public and to be able to respond to changing circumstances*", to be assessed[1616]

> by balancing the State's interest in acting to the benefit of the general public against the interests of the individual, with the State's interest in change coming to the fore and in case of doubt outweighing the interest of the individual.

818. It submits further that the "*rationale for the permissibility of laws with quasi-retroactive effect compared to the rationale for the impermissibility of laws with real retroactive effect therefore is completely different*", and therefore prior rulings

[1613] Resp. Rej., para. 541, referring to Cl. Reply, para. 386.

[1614] Resp. Rej., paras. 541-542; **CL-0073**, *Cairn v. India*, para. 1807. *See also* Resp. C-Mem., para. 698.

[1615] Resp. Rej., para. 543.

[1616] Resp. Rej., para. 544; SBT Expert Report, paras. 180 *et seq*. *See also* Resp. C-Mem., paras. 588 *et seq.*

dealing with the latter "*cannot be transferred to apply*" here, as this would "*efface the balancing test which is at the core of the concept of proportionality*".[1617] According to the Respondent, the Claimants' view (which it describes as "*evidentially false and not backed up by arbitral practice*")[1618]

> boils down to … that the margin of appreciation enjoyed by host States exercising their sovereign right to regulate only pertains to choosing policy objectives and does not impact the balancing of interests that is part of the proportionality test … . [I]nvestor's interests are to be put above everything else.

819. By contrast, the Respondent's view is that its right to regulate[1619]

> includes the right to prioritize legitimate policy objectives and necessarily entails the host State's right to prioritize interests when balancing interests and economic effects between various stakeholders, including public interests. [It] … is not obliged to give absolute priority to a group of stakeholders that have not achieved a secured position yet, simply because they claim to have lost money.

820. In support of its position that a host State has the right to prioritize legitimate policy objectives, the Respondent refers to prior rulings in:

a. *Crystallex v. Venezuela*:[1620] where the Tribunal confirmed that host States enjoy a "*margin of appreciation*" for both "*substantive correctness*" and "*weighing of 'certain policy objectives over others'*":

> The Tribunal believes that in matters where a government regulator and/or administration is called to make decisions of a technical nature, those government authorities are the primary decision-makers called to examine the reports presented by the applying investor and the available scientific data. As such, those governmental authorities should enjoy a high level of deference for reasons of their expertise and competence (which is assumed to be present in those institutions called to make the relevant decisions) and proximity with the situation under examination. It is not for an investor-state tribunal to second- guess the substantive correctness of the reasons which an administration were to put forward in its decisions, or to question the

[1617] Resp. Rej., paras. 544-545.

[1618] Resp. Rej., para. 546.

[1619] Resp. Rej., para. 547.

[1620] Resp. Rej., paras. 548-549; **CL-0125**, *Crystallex v. Venezuela*, para. 583.

> importance assigned by the administration to certain policy objectives over others.

b. *Infracapital v. Spain*:[1621] according to the Respondent, the tribunal confirmed the approach in *Crystallex*; and

c. *Glamis Gold v. USA*:[1622] the Respondent cites this case in support of its argument that the "*margin of appreciation enjoyed by host States must be respected within the assessment of proportionality*", which "*effectively translates into a presumption of legitimacy for the host State's regulatory measures*".

iv. Fair and Equitable Treatment and Transparency

821. Fourthly, as to fair and equitable treatment and transparency, the Respondent argues that there is a high threshold for violation.[1623] It argues that the Claimants "*misunderstand*[ ] *... the concept*" and its treatment in prior arbitral decisions which demonstrate that "*not every lack of transparency automatically translates into a breach of the FET standard*",[1624] but instead only where:

a. there exists "*a continuing pattern of non-transparent actions by a government over time*";[1625]

b. the host State "*entirely disregarded the procedural rules that it must follow within a particular process*";[1626] and

c. the host State displays a "*complete lack of transparency and candour*",[1627]

[1621] Resp. Rej., para. 549; **CL-0142**, *Infracapital v. Spain*, para. 662.

[1622] Resp. Rej., para. 549; **RL-0170**, G*lamis Gold v. USA*, para. 805. *See also* Resp. C-Mem., para. 586.

[1623] Resp. Rej., paras. 550-568.

[1624] Resp. Rej., paras. 550-551.

[1625] Resp. Rej., para. 551; **CL-0208**, *Stadtwerke München GmbH, RWE Innogy GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019 ("***Stadtwerke v. Spain***"). para. 311.

[1626] Resp. Rej., para. 551; **RL-0182**, *Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1 (UNCITRAL), Final Award, 5 June 2020 ("***Nelson v. Mexico***"), para. 361.

[1627] Resp. Rej., para. 551; **CL-0069**, *Waste Management v. Mexico*, para. 98.

d. usually there involves "*accessibility of public documents and regulations*"; "*clarity and foreseeability of the decision-making process, with the investor having to exercise due diligence*"; and "*an obligation to notify any measure that is targeted at the investor*";[1628] and

e. transparency "*illuminates the process*", but cannot stop things from occurring all together.[1629]

822. The Respondent addresses prior case law concerning transparency in some detail, including:

a. *Metalclad v. Mexico*:[1630] where, according to the Respondent the claimants were subject to a series of administrative measures by different municipal, State and federal administrative authorities (granted permission at State level for a hazardous waste landfill without an operating or construction permit, halted at municipal level for lack of construction permit, assured by federal authorities that required permits were held), and the host State was found to have failed to ensure a "*transparent and predictable framework*", which the Respondent distinguishes from the current arbitration on the basis that:

i. the claimants in *Metalclad* had permits;

ii. the decision dealt with administrative practice ("*problems of conflicting and competing competence*"), not regulatory reform; and

iii. the tribunal required that legal requirements were "*readily known to all affected*", to avoid "*doubt and uncertainty*";

b. *Tecmed v. Mexico*:[1631] in that case the claimants had obtained a license which was later replaced by another with an insufficient reasoning (based on reasons

[1628] Resp. Rej., para. 551; **CL-0102**, *OperaFund v. Spain*; **CL-0139**, *Sevilla Beheer v. Spain*; **CL-0068**, *Micula v. Romania (I)*.

[1629] Resp. Rej., para. 552.

[1630] Resp. Rej., paras. 554-555; **CL-0078**, *Metalclad. v. Mexico*, paras. 28 *et seq*., 40-41, 76, 99, 154, 160, 164.

[1631] Resp. Rej., para. 556; **CL-0037**, *Tecmed v. Mexico*, paras. 154, 160, 164.

provided, according to the Respondent, it was "*impossible for claimants to remedy the alleged insufficiencies or defend themselves against them*"), which the Respondent distinguishes from the current arbitration on the basis that:

i. the claimants in *Tecmed* had a license;

ii. the tribunal focused on the importance that the executive (including administrative authorities) "*follows clear procedural principles and due process*"; and

iii. *Tecmed* did not deal with regulatory reform; and

c. *Gold Reserve v. Venezuela*:[1632] that case also differs on the facts because "*transparency*" was defined in Article XV of the applicable Canada-Venezuela BIT, requiring "*prompt publication for the information of interested parties*" extending "*only to the way laws and regulations were 'applied by the Administration'*", and therefore the tribunal's decision was unrelated to regulatory reform.

823. Regarding Claimants' argument that "*'inconsistent behaviour from a State and its organs' amounts to a violation of the concept of transparency*",[1633] the Respondent submits that:

[1632] Resp. Rej., para. 557; **CL-0116**, *Gold Reserve v. Venezuela*, fn. 465. According to the Respondent, the Claimants' quote from *Gold Reserve* is

> actually misleading as it uses the term "Initiation Act" and hence suggests the application of the concept of transparency to regulatory reform in said decision. This, however, was not the case. The decision … only dealt with the application of laws and regulations by the administrative authorities. The term "Initiation Act" did not designate a law, but an administrative act issued by the Ministry for the Environment, which issues permits and approves environmental impact studies, but has no legislative powers.

Resp. Rej., fn. 1025; **CL-0116**, *Gold Reserve v. Venezuela*, paras. 9, 592.

[1633] Resp. Rej., para. 559, referring to Cl. Reply, para. 381.

a. "*intransparent is not synonymous with … inconsistent*", "*consistent*" means "*coherent*", and "*transparent*" means "*clear*", which are distinct terms in arbitral practice;[1634]

b. prior awards relied on by the Claimants only dealt with an inconsistent behaviour by administrative authorities, whereas this case relates to regulatory reform, so those cases are distinguishable on law and fact:[1635]

   i. *Lauder v. Czech Republic*:[1636] the Respondent contends that *Lauder* concerned revocation of existing license, did not deal with transparency, and considered inconsistent behaviour of the State, finding there was none so as to violate the fair and equitable treatment standard;

   ii. *Crystallex v. Venezuela*:[1637] according to the Respondent, it concerned an administrative procedure leading to a decision to issue/deny the permit, did not deal with regulatory reform and considered the sufficiency of reasons for denial (reasons not previously discussed and made in "*vague terms and without supporting authority*"), with the tribunal finding that "*[w]ithout more detailed specifications or explanations, theses indeterminate references are, by any standards, entirely incapable of providing any possibly sound justification for a decision*", and that "*only a precise and reasoned denial*" afforded "*true opportunity to challenge the denial*" or "*remedy the deficiencies*"; the tribunal was also concerned with "*flaws of an administrative procedure*" which are not at issue here;

[1634] Resp. Rej., para. 559; **R-0086**, "*consistent*" in *Collins Thesaurus*; **R-0087**, "*transparent*" in *Collins Thesaurus*; **CL-0037**, *Tecmed v. Mexico*; **CL-0116**, *Gold Reserve v. Venezuela*; **RL-0204**; *Lauder v. Czech Republic*, **CL-0125**; *Crystallex v. Venezuela*; **CL-0254**, *Garanti Koza LLP v. Turkmenistan*.

[1635] Resp. Rej., paras. 560-561.

[1636] Resp. Rejoinder, paras. 562-563; **RL-0204**, *Lauder v. Czech Republic*, paras. 196, 289-290, 293.

[1637] Resp. Rejoinder, paras. 564-565; **CL-0125**, *Crystallex v. Venezuela*., paras. 7, 581, 583, 593-594, 598.

iii. *Garanti Koza v. Turkmenistan*:[1638] the tribunal did not define the term "*transparency*" or discuss it in detail, mentioning it only as "*one of the elements the claimants considered to be part of the FET standard*", without basing its decision on a "*violation … for disregard of the principle of transparency*".

v. Fair and Equitable Treatment and Good Faith

824. Fifthly, as to fair and equitable treatment and "*lack of good faith*", according to the Respondent this is not a recognized criterion in the fair and equitable treatment context, and the Claimants "*fail to present a full and correct picture of the concept of good faith within the context of the FET standard*".[1639] In particular:

a. according to the Respondent, the Claimants' argument that it is not necessary to show bad faith but a "*lack of good faith*" is a consideration within fair and equitable treatment, is "*confusing*" and "*truly absurd*", and the Claimants fail to elaborate;[1640]

b. "*lack of good faith*" is not a criterion recognized in arbitral practice;[1641]

c. in the cases cited by the Claimants:

i. *Lemire v. Ukraine*:[1642] according to the Respondent, the tribunal found that the threshold for bad faith was very high ("*whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State*");

ii. *Frontier v. Czech Republic*:[1643] the tribunal stated:

[1638] Resp. Rejoinder, para. 568; **CL-0254**, *Garanti Koza v. Turkmenistan*, para. 382.
[1639] Resp. Rej., paras. 569-574.
[1640] Resp. Rej., para. 569, referring to Cl. Reply, para. 382.
[1641] Resp. Rej., para. 570.
[1642] Resp. Rej., para. 571; **CL-0071**, *Lemire v. Ukraine*, para. 284.
[1643] Resp. Rej., para. 572; **CL-0053**, *Frontier v. Czech Republic*, para. 300.

> Bad faith action by the host state includes the use of legal instruments for purposes other than those for which they were created. It also includes a conspiracy by state organs to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the ones put forth by the government, and expulsion of an investment based on local favouritism. Reliance by a government on its internal structures to excuse non-compliance with contractual obligations would also be contrary to good faith.

825. On that basis, the Respondent submits that "*there is no substance*" to the Claimants' argument that good faith "*should be an integral part of the Tribunal's analysis*".[1644]

b. Facts Relating to the Claimants' Expectations

826. In response to the Claimants' case on legitimate expectations on the facts, the Respondent first addresses the relevant point in time for assessing legitimate expectations and then explains why, in its view, there were no legitimate expectations in respect of (i) approval, (ii) grid connection or (iii) economic incentives.

827. According to the Respondent in its Post-Hearing Brief, "*the ECT is silent regarding the point in time relevant for the assessment of legitimate expectations*", but prior awards suggest it is "*the moment the investment was made*", which it argues is "*the moment when the FID is taken*" and here the "*Claimants never made any investment, as they never took a FID*".[1645] Even if there were an investment (*quod non*), the Respondent denies that the Claimants had any legitimate expectations at the relevant time because:[1646]

a. according to prior awards:

i. practice differs, as some "*focus on each individual investment measure and assess the legitimate expectations individually*",[1647] and

[1644] Resp. Rej., para. 573.

[1645] Resp. PHB, para. 67; **CL-0033**, *AES v. Hungary*, paras. 9.3.8 *et seq.*; **CL-0047**, *Novenergia v. Spain*, para. 532; **CL-0053**, *Frontier v. Czech Republic*, para. 287 and the sources cited therein; Tr. Day 1, 60:21–61:4; Tr. Day 8, 148:1–149:16.

[1646] Resp. PHB, paras. 68-72. See also Resp. C-Mem., paras. 606 *et seq*.; Resp. Rej., paras. 578 *et seq*.

[1647] Resp. PHB, para. 69; **CL-0033**, *AES v. Hungary*, paras. 9.3.14 *et seq.*; **CL-0125**, *Crystallex v. Venezuela*, para. 557; **CL-0209**, para. 723; **CL-0053**, *Frontier v. Czech Republic*, para. 287.

others "*focus on the original investment decision, excluding the protection of expectations that later arise*";[1648]

ii. regardless, "*later circumstances and facts are considered, if a later made investment confirms the original investment*", with tribunals examining legitimate expectations "*for each stage*";[1649] and

iii. the baseline for alleged multiple related investments is to consider expectations "*separately and for each step, i.e., knowledge acquired after the first investment measure as well as all information available at the time of the next measure must be considered*";[1650]

b. the Respondent highlights the Claimants' confirmation that expectations evolve over time so that[1651]

> the relevant point in time for assessing the legitimate expectations of the initial assessment is when the initial applications were filed, then over the course of the investment there will be separate points in time. And it is for the Tribunal to then assess what the legitimate expectation at the relevant time was.
>
> As a headline point, the Claimants' position is that at each and every step when investments were made, they were made in the legitimate expectations of the framework that existed at the time when these investments were made.

c. the Claimants had no legitimate expectations at the beginning of activities in Germany (i.e., at the filing of the applications) or "*at any other point*", as they "*could never expect regulatory standstill, as the expectation that the applicable law will not change is not protected under German constitutional law unless there are additional exceptional circumstances*";[1652]

[1648] Resp. PHB, para. 69; **CL-0024**, *Duke Energy v. Ecuador*, para. 340; **CL-0047**, *Novenergia v. Spain*, para. 539 ("*the timing of an investor's decision to invest sets a backstop date*").

[1649] Resp. PHB, para. 69; **CL-0209**, *SunReserve v. Italy*, para. 722.

[1650] Resp. PHB, para. 69.

[1651] Resp. PHB, para. 70, quoting Tr. Day 9, 168:22–169:8.

[1652] Resp. PHB, para. 71. See also Resp. Rej., para. 595. According to the Respondent, Dr. Prall confirmed that "*it is 'just not conceivable' that there are no legal changes to the legal framework*": Tr. Day 1, 149:19 *et seq*.

d. as offshore wind was "*a completely new technology facing countless challenges and Claimants acted during Respondent's historic energy transition, Claimants had to expect legal changes, which were necessary*";[1653]

e. the Claimants' allegation that they "*relied on a legally non-binding political strategy from the year 2002*" and "*did not expect any detrimental changes years after they filed the applications*" is "*implausible, in particular as their own legal advisor Dr Ursula Prall confirmed that the Offshore Strategy 2002 was not binding, and changes were possible*".[1654]

828. In its Reply Post-Hearing Brief, the Respondent further submits in relation to timing on the expectation and the need to adapt to evolving knowledge and information, that:[1655]

a. the Parties are in agreement that legitimate expectations "*evolve over time in accordance with knowledge and additional information*";[1656]

b. in 2002, "*there was no experience at all in the offshore wind energy sector*", therefore "*from a practical and legislative point of view, changes were imminent from the outset*", and "[d]*ue to the lack of experience, the development of the offshore wind energy sector and its framework were not foreseeable in detail*";[1657]

c. from 2002 over the course of the Claimants' activities, "*there was constant discussion among stakeholders about the inadequacy of the legal framework and the rising and enormous practical problems*", which the Claimants actively participated in;[1658]

[1653] Resp. PHB, para. 72

[1654] Resp. PHB, referring to Tr. Day 1, 211:5-7.

[1655] Resp. Reply PHB, paras. 30-38.

[1656] Resp. Reply PHB, referring to Cl. PHB, para. 30.

[1657] Resp. Reply PHB, para. 31.

[1658] Resp. Reply PHB, para. 32. *See also* Resp. PHB. para. 115.

d. the Respondent "*reacted in a fair and transparent manner, publishing drafts, inviting to discussion and comments, and providing for transitional provisions*", promoting and supporting "*efficient and effective expansion of the offshore wind energy sector … in accordance with the overall goal of the Offshore Strategy 2002*" (which did not protect individual rights or "*state that OWF developers must receive never-ending feed-in-tariffs, other financial benefits, or free grid connections*");[1659]

e. the Claimants' table confirms that they "*never had any legitimate expectations at any point in tim*e"[1660] because:

   i. at the 4 September 2008 Board Meeting, "*the Draft Spatial Planning Ordinance had been published, announcing the introduction of priority areas, which would exclude the Horizont Projects*";[1661]

   ii. in June 2009, the "*Board approved expenses for geotechnical studies, even though the Draft SeeAnlV 2009 had been published in the same month, proposing a tendering procedure*";[1662]

   iii. by 15 August 2011, at the latest, the Claimants "*knew about the introduction of the Planning Approval Procedure … when the draft SeeAnlV 2012 was sent to the stakeholders*";[1663] and nevertheless

   iv. "[t]*hey continued spending money, even though they allegedly perceived this measure to have an adverse impact*" and they had no way "*to be sure that none of these drafts would become law*" as "*the Bundestag as the democratically elected body adopts the laws – not*

[1659] Resp. Reply PHB, para. 33.

[1660] Resp. Reply PHB, para. 34, referring to Cl. PHB, para. 33.

[1661] Resp. Reply PHB, para. 34; **C-0098**, February/March 2009 Mainstream Board Report.

[1662] Resp. Reply PHB, para. 34.

[1663] Resp. Reply PHB, para. 35.

lobbyists and most certainly not the BSH as administrative authority";[1664]

f. if the Claimants believed the law was "*unconstitutional or not in accordance with a nonbinding political strategy from years earlier, they could have taken legal action*", but did not do so until the WindSeeG was enacted;[1665]

g. the Claimants did not invoke the 2002 Offshore Wind Strategy in the German Constitutional Court proceedings;[1666]

h. "*developing knowledge must be considered if the investor confirms its investment by taking several 'relevant business decisions'*" and the Claimants "*took several business decisions over the years, each after learning about a new legal development*", so they must consider new knowledge (e.g., when they incorporated the Fourth and Sixth Claimants in 2012, they knew about the introduction of the Planning Approval Procedure in the 2012 SeeAnlV, the 2012 EnWG and other measures);[1667] and

i. according to the commentary relied upon by the Claimants, "*the general legal framework can only be basis for legitimate expectations if it contains a genuine guarantee by the host State*"; however, the cases cited in that article all deal with the same guarantee contained in the same national law.[1668]

c. The Claimants' Reliance on Expectations

829. As to the existence of legitimate expectations in fact, according to the Respondent in its Post-Hearing Brief, the Hearing "*confirmed that when filing their applications on 27 June 2008 and 11 July 2008*" the Claimants:[1669]

[1664] Resp. Reply PHB, para. 35.
[1665] Resp. Reply PHB, para. 36.
[1666] Resp. Reply PHB, para. 36.
[1667] Resp. Reply PHB, para. 37; **CL-0366**, Schreuer/Kriebaum, Legitimate Expectation, p. 276.
[1668] Resp. Reply PHB, para. 38; **CL-0366**, Schreuer/Kriebaum, Legitimate Expectation, fns. 38-39.
[1669] Resp. PHB, para. 73.

a. "*did not harbor any legitimate expectations with respect to obtaining Approval*" or

b. "*getting a grid connection by a certain date*", and

c. could not "*expect to receive the specific 2014 feed-in tariff on which their damages calculation is based*".

To the extent the Claimants' case relies on "*the non-binding Offshore Strategy 2002 or policy expansion targets*", the Respondent argues that this "*is not supported by any evidence*".

i. Approval Expectation

830. As to the alleged expectation for approval, the Respondent also focuses on the approval process pursuant to the SeeAnlV.[1670]

831. It notes regarding the relevant SeeAnlV amendments that:

a. the 2006 SeeAnlV was in force at the date of the filing of the applications, granting "*a legal entitlement to an Approval if there were no grounds for refusal pursuant to Sec. 3, i.e., if neither (i) the safety and ease of traffic were impaired nor (ii) the marine environment was endangered*";[1671]

b. the original SeeAnlV was enacted at the beginning of 1997 and amended several times until 2008, with relevant grounds for refusal in SeeAnlV Section 3 amended in 2002 to include:[1672]

i. a new Section 2a with additional obligations for OWF developers to conduct an environmental impact assessment ("**EIA**");

[1670] Resp. PHB, paras. 74-90.

[1671] Resp. PHB, para. 74; **C-0073**, 2006 SeeAnlV. The Respondent clarifies, "*Endangerment of marine environment is further specified as pollution of the marine environment and/or endangerment of bird migration*": Resp. PHB, fn. 122.

[1672] Resp. PHB, para. 75; **C-0073**, 2006 SeeAnlV; **RL-0115**, 2002 SeeAnlV.

ii. a new Section 3a empowering of the Federal Ministry for Transport, Building and Housing to designate special suitability areas for OWF in the German EEZ; and

iii. a new Section 5(1) sentence 4 (the 'priority principle');

c. relevant grounds for refusal in SeeAnlV Section 3 were further amended in 2008 to include the refusal for other overriding public interests, giving the BSH wide discretion for "*factual assessment to weigh public interests against the interests of the applicant and refuse Approval if it found public interest to outweigh the developer's interests*":[1673]

d. the legal basis for the amendment "*was an amendment of the Federal Maritime Responsibilities Act*", published 19 October 2007,[1674] and

e. the 2002 and 2008 SeeAnlV provided the applicant "*non-discretionary legal entitlement to obtain approval/consent*", meaning that if "*the BSH, as the competent public authority conclude*[d] *in its assessment that all statutory prerequisites are met,* [it] *had to issue the decision*" though it still had "*power and authority to assess the facts in each individual case to decide whether the requirements were met and whether there were grounds for refusal*".[1675]

832. As to the application of the relevant 2006 SeeAnlV amendments to the Claimants' legitimate expectations, according to the Respondent the Claimants were aware that:

a. at the date of the Consent Applications, "*it was already clear that the SeeAnlV would be amended*" (and it was amended four weeks later);[1676]

[1673] Resp. PHB, para. 76; **C-0073**, 2006 SeeAnlV. See also Resp. C-Mem., paras. 339 *et seq*.

[1674] Resp. PHB, para. 76; **RL-0121**, Draft Act regarding the amendment of shipping regulations, 19 October 2007; **UP-0010**, Minutes of OFW General Assembly, 4 April 2008, p. 3.

[1675] Resp. PHB, para. 80. According to the Respondent, "*By contrast, if a specific legal provision granted the public authority discretion whether to grant Approval or not, even if all statutory prerequisites were met, this is called 'Ermessensentscheidung'*": Resp. PHB, fn. 135.

[1676] Resp. PHB, para. 76.

b. the 2008 SeeAnlV, although entering into force after the Consent Applications, was immediately applicable (German law provides that law in force at the time of the administrative decision applies);[1677]

c. although there are transitional provisions exceptions, the Horizont Projects did not qualify because they were not publicly announced (2008 SeeAnlV Section 16a(1));[1678]

d. increased developer obligations in the 2002 SeeAnlV and additional grounds for refusal in the 2008 SeeAnlV demonstrates "*that the regulatory framework had previously changed to the disadvantage of developers*", disproving any expectation for "*change to be only to* [investor] *benefit*";[1679] and

e. there were "*potential negative consequences of the Draft Spatial Planning Ordinance 2008 for the Horizont Projects*" as it "*designated priority areas with exclusion effect for the development of OWFs in the German EEZ*" and the requirements of spatial planning must be "*taken into account in every Approval Procedure under the SeeAnlV*", so if enacted this "*would have meant the end for the Horizont Projects because they lay outside of the envisaged priority areas*".[1680]

833. For the reasons set out above, the Respondent concludes therefore that the Claimants:

a. based on the imminent 2008 SeeAnlV amendment, "*already took into account the additional grounds to refuse Approva*l" and "*knew that a contradiction with the objectives of spatial planning constituted grounds for refusing Approval under the new SeeAnlV 2008*";[1681]

[1677] Resp. PHB, para. 79; Tr. Day 5, 10:5-11 and 76:3-9.

[1678] Resp. PHB, para. 79.

[1679] Resp. PHB, para. 78. *See also* Resp. C-Mem., para. 341.

[1680] Resp. PHB, para. 81; **C-0093**, Horizont II Application, p. 10 ("*Mainstream RP is also aware that, in accordance with the imminent adoption of a SeeAnlV amendment, a contradiction with the objectives of spatial planning will be grounds for refusing approval*").

[1681] Resp. PHB, para. 79.

b. sought to downplay the importance of the Draft Spatial Planning Ordinance (i.e., accusing the BSH of "*irresponsible regulatory behaviour*" and "*overstepping its competence by publishing*" without consulting the Federal Ministry of Transport);[1682] and

c. "*deliberately misinterpreted a letter from the Federal Ministry of Transport from September 2008 outlining the further course of action after the public participation process as an alleged 'stern warning' against the BSH*", which the Respondent argues in fact "*shows the close coordination between the ministry and its subordinated agency*".[1683]

834. The Respondent raises additional factors relating specifically to the approval procedure:

a. in June 2009, the Draft 2009 SeeAnlV was published to propose change from an approval procedure to a tendering system yet the Claimants moved forward to start geotechnical surveys in July 2009;[1684]

b. general grounds to refuse approval "*remained the same after the introduction of the Planning Approval Procedure pursuant to the SeeAnlV 2012*" as the "*appropriate instrument for large construction projects such as the construction of an OWF*", which the Claimants' expert "*admitted ... is not unusual*" and to which they did not object or seek legal remedies;[1685]

c. the Claimants did not "*prove that the Horizont Projects fulfilled all legal requirements for Approval*", which the Respondent's experts argued "*is not a mere formality and is not automatically granted just because a Stakeholder Conference is held*", pointing to "*examples where Approvals were refused*

[1682] Resp. PHB, para. 82, referring to Tr. Day 8, 121:2-9.

[1683] Resp. PHB, para. 82, referring to Tr. Day 8, 119:20–121:12; **C-0222**, Ministry of Transport, 2008 Internal Note, p. 1 (*"We … would be happy to discuss this and coordinate by phone*"); **RL-0122**, Draft Spatial Planning Ordinance, p. 1. The Respondent points out that the Draft Spatial Planning Ordinance "*was ordered by the Federal Ministry of Transport, Building and Urban Affairs in accordance with the Federal Spatial Planning Act*" and this coordination was "*confirmed by Dr. Nolte*".

[1684] Resp. PHB, para. 84. *See also* Resp. Rej., para. 206.

[1685] Resp. PHB, para. 85, referring to Tr. Day 1, 222:2-5. *See also* Resp. C-Mem., paras. 354 *et seq*.; Resp. Rej., para. 229.

after the Stakeholder Conference because the BSH concluded that the legal requirements were not met";[1686]

d. Dr. Prall accepted that "*it is not the purpose of the Stakeholder Conference to con-firm the approvability of a project*" and "*it is legally incorrect to say that with the stakeholder conference, the pre-stage of planning approval has been reached*",[1687] advising Claimants at the time that a Stakeholder Conference did not mean "*approval would need to be given*", which Mr. Schwencke also knew;[1688]

e. the BSH "*never confirmed that Claimants fulfilled all legal requirements to obtain Approval*";[1689]

f. any BSH promise that Approval would be forthcoming would have been "*in writing and made part of the official BSH files, as is done for all relevant steps of the Approval Procedure*";[1690]

g. as to the necessity for a helicopter corridor study after the Stakeholder Conference, as the Claimants applied for a helicopter landing deck and included it in the applications, they "*were required to prove that the helicopter traffic would not endanger the safety and ease of (air) traffic*";[1691] and

h. the BSH "*never concluded its assessment of the approvability of the Horizont Projects*", having halted the procedure in March 2015, "*because the applications lacked planning justification, as grid connections for the*

[1686] Resp. PHB, para. 86; Tr. Day 3, 58:14.

[1687] Resp. PHB, para. 87; Tr. Day 2, 22:10-18.

[1688] Resp. PHB, para. 87; Tr. Day 2, 22:20–23:3, 24:3-5 and 142:10-15.

[1689] Resp. PHB, para. 88. At the Hearing, Ms. Nemitz confirmed that "*mere confirmation of the completeness of the application documents does not entail approvability of the project*": Tr. Day 3, 164:3-5 and 167:20–168:1.

[1690] Resp. PHB, para. 88; Tr. Day 3, 167:21-25.

[1691] Resp. PHB, para. 89.

respective clusters would only be available in 2028/2029", which was "*a prerequisite for each Planning Approval*".[1692]

835. The Respondent argues further in its Reply Post-Hearing Brief regarding approval that:

a. the Claimants knew "*laws can change and that the law in force at the time of the application is not necessarily the same as the one in force when the decision about the application is made*", and the "*knew about the need for reform, and the high probability of legislative reform between the application and the BSH's decision*";[1693]

b. the Respondent "*did not radically change the approval regime in 2012*", there is "*no such thing as radical change under German law*", and there was "*no change in policy, as Respondent still did everything for a swift expansion of the offshore wind energy sector*";[1694]

c. it is "*evidently incorrect*" that Claimants had "*done everything required to secure consent*";[1695]

d. it is a "*misconception on Claimants' part that all legal requirements to obtain Approval were met*",[1696] because:

i. the "*Stakeholder Conference did not trigger Approval*", noting that:

1. the Stakeholder Conference was not the final stage in the Approval Procedure as the Claimants had to fulfil additional requirements, completed one year later;[1697]

[1692] Resp. PHB, para. 90. *See also* Resp. C-Mem., para. 379.
[1693] Resp. Reply PHB, para. 40.
[1694] Resp. Reply PHB, para. 40.
[1695] Resp. Reply PHB, para. 41.
[1696] Resp. Reply PHB, para. 42.
[1697] Resp. Reply PHB, para. 43; **C-0125**, Letter from BSH to Fourth, Fifth and Sixth Claimants, 24 March 2015.

2. Dr. Nolte explained that it was "*the first opportunity to discuss the application documents with stakeholders*" and confirmed that "*a formally complete set of documents was only the basis for discussion, but not the decision itself*", and the "*Stakeholder Conference did not automatically result in Approval*";[1698]

3. the Consent Application content had to be "*examined by the BSH after the Stakeholder Conference*", assessing each application "*on its own merits, considering the individual circumstances of each site and project*";[1699]

4. the "*Respondent never promised Approval to Claimants but rather stressed that there still were many hurdles to overcom*e" and that even though "*only two projects … had been denied Approval after the Stakeholder Conference did not mean that the Stakeholder Conference would trigger Approval for Claimants*";[1700]

ii. the "*BSH had informed Claimants accordingly when communicating the decision to halt the Approval Procedures*",[1701] noting that:

1. the Consent Applications were "*halted due to lack of planning justification*" under the 2012 SeeAnlV which was not new ("*that the project must have a chance to be realized in the short to medium term has always been a requirement for all types of approvals*");[1702]

[1698] Resp. PHB, para. 44; Tr. Day 3, 4:22–5:11 and 55:4-24.

[1699] Resp. Reply PHB, para. 44. *See also* Resp. PHB, para. 20.

[1700] Resp. Reply PHB, para. 45.

[1701] Resp. Reply PHB, para. 42.

[1702] Resp. Reply PHB, para. 46. *See also* Resp. Rej., paras. 264 *et seq*.

2. Prof. Ekkehard Hofmann confirmed planning justification can lapse;[1703]

3. Dr. Prall "*advised Claimants that grid connection was a legal requirement for Approval and that Approval would not be issued for lack of 'sufficient cause to warrant a decision in the matter'*", e.g., "*if the grid connection date was pushed too far into the future*", which Mr. Schwencke clearly knew of and acknowledged, noting it "*remains a critical point*";[1704]

4. the Claimants knew grid connection for the Horizont Projects would not be available within a 10-year timeframe and "*confuse cause and effect when blaming Respondent for the delayed grid connection due to the System Change 2012*" when "*connection delays experienced by the entire offshore industry made this reform necessary in the first place*";[1705]

5. the Claimants "*were advised before the EEG 2014 set legally binding expansion targets for the first time*", refuting their claim that "*Approval Procedures were discontinued due to an alleged reduction of the expansion targets for the offshore wind energy sector*", given that previously there were no binding targets, "*only non-binding aspirations of the Offshore Strategy 2002*", and "*binding targets were introduced to provide a more reliable and realistic and enforceable perspective*", taking account of "*delayed development of the sector, while ensuring a synchronization with the required grid expansion*";[1706]

[1703] Resp. Reply PHB, para. 47; Tr. Day 5, 57:8–58:24.

[1704] Resp. Reply PHB, para. 48; **R-0072**, Dr. Ursula Prall, Draft Memorandum on the status of the Horizont Projects, pp. 6-7.

[1705] Resp. Reply PHB, para. 49. *See also* Resp. PHB, paras. 95 *et seq*.

[1706] Resp. Reply PHB, para. 50. *See also* Resp. Rej., paras. 316 *et seq*.

6. Ms. Nemitz's letter to the Claimants in 2015 confirmed that the "*Approval Procedure was discontinued because of 'legal planning obstacles', inter alia that 'a connection […] would be conceivable at the earliest in 2028 and 2029'*", confirming that "*it was the missing grid connection perspective within the next ten years that resulted in the lack of planning justification*";[1707]

iii. the "*BSH therefore did not decide based on discretion*",[1708] as the Respondent notes that:

1. discretion "*can only be exercised once the legal requirements are fulfilled*" and planning justification "*was such legal requirement*" which the Claimants did not have, leaving BSH with no choice but to halt the Approval Procedures;[1709] and

2. even if the BSH did exercise discretion, "*this does not equal an arbitrary act*" as it is "*subject to specific standards, e.g., giving detailed reasoning, and in any event is subject to judicial review*".[1710]

ii. Grid Connection Expectation

836. As to the alleged expectation for grid connection, according to the Respondent the applicable law was the 2006 EnWG Section 17(2a) which "*gave developers a right to a grid connection at the time of commissioning*",[1711] but:

a. applied only if construction commenced by 31 December 2011 (EnWG Section 118(7)); and

[1707] Resp. Reply PHB, para. 51; **C-0125**, Letter from BSH to Fourth, Fifth and Sixth Claimants, 24 March 2015.
[1708] Resp. Reply PHB, para. 42.
[1709] Resp. Reply PHB, para. 52.
[1710] Resp. Reply PHB, para. 53.
[1711] Resp. PHB, para. 91.

b. the Claimants' schedule did not meet that deadline; which

c. leaves "*no basis for Claimants to legitimately expect to receive a grid connection by a certain point in time in the future*".

837. As a matter of fact, the Respondent submits that:

a. "*it was evident as early as 2007 that the process of providing grid connections for each OWF individually was unrealistic in practice and could not be implemented by the TSOs*",[1712] relying on Dr. Guido Wustlich's testimony that:[1713]

i. "*it became clear in the course of 2007 that the individual grid connection regime pursuant to Sec. 17 (2a) EnWG did not work in practice*";

ii. it was a "*huge challenge*" to ensure OWFs and grid connections were ready to avoid "*stranded investments*";

iii. EnWG Section 17(2a) "*failed to ensure synchronization between grid connection and OWF development because it was not certain whether grid connection would be available when the OWF was ready*";

iv. "[i]*ndividual grid connections were problematic because it could mean that for five different OWFs built in five different years one would have to provide five different grid connections*", inducing "*nature conservation problems, environmental issues*" and "*extremely high costs*"; and

v. "*individual entitlement to a grid connection was not cost efficient and unnecessarily multiplied the negative impact on the marine*

[1712] Resp. PHB, para. 92. *See also* Resp. Rej., para. 106.

[1713] Resp. PHB, para. 92; Tr. Day 4, 45:15–47:20.

environment" and as at the Consent Applications "*not a single OWF was connected to the grid*";

b. based on Dr. Ursula Prall's testimony that:

i. "*the situation in 2008/2009*" was "*a vicious circle, leading to delays and difficulties and quarrels*", which eventually "*led to a stop*";[1714]

ii. the BNetzA Position Paper 2009 "*was supposed to solve the situation by providing 'guaranteed grid connection to the operators in a staged manner'*" but "*it didn't [solve the problem] in the end, because the grid connection took a lot longer than the 30 months that it was supposed to take*";[1715]

c. Claimants "*undisputedly never fulfilled any of the connection criteria set forth in the BNetzA Position Paper 2009*";[1716]

d. the need to build offshore converter platforms to connect OWFs to the onshore grid, among other things, led to delay;[1717]

e. "*from the beginning there was a consensus in the offshore wind sector that the grid connection regime was inadequate, especially from a practical standpoint*";[1718]

f. legal entitlement to a timely grid connection was "*de facto unenforceable*" (per Dr. Prall: "*it was impossible for OWF developers to enforce their legal entitlement because the TSOs were unable to deliver*"[1719] and per Mr.

[1714] Resp. PHB, para. 93; Tr. Day 2, 7:25–8:3.
[1715] Resp. PHB, para. 93; Tr. Day 2, 8:4-21.
[1716] Resp. PHB, para. 93.
[1717] Resp. PHB, para. 94.
[1718] Resp. PHB, para. 95; **R-0076**, GOWEF, 2012 Position Paper, p. 2.
[1719] Resp. PHB, para. 95; Tr. Day 2, 10:11-20.

Neupert: "*TSOs made it clear for all market participants that the individual grid connection right could not be maintained*");[1720] and

g. the Offshore Wind Energy Forum's proposal "*was a system change which included a prioritization of OWFs with a grid connection commitment under the BNetzA Position Paper 2009*" which the Claimants did not have, so the Projects "*would not be given priority since further advanced OWFs and projects in rows 1 and 2 would receive a connection first*".[1721]

838. Specifically in relation to the location of the offshore wind energy sites in the German EEZ, according to the Respondent:

a. the Offshore Strategy 2002 "*laid the foundation for spatial steering of OWF development in the German EEZ*";[1722]

b. by 2008, OWF sites were "*not yet officially clustered into zones*" (though the Claimants refer to "*rows*" to "*depict the distance to the shore*" and "*knew that the Horizont Projects' sites were less attractive in terms of distance to shore because of their location in row/zone 3*", at greater geographic distance from shore);[1723]

c. the Claimants "*chose development sites in row/zone 3*";[1724]

d. Dr. Prall "*conceded that lower water depth and closeness to shore were preferable because this made construction and maintenance easier and reduced costs*" and "*distance to shore, water depth and large size of the planned OWFs all added to their risk profile*" (per Mr. Stöver: "*parameters of the Horizont Projects were peak values, the maximum of what was*

[1720] Resp. PHB, para. 95; **R-0076**, GOWEF, 2012 Position Paper, p. 5; Tr. Day 2, 10:16-25; Tr. Day 6, 232:11-16 and 236:5-7.

[1721] Resp. PHB, para. 96. The Respondent notes, "*At the time, Dr. Ursula Prall was managing director of the Offshore Wind Energy Forum and Mainstream was a member*": Resp. PHB, fn. 192; **R-0076**, GOWEF, 2012 Position Paper, p. 15.

[1722] Resp. PHB, para. 97.

[1723] Resp. PHB, para. 98. According to the Respondent, "*Mr Petja Stöver noted that the Horizont Projects would have been the OWFs furthest from the shore in the German EEZ ever*": Tr. Day 6, 162:20-25.

[1724] Resp. PHB, para. 98.

technically available at the time would have had to work at an optimum level for the installation to succeed");[1725]

e. the Claimants were aware "*they would be the last to be connected to the grid, after all other projects in rows/zones 1 and 2*", knowing by December 2012 at the latest that grid connection was envisaged post-2022;[1726]

f. the 2012 BFO "*did not foresee grid connections for clusters 11/12 before that date*";[1727]

g. the first draft O-NEP 2013, published on 3 March 2013 (two days before the Stakeholder Conference) "*did not foresee grid connections for clusters 11/12 for the next ten years*":[1728]

   i. Dr. Prall is wrong that O-NEP 2014 pushed the grid connection beyond 10 years;[1729]

   ii. Mr. Neupert "*recalled that in 2011/2012, the few manufacturers of HVDC were unable to offer the construction of grid access systems to the TSOs in 30 months due to the technical and economic challenges of the required large-scale construction*";[1730] and

   iii. "[w]*ithout a converter station, there is obviously no connection of the OWF to the grid*" so further pushback was to be expected.[1731]

839. In its Reply Post-Hearing Brief, the Respondent reiterates that the Claimants did not have any legitimate expectations regarding grid connection, arguing that they did not refute this in their First Post-Hearing Brief. The Respondent describes the

[1725] Resp. PHB, para. 98; Tr. Day 1, 192:9–193:3; Tr. Day 6, 256:24–258:18.
[1726] Resp. PHB, para. 99; **SE-0117**, Horizont Update, 29 October 2011, p. 1.
[1727] Resp. PHB, para. 99.
[1728] Resp. PHB, para. 99. *See also* Resp. C-Mem., para. 364; **C-0107**, First Draft O-NEP 2013, p. 82.
[1729] Resp. PHB, para. 99.
[1730] Resp. PHB, para. 100.
[1731] Resp. PHB, para. 100.

contemporary evidence as "*confirming the problems regarding grid connection*" and the Claimants' respective knowledge as "*crushing*".[1732] It refers further to:

a. Dr. Prall confirmed that there were "*massive problems with the grid connection*" in 2008 and the BNetzA Position Paper 2009 could not solve these alone, as evidenced by TenneT's letter of 7 November 2011, which the Claimants confirm "*prompted regulatory reform*";[1733]

b. it did not downplay this to require only a "*moderate upgrade of the network*", which misunderstands the BMU Paper (which "*talks about the integration into the German transmission grid, which in January 2007 only existed onshore*" when "[t]*here was not a single cable in the sea in January 2007*" and thus "*required the creation of an offshore grid, not simply an upgrade of the onshore grid*");[1734]

c. the Claimants were aware of grid connection problems and they knew as of the Stakeholder Conference "*they would only obtain grid connection post-2022, as the respective BFO providing for such date had already entered into force*" and "*grid connection at the earliest in 2026 was even more likely, as the first draft of O-NEP 2013 containing that information had also already been published*";[1735] and

d. the Claimants fail "*to explain why they should have received preferential treatment regarding grid connection*", as there were "*many OWF developers*", "*the sector suffered from enormous practical problems*", and until 2013, "*not a single OWF was built in the German EEZ*", with many "*in the pipeline for the first and second rows, which for good reasons were first in line to receive grid connection*".[1736]

[1732] Resp. Reply PHB, para. 54.

[1733] Resp. Reply PHB, para. 55, referring to Cl. PHB, fn. 60; **R-0024**, Letter from TenneT to Federal Chancellery, 7 November 2011.

[1734] Resp. Reply PHB, para. 56, referring to Cl. PHB, para. 28; **C-0306**, BMU Paper.

[1735] Resp. Reply PHB, para. 57.

[1736] Resp. Reply PHB, para. 58.

iii. Economic Incentive Expectation

840. As to the existence of legitimate expectation of economic incentives, according to the Respondent in its Post-Hearing Brief, "[o]*btaining a feed-in-tariff has always been contingent on commissioning, which Claimants knew*".[1737] In this regard, they rely on:

a. Dr. Prall's testimony ("*commissioning was the decisive factor*" to determine the feed-in tariff and "*the tariff at the time of commissioning applied*");[1738]

b. the 2004 EEG being in force at the time of the 2008 Consent Applications, which "*provided for a specific feed-in tariff for OWFs commissioned by 31 December 2010*" but the Horizont Projects would not be commissioned by 31 December 2010;[1739] and

c. the rudimentary nature of the 2008 regulatory framework (Dr. Wustlich described offshore wind energy as "*young and dynamic*", "*where the framework conditions were constantly changing*" which was known to remain "*highly uncertain*" until around 2010 (e.g., the SeeAnlV was "*originally intended to regulate oil and gas production*" and the EEG was "*adjusted 'on*[c]*e, twice or three times a year' in accordance with the development of the offshore wind energy sector*").[1740]

841. According to the Respondent, the Claimants were aware in June/July 200 that "*legal changes would also include the EEG and that hence the feed-in tariff for renewable energy would evolve*", with the 2009 draft EEG (published 4 January 2008) containing other feed-in tariffs and with further changes "*on the horizon, with the*

[1737] Resp. PHB, para. 101.

[1738] Resp. PHB, para. 101; Tr. Day 1, 225:11-22. *See also* Resp. Rej., paras. 115 *et seq*.

[1739] Resp. PHB, para. 102.

[1740] Resp. PHB, para. 103.

EEG feed-in tariffs indeed starting to decrease in the mid-2010s",[1741] and they were aware of:

a. the possibility of economic incentives decreasing in 2007 at the latest;[1742]

b. the German Federal Government expectation that OWFs become economically viable without any EEG funding (per the Offshore Strategy 2002);[1743]

c. the EEG feed-in tariff being "*intended to incentivize the development of OWFs as a market roll-out program*";[1744]

d. OWFs being "*expected to become economically viable without subsidies*";[1745] and

e. EEG funding being stopped "*if costs for offshore wind energy decreased to make an economic operation of OWFs possible*".[1746]

842. Therefore, according to the Respondent, "*individual developers could not derive any legitimate expectations from the targets for individual projects because EEG funding was only envisaged until economic viability, i.e., for the short and medium term expansion targets*".[1747]

843. Further in response to Claimants' submissions otherwise, the Respondent notes that:

a. Dr. Prall "*admitted that the EEG 2004 feed-in tariff was not sufficient for the Horizont Projects to be financially viable*";[1748]

[1741] Resp. PHB, para. 104.

[1742] Resp. PHB, para. 105; **C-0306**, BMU Paper, p. 11.

[1743] Resp. PHB, para. 105; **R-0009**, 2002 Offshore Wind Strategy, p. 7 ("*The German government assumes that renewable energies will be competitive in the long term without subsidies*").

[1744] Resp. PHB, para. 105; Wustlich Witness Statement, para. 21.

[1745] Resp. PHB, para. 105; Wustlich Witness Statement, paras. 21, 32.

[1746] Resp. PHB, para. 105.

[1747] Resp. PHB, para. 105; Wustlich Witness Statement, paras. 31-32.

[1748] Resp. PHB, para. 106; Tr. Day 1, 225:23–226:2.

b. Mr. Schwencke "*testified that achieving a positive net present value for the Horizont Projects depended on successful lobbying for higher feed-in tariffs*" (i.e., it was Mainstream's "*professional assessment that the feed-in tariff should also be changed in a way that the projects would be economically viable*"), relying on "*political expansion targets in the Offshore Strategy 2002*";[1749]

c. but that this "*was not confirmed at the Hearing*",[1750] as:

i. Dr. Prall "*contested Claimants' purported reliance on the Offshore Strategy 2002, confirming that the 'strategy is not legally binding'*" and "*conceded that she did not expect a regulatory standstill after the publication of the Offshore Strategy 2002*";[1751]

ii. Dr. Wustlich "*explained that the offshore wind energy expansion targets in 2008 were simply of a political nature and deliberately not included in the legal framework – hence not binding*", "*confirmed that the targets were not sector-specific but spread across all renewable energies*" and that "[t]*here was no preference for offshore wind*".[1752]

844. Therefore, the Respondent maintains, "*Claimants could not expect only upgrades or even a specific feed-in tariff*" and at any rate, it "*was not responsible to make Claimants' projects viable*"; therefore, "*in 2008, Claimants had no legal certainty, much less a legal right to a specific feed-in tariff, be it the 2014 tariff on which they base their damages calculation or another future one*".[1753]

845. According to the Respondent, even if the Claimants had any legitimate expectations, they have not established that they relied on these before taking steps as required to

[1749] Resp. PHB, para. 106; Tr. Day 2, 119:21–120:11.
[1750] Resp. PHB, para. 107.
[1751] Resp. PHB, para. 107. Tr. Day 1, 211:5-7 and 214:7-13.
[1752] Resp. PHB, para. 107; Tr. Day 4, 19:25–20:4, 76:9-12 and 106:21–107:14.
[1753] Resp. PHB, para. 108.

discharge their burden of proof.[1754] It refers to Mr. Schwencke's testimony that "*Claimants were aware of the risks and possibilities of change and still continued …, hoping that things would turn out the way they wanted them to*".[1755]

846. It concludes that the Claimants "*did not rely on the regulatory framework*" but on the contrary "*through their attorneys and staff, actively lobbied for change of the regulatory framework*" and being "*actively involved in lobbying activities shows that one is willing and welcoming change*".[1756]

847. According to the Respondent, "[l]*obbying is no guarantee that the legislator will adopt the desired outcome lobbied for, especially not in a democracy such as Respondent's*".[1757]

848. In its Reply Post-Hearing Brief, the Respondent observes that the Claimants "*had no legitimate economic expectations*" and their "*First-Post-Hearing-Brief does not say otherwise*", speculating that "*Claimants are sensible enough not to comment on this matter in detail, as it is a lost cause for them*".[1758]

849. It further contests that "[a]*ny reform regarding feed-in-tariffs was of no concern to Claimants, who were still in the pre-investment phase and, even under their own timeline, far from reaching the stage where the respective laws were applicable to their situation*", and in any event they knew that "*the sector was supposed to be viable without feed-in-tariffs in the medium to long-term*", so they "*had no certainty of subsidies at all*".[1759]

d. Alleged Breach of the Claimants' Expectations

850. As to alleged breach, the Respondent submits that it did not violate the fair and equitable standard in ECT Article 10(1), "*always treated Claimants fairly and*

[1754] Resp. PHB, paras. 109-110. *See also* Resp. Rej., paras. 575-576.
[1755] Resp. PHB, para. 109; Tr. Day 2, 120:1-11.
[1756] Resp. PHB, para. 110. *See also* Resp. Rej., para. 618.
[1757] Resp. PHB, para. 100.
[1758] Resp. Reply PHB, para. 59.
[1759] Resp. Reply PHB, para. 60.

equitably" and "*did not frustrate Claimants' legitimate expectations*" as "*there were no legitimate expectations to being with*".[1760] Yet, "[e]*ven if Claimants had harbored legitimate expectations, these were not frustrated by Respondent*" because:

a. its legislative measures were not "*radical changes*" (Prof. Dr. Ekkehard Hofmann confirmed that the term *"radical"* is not a defined term under German law" and it is "*of course*" possible under German law to create a completely new legal regime and Dr. Prall "*confirmed that she has seen many legislative changes*");[1761] and

b. "[a]*ll stakeholders were aware that the legislative framework was in dire need of improvement and change*"[1762] (Dr. Wustlich "*confirmed that the novelty of the sector made changes necessary, and experience gained in the field mapped out what changes had to be made*",[1763] Prof. Dr. Bäumler and Dr. Prall "*confirmed that if there is a 'new factual problem', 'it is often necessary that a regulation is implemented for it so that society can deal with it'*",[1764] and Dr. Prall "*explicitly confirmed that 'change was necessary', inter alia welcoming the introduction of the System Change*");[1765] and

c. the regulatory changes "*led to a situation in 2013 where the inadequate situation was improved and flaws were eliminated for the benefit of the overall development of the offshore wind energy sector*" and this was "*reasonable and proportionate*".[1766]

851. Further in its Reply Post-Hearing Brief, the Respondent contends that the Claimants never reference the Hearing when alleging frustration of expectations because the Hearing "*fully confirmed that Respondent's behavior was fair and equitable at all*

[1760] Resp. PHB, para. 66.
[1761] Resp. PHB, para. 111; Tr. Day 1, 224:1-5; Tr. Day 5:13:23 and 22:1-4.
[1762] Resp. PHB, para. 112.
[1763] Resp. PHB, para. 112; Tr. Day 4, 37:2-10.
[1764] Resp. PHB, para. 112; Tr. Day 1, 221:8-16; Tr. Day 5, 115:2-10.
[1765] Resp. PHB, para. 112; Day 1, 221:12-16.
[1766] Resp. PHB, para. 112. *See also* Resp. C-Mem., paras. 681 *et seq*.; Resp. Rej., paras. 637 *et seq*.

times and never frustrated Claimants' expectations, assuming there were any (quod non)".[1767] It maintains that there was never a specific commitment to grant Approval, as:[1768]

a. "[e]*very developer had to fulfill the legal requirements in force at the time of the authority's decision-taking*";

b. "*it was for the BSH alone to decide whether the requirements were met*";

c. "[t]*here was no guarantee of success. Claimants' documents were formally complete, but Claimants never fulfilled the conditions for Approval due to a lack of planning justification*"; and

d. "[a]*t no point in time did Respondent's legal framework applicable to Claimants' situation ever make any promise or commitment*".

852. In response to the Claimants' reliance on *9REN v. Spain*, it distinguishes that the "*Spanish framework contained 'express assurances', i.e., the assurance to apply 'fixed tariffs to qualifying, registered PV facilities'*", which the tribunal emphasized "*only apply to operating and existing, but not to simply planned investment*".[1769]

853. Finally in relation to fair and equitable treatment, the Respondent submits that the Claimants "*no longer mention a violation of the non-impairment obligation under Art. 10 (1) ECT, and rightly so*".[1770]

e. Non-Impairment Obligation of ECT Article 10

854. In its Post-Hearing Brief, the Respondent further submits that it did not violate the non-impairment obligation pursuant to ECT Article 10.[1771] In this regard it submits that the Hearing confirmed that it "*never impaired and never discriminated against*

[1767] Resp. Reply PHB, para. 61, referring to Cl. PHB, para. 85.
[1768] Resp. Reply PHB, para. 62.
[1769] Resp. Reply PHB, para. 62; **CL-0049**, REN v. Spain, para. 227. *See also* Resp. Rej., para. 478.
[1770] Resp. Reply PHB, para. 68.
[1771] Resp. PHB, paras. 119-120.

Claimants, and hence did not violate the non-impairment obligation of Art. 10 ECT", with the experts and witnesses confirming that its "*measures were reasonable, having an appropriate relationship to a rational policy*".[1772] It further submits that the Claimants "*knew about the necessity of changes and the impending regulatory changes*", the Respondent "*at all times acted transparently with the evolving policy changes necessary for an effective implementation of its energy policies*" and that the "*Claimants never allege*[ ] *that Respondent's changes to the regulatory framework were founded on caprice, prejudice or personal preference*", which they "*were not*", but instead were "*proportionate and not discriminatory*".[1773]

855. The Tribunal notes that the Claimants do not appear to be making (or at least maintaining) a non-impairment claim pursuant to ECT Article 10, and the Respondent's Post-Hearing Brief appears to deal with it out of an abundance of caution.

(3) Tribunal's Reasoning and Analysis

856. The Tribunal has carefully considered each of the Claimants' and the Respondent's submissions, evidence and expert opinion in support of the claim for breach of the fair and equitable treatment standard (and any alleged other legal standard/s) pursuant to ECT Article 10(1).

a. Applicable Legal Standard

857. The relevant protection provides as follows:[1774]

> (1) 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.

[1772] Resp. PHB, para. 119; Tr. Day 5, 32:7-9, 53:23-25, 77:9-25. *See also* Resp. C-Mem., paras. 713 *et seq*.; Resp. Rej., paras. 696 *et seq*.

[1773] Resp. PHB, para. 120. *See also* Resp. C-Mem., para. 743.

[1774] **CL-0001 / RL-0084**, ECT, Art. 10(1).

> 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 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.

858. It is common ground that ECT Article 10(1) imposes a legal obligation on the State to afford the Claimants fair and equitable treatment in the exercise of their sovereign right to regulate. Put another way, the Parties accept that the host State's right to regulate is subject to its fair and equitable treatment obligation.

859. As set out above, the Claimants have been at pains to reassure the Respondent and Tribunal that their case is not based on the host State forgoing its right to regulate as a consequence of ECT Article 10(1). If that were their position, it plainly would be rejected.

860. Instead, both the Claimants and the Respondent accept that fair and equitable treatment creates, at international law, a standard that the host State must meet in its conduct that impacts protected Investors and Investment, which if breached may constitute a breach of substantive investment treaty protections pursuant to the ECT Article 10(1).

861. Therefore, the Parties agree that protection exists, which potentially could affect the exercise of the right to regulate, but dispute its nature, scope and effect.

862. The Claimants' position is that ECT Article 10(1) imposes on the host State up to five "*separate and self-standing obligations*",[1775] the breach of any one being "*sufficient to establish a breach of Article 10(1)*":[1776]

[1775] Cl. Mem. Merits, para. 168 and fn. 325.

[1776] Cl. Mem. Merits, para. 171.

a. "*to* ***create stable, equitable, favourable and transparent conditions*** *for Investments of Investors*" (read alongside the object and purpose of the ECT);

b. to afford fair and equitable treatment to protect an investor's ***legitimate expectations***;[1777]

c. to act ***proportionately***;

d. to act ***transparently***; and

e. to act in ***good faith***.

863. The Respondent's position is that there is a single standard of fair and equitable treatment at ECT Article 10(1) and in particular:

a. the reference to Contracting States "*encourag*[ing] *and creat*[ing] *stable, equitable, favourable and transparent conditions for Investments of Investors*":[1778]

i. "*is not a self-standing standard of stability that an investor could rely on*";

ii. "*only has programmatic character as it informs and defines the fair and equitable treatment … standard in the second sentence*"; and

iii. "*is not a stabilization clause, restricting a host state's right to regulate*";

b. any fair and equitable treatment arising out of Investor legitimate expectations is limited to where the host State has made a specific commitment to the Investor;

c. good faith is not a self-standing obligation;

[1777] Cl. Mem. Merits, para. 169; **CL-0030**, Dolzer/Schreuer, *Principles* (2012) (Claimants' excerpt), p. 145.

[1778] Resp. C-Mem., para. 494.

d. transparency is a feature of fair and equitable treatment in certain circumstances, which do not apply here, and subject to a very high bar; and

e. proportionately is similarly a feature of fair and equitable treatment, which permits the host State to weigh up its right to regulate.

864. These positions are in stark contrast to one another. Each relies on prior case law in support, many pursuant to the ECT (although not all) and most based on different facts. Even where the facts are largely common (e.g., in the Spanish solar cases discussed below) prior awards and decisions have not yet achieved "*harmonious development of investment law*",[1779] although a clearer approach is (perhaps) beginning to emerge.

865. Accordingly (as with the ECT Article 26(6) dispute concerning consent), the dispute between the Parties as to the meaning to the ECT Article 10(1) obligation requires the Tribunal to look to the VCLT Article 31 rule of general interpretation and VCLT Article 32. As set out above in relation to jurisdiction, VCLT Article 31 requires the Tribunal to interpret the provision in good faith with the ordinary meaning to be given to the terms of the ECT in their context and in light of their object and purpose, as well as any relevant rules of international law applicable in the relations between the parties.

866. In that regard, the ECT (and its Preamble in particular) is at least informed by the ICJ Advisory Opinion. The Tribunal therefore rejects the Respondent's position that this "*is of no relevance to these arbitration proceedings*". Whilst the Claimants' case relies on alleged violation of the ECT, as opposed to the UNFCCC, the Tribunal does not agree with the Respondent that the ICJ "*rendered its ICJ Opinion*" solely on the UNFCCC. Instead, the ICJ stated that:[1780]

> For the reasons given above (see paragraphs 113-171), the Court is of the view that the most directly relevant applicable law consists of the Charter of the United Nations, the UNFCCC, the Kyoto Protocol, the Paris Agreement, UNCLOS, the ozone layer treaties, the Biodiversity

[1779] **CL-0140**, *Saipem v. Bangladesh*, para. 67.

[1780] **CL-0375**, ICJ Advisory Opinion, paras. 172-173.

> Convention, the Desertification Convention, the customary duty to prevent significant harm to the environment and the duty to co-operate for the protection of the environment, and international human rights law, as well as certain guiding principles for the interpretation of various applicable rules and principles (sustainable development, common but differentiated responsibilities and respective capabilities, equity, intergenerational equity, and the precautionary approach or principle).
>
> The Court emphasizes that this list serves to determine only the applicable law which is most directly relevant for answering question (a) put to it by the General Assembly. It is without prejudice to other rules of international law that may also be relevant under various circumstances in the context of climate change. Such rules may be found, for example, in international trade law, international investment law, and international humanitarian law.

867. Here the ICJ makes express reference to international investment law. In addition therefore, although the Claimants in the current arbitration "*did not claim damages on the basis of an alleged violation of the ECT's preamble*" or that the "*Respondent would not fulfill its obligations under the Climate Change Convention*", it does not follow that "*the ICJ Opinion does not contribute anything to the solution of the current dispute and should not be added to the record*". In cases dealing with State measures to mitigate climate change, the ICJ Advisory Opinion may properly form (or at minimum inform) relevant rules of international law applicable in the relations between the parties.

i. ECT Article 10(1) "*Stable Conditions*"

868. The Tribunal begins its analysis of the ECT Article 10(1) applicable legal standard by considering and determining the threshold question as to the existence of a stable conditions protection based on language and context of ECT Article 10(1) first sentence.

869. The Claimants' position appears to be that, in addition to the ECT Article 10(1) fair and equitable treatment standard, the Contracting States also committed "*to **create stable, equitable, favourable and transparent conditions** for Investments of Investors*". Such commitment to "*create stable … conditions*" was breached by the Respondent "*overhauling the applicable legal, regulatory and political framework*

upon which [they] *relied on when investing in Germany* [which] *breached the fair and equitable treatment standard set out in Article 10(1)*" and in particular by "***fundamentally altering the stability of the legal, regulatory and political framework*** *applicable to* [their] *investments* …".[1781] Although the host State retained the right to regulate, according to the Claimants it could not do so in a manner that overhauled and fundamentally changed the stability of the applicable framework.

870. The Respondent refutes that ECT Article 10(1) first sentence contained any additional commitment beyond the fair and equitable treatment standard of protection, because the reference in Article 10(1) first sentence to "*stable ... conditions*":

a. is to "*the ones prescribed in the ECT's substantive provisions*",[1782] at:

   i. ECT Article 10(1) second sentence: "[s]*uch conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment*";[1783] and

   ii. ECT Article 10(1) third sentence: "[s]*uch Investments shall also enjoy the most constant protection and security*";

b. which "*pertains to the stable, i.e., steady and unchanging guarantee of FET treatment as well as protection and security*";[1784]

c. is of "*mere referential character*"; and

d. "*does not contain a substantive content of its own*", as supported by its absence from the rest of the ECT (i.e., no definition or description of "*what*

[1781] Cl. Mem., para. 165 (emphasis added). This appears to be separate to their fair and equitable treatment based on legitimate expectations claim.

[1782] Resp. C-Mem., para. 512; **RL-0163**, *BayWa v. Spain*, para. 458.

[1783] Resp. C-Mem., para. 513; **RL-0163**, *BayWa v. Spain*, para. 458.

[1784] Resp. C-Mem., para. 515.

constitutes 'stable conditions' for the purpose of the first sentence of Art. 10 (1) ECT").[1785]

871. In order to ascertain whether or not, on a proper, good faith interpretation, ECT Article 10(1) first sentence gives rise to any "*self-standing standard of stability*", VCLT Article 31 requires the Tribunal first to consider the ordinary meaning of the language and context within the provision. In this regard, the language includes:

a. the 'conditions': "*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*";

b. the fair and equitable treatment 'commitment': "***Such conditions shall include** a **commitment to accord** at all times to Investments of Investors of other Contracting Parties fair and equitable treatment*"; and

c. four additional standard of protection commitments:

i. "[s]*uch Investments **shall also enjoy** the most constant protection and security*"; and

ii. "*no Contracting Party **shall in any way** impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal*";

iii. "**[i]***n **no case shall** such Investments be accorded treatment less favourable than that required by international law, including treaty obligations*"; and

[1785] Resp. C-Mem., para. 516.

iv. "[e]*ach Contracting Party* ***shall observe any obligations*** *it has entered into with an Investor or an Investment of an Investor of any other Contracting Party*".

872. As to the ordinary meaning of the language of ECT Article 10(1) first sentence, and its adjacent second sentence language, the Tribunal makes three main observations:

a. the noun adopted by the Contracting Parties to describe the elements ("*stable, equitable, favourable and transparent*") in the first sentence (i.e., 'conditions') is distinctly different to the noun adopted to describe "*fair and equitable treatment*" in the second sentence (i.e., 'commitment'), which suggests that:

i. if the Contracting Parties had intended the elements in the first sentence to form affirmative obligations, they could have called them 'commitments', both in the first sentence and by reference in the second, but did not do so;

ii. instead, the first sentence speaks only to 'conditions', and the second sentence refers to the aforementioned 'conditions' and further agrees that these 'conditions' shall ***include*** a 'commitment', i.e., that a commitment is made part of the 'conditions', suggesting that the 'conditions' themselves are not otherwise so;

iii. the 'commitment' that the Contracting Parties include – and therefore conclude – is to afford fair and equitable treatment;

b. the verbs adopted in the first sentence further suggest that the Contracting Parties treated these as being less than binding in nature, in that "[e]*ach Contracting Party shall, …* ***encourage*** *and* ***create*** *… conditions*", where:

i. both verbs "*encourage*" and "*create*", and in particular "*create*", suggest establishment of conditions that are not already in place, i.e.,

establishing the readiness for the "*Making of Investment*", or pre-investment activity;

ii. the verb "*encourage*" is difficult to define or measure: is it subjective or objective? If subjective, is the encouragement from the host State perspective or an investor perspective? If an investor perspective, does what encourages one necessarily encourage others?

iii. the verb "*create*" is slightly less vague, but also difficult to define or measure: does creating conditions require a specific affirmative act (e.g., specific investment regulation) or does it just mean to operate in a particular way? If there were an obligation to create certain new, say regulatory, conditions that do not currently exist, could an investor claim that its legitimate expectation was that these would be created in the future and it invested on the basis of that? and

c. if the first sentence were a stand-alone commitment, then parts of the second sentence (at least) would be rendered otiose (e.g., a commitment in the ECT Article 10(1) first sentence to create equitable conditions would appear to add nothing to fair treatment protection at Article 10(1) second sentence), as would other commitments in ECT Article 10 (e.g., a commitment in the ECT Article 10(1) first sentence to create favourable conditions would appear to add nothing to the favourable treatment protections at Article 10(7)).

873. As to the ordinary meaning and context of the third and fourth sentences of ECT Article 10(1), these introduce new protections (full protection and security, non-discrimination and compliance with international law) extending beyond fair and equitable treatment. Contextually, these are recognised as fairly standard investment protections in international law, as is fair and equitable treatment (although the precise nature and scope continues to lack any uniform approach). Therefore, even though the third and fourth sentences also do not refer to 'commitments', they do not mention 'conditions' either and it is difficult to read them as anything other than commitments, in the context of international law.

874. Specifically, regarding compliance with international law in the fourth sentence, the Chairman's Statement accompanying the ECT text states (emphasis added):[1786]

> I would like to note that the Russian Federation believes that the reference to international law in Article 10(1) is not intended to impose most favoured nation obligations ***with regard to Making of Investments***. This is clearly in accordance with ***the intent of the negotiators who decided not to include in this first Treaty MFN obligations for the pre-investment stage***.

875. There is no parallel statement regarding an intention not to impose fair and equitable treatment obligations with regard to "*Making of Investments*", but this is dealt with in more detail at ECT Article 10(2) onwards as at paragraph 878 below.

876. As to the fifth and final sentence of Article 10(1), this is an additional commitment to comply with separate obligations (e.g., contractual obligations) entered into between the host State and investors. (These may of course be subject to their own enforcement provisions outside the ECT (and international law) as well or instead.)

877. For further context, the Tribunal also considers the remaining provisions of ECT Article 10, including as it pertains to imposing obligations with regard to "*Making of Investments*", as well as the ECT as a whole.

878. As to the remaining provisions of Article 10, which as a whole is to provide for "*Promotion, Protection and Treatment of Investments*", the operative provisions appear to be limited to Article 10(1) and (7), and to some extent (11) and (12), and not include Articles 10(2) to (6), 10(8) to (9) and 10(10) (in part), as follows:

a. provisions at Articles 10(2) to 10(6), 10(8) and 10(9), and part of 10(10), relate to pre-investment readiness commitments to be agreed in a future supplementary treaty by Contracting Parties as follows:

[1786] ECT, Chairman's Statement at Adoption Session, 17 December 1994 (available at: https://www.energychartertreaty.org/provisions/part-iii-investment-promotion-and-protection/article-10-promotion-protection-and-treatment-of-investments/101/).

i. Article 10(2) requires Contracting Parties "*to endeavour to accord to Investors, **as regards the Making of Investments in its Area**, the Treatment described*" in Article 10(3) (emphasis added);

ii. Article 10(3) defines such "*Treatment*" as "*no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or third state, whichever is most favourable*";

iii. Article 10(4) requires a supplementary treaty for "*Treatment*" commitments concerning the "*Making of Investments*" in a Contracting State's Area;

iv. Article 10(5) requires Contracting Parties to minimise exceptions to the "*Treatment*" for the Making of Investments, and progressively to remove restrictions affecting Investors;

v. Article 10(6) permits Contracting Parties voluntarily to declare an intention not to introduce exceptions and to notify voluntary commitment to "*Treatment*" for the Making of Investments;

vi. Article 10(8) reserves for a supplementary treaty the modalities of application for Article 10(7) ("*programmes under which a Contracting Party provides grants or other financial assistance, or enters into contracts, for energy technology research and development*"); and

vii. Article 10(9) requires Contracting States to submit to the Secretariat, "*a report summarising all laws, regulations or other measures relevant to: (a) exceptions to paragraph (2); or the programmes referred to in paragraph (8)*", both of which are subject to the supplementary treaty; relates to the laws, regulations or other relevant measures in furtherance of the "*Treatment*";

b. Article 10(7), which itself is not subject to a supplementary treaty, imposes two additional standards of protection for Investments (not pre-investment) being (i) national treatment (Investors must be treated no less favourably than nationals) and (ii) most favoured national treatment (MFN) (Investors must be treated no less favourably than investors from third party (i.e., non-ECT Contracting Party) States;

c. Article 10(10) excludes intellectual property from the protections in Article 10(7), as well as the "*Treatment*" per the supplementary treaty;

d. Article 10(11) provides for trade related disputes; and

e. Article 10(12) requires Contracting Parties to ensure that their domestic law provides effective means for asserting claims and enforcing rights concerning "*Investments, investment agreements and investment authorisations*".

879. Although nothing in Article 10 adds to the fair and equitable treatment standard of protection at Article 10(1), the provisions at Articles 10(2) to (6) and (8) to (10) arguably carve out their application to the pre-investment stage, making those subject to a supplementary treaty (to be agreed). As the Tribunal has already determined in the context of the jurisdiction *ratione materiae* objection above at **Section IV**, in the current case the Claimants' activity in the development of the Projects is an Investment pursuant to the ECT. Therefore, any pre-investment stage carve-out would not apply.

880. Nevertheless, it is worth noting here that the Claimants' argument that Article 10(1) first sentence creates a stand-alone obligation to create a particular regulatory environment for the purpose of investment may risk treading tread into the territory of obligations reserved in the latter provisions of Article 10 for a supplementary treaty.

881. As to the ECT as a whole, both the Claimants and the Respondent rely on ECT Article 2 and the Claimants further rely on the Preamble and Article 19, as follows:

a. ECT Article 2's object and purpose, "*to catalyse economic growth by means of measures to liberalize investment and trade in energy*";

b. ECT Preamble's object and purpose, to "*promote long-term cooperation in the energy field, based on complementarities and mutual benefits*",

c. ECT Preamble, "[r]*ecalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects*";

d. ECT Article 19, requiring Contracting States "*to strive to minimise the environmental impact of energy operations*"; and

e. ECT Article 26(6) requiring the Tribunal "*to decide the issues in dispute in accordance with the ECT and applicable rules and principles of international law*" and "[t]*his includes the Climate Change Convention*".[1787]

882. These provisions offer broader context to the Contracting Parties' commitments to promote and protect investments at Article 10(1). As with ECT Articles 10(2) to (12), none of the broader Preamble or provisions in ECT Article 2 or Article 19 operate to enlarge or expand the meaning of the ordinary language adopted in ECT Article 10(1) first sentence. All are consistent with fair and equitable treatment, full protection and security, non-discrimination, compliance with international law and compliance with other obligations protections at international law. They do not require or suggest any additional and separate positive obligation to "*encourage and create stable ... conditions*".

883. Therefore, the Tribunal rejects the Claimants' position, if it is their position, that ECT Article 10(1) first sentence creates an additional and stand-alone obligation beyond the fair and equitable treatment protection in the second sentence. Instead, the Tribunal considers that the proper interpretation of Article 10(1) first sentence is to

[1787] Cl. Reply, para. 352.

treat the language as prefatory; it is a precursor to the operational commitments that follow in the remainder of Article 10(1).

884. The Respondent describes the first sentence as "*programmatic*", which it goes on to characterise as:

a. being confined to pre-investment activity (i.e., "*inform*[ing] *and elucidat*[ing] *the meaning of the post-investment obligations only*",

b. establishing no "*obligation of its own*",

c. not being "*a substantive norm … from which an investor during the post-investment phase could derive any rights*",

d. having the effect that "*once an investment has been made,* [it] *no longer directly applies, but only has programmatic character*", and

e. based on "*the programmatic, informative and introductory nature*" ("*in accordance with the provisions of this Treaty*"), it "*cannot be read by itself to be creating investor's rights*").[1788]

885. Although not entirely clear, the Respondent appears to suggest that the ECT Article 10(1) prefatory language might relate only to pre-investment activity. Having rejected the Claimants' position that ECT Article 10(1) first sentence gives rise to a free-standing protection obligation, independent of fair and equitable treatment, the Tribunal does not accept that it relates exclusively to pre-investment activity. As can be seen from ECT Articles 10(2) to (6) and 10(8) to (10), the Contracting Parties expressly provided for a future agreement to deal with the "*Treatment*" relating to the "*Making of Investments*", concerning pre-investment activity by the host State (i.e., preparatory activity in readiness of Investment) elsewhere in Article 10, making no reference to ECT Article 10(1) or any saving therein.

[1788] Resp. C-Mem., paras. 510-516.

886. Moreover, the Respondent's arguments that the first sentence "*inform*[s]", or "*elucidate*[s]" or "*introduce*[s]" the actual obligation in the remainder of ECT Article 10(1), are more consistent with that language being prefatory, as the Tribunal has found, rather than "*programmatic*" (on the basis the latter means relating only to pre-investment activity, which falls outside the scope of Article 10).

887. The Tribunal's prefatory language approach is consistent with the ECT purpose and objectives to catalyse economic growth through investment in energy, promoting long-term cooperation in the context of recalling the UNFCCC and other international environmental agreements and minimising environmental impact of energy operations, and also consistent with a commitment to afford fair and equitable treatment, informed by what is required in order to encourage and create stable, equitable, favourable and transparent conditions.

888. The treatment of the first sentence as prefatory does not strip it, or the conditions referred to therein, of effectiveness and meaning. On the contrary, the conditions inform the nature of the commitments that follow (including but not necessarily limited to fair and equitable treatment).

889. Therefore, the task for the Tribunal is to determine the extent to which the conditions (that ECT Article 10(1) first sentence requires be encouraged and created) inform the fair and equitable treatment standard in the second sentence. As set out above, the Parties deal with this question by separating their arguments into the following parts:

a. protection of an Investors' legitimate expectations;

b. proportionality;

c. transparency; and

d. good faith.

890. The Tribunal takes each of these in turn.

ii. Article 10(1) and Legitimate Expectations

891. The Tribunal turns to consider the scope of the fair and equitable treatment commitment at ECT Article 10(1) second sentence, as informed by the prefatory first sentence language, regarding so-called legitimate expectations.

892. To recap, the Claimants argue that the Respondent's conduct in "*overhauling the applicable legal, regulatory and political framework upon which* [they] *relied on when investing in Germany breached the fair and equitable treatment standard set out in Article 10(1)*" and in particular by "***frustrating the legitimate expectations*** *on which* [the Claimants] *relied in making* [their] *investments*".[1789] In this regard, they submit that:[1790]

a. "*when a State generates a legal and regulatory framework that encourages investors and upon which an investor relies*";

b. that creates "*legitimate expectations*";

c. therefore, "*their later frustration breaches the fair and equitable treatment standard*";

d. "*regardless of the motives for any legislative or regulatory change and irrespective of any showing of bad faith*".

893. Specifically, according to the Claimants (emphasis added): [1791]

> The Respondent's international legal obligations under Article 10(1) of the ECT mean that it has knowingly accepted limitations on its regulatory power, in particular, ***its ability to fundamentally alter the legal, regulatory and political framework applicable to existing investments***.

894. The Respondent did not refute that breach of the fair and equitable treatment standard could arise out of Investor legitimate expectations, but only in circumstances where

[1789] Cl. Mem. on Merits, para. 165 (emphasis added).

[1790] Cl. Mem. on Merits, para. 178.

[1791] Cl. Mem. on Merits, para. 181.

the host State made a specific commitment to the Investor in relation to the Investment. It did not specifically deny that such specific commitment could arise in general regulation, but that it nevertheless must be specific (as discussed further below).

895. The term "*fair and equitable treatment*" in the ECT is undefined, save for the informing effect of the prefatory language in ECT Article 10(1) first sentence. In so far as the scope of fair and equitable treatment is informed by the reference in Article 10(1) first sentence to "*stable … conditions*", both the Claimants and the Respondent offer up copious prior rulings to support their respective arguments. However, as already noted, there is no uniform approach to the fair and equitable treatment standard of protection in the body of prior case law.

896. Nevertheless, regarding a claim arising out of changes in the "*applicable legal, regulatory and political framework*", the pattern of approaches in prior awards and decisions is at least informative. The vast majority of recent ECT cases relate to Investment in scaling up renewable infrastructure within the EU, where EU Member States have sought to implement the 1991 EU Renewables Directive (as here). This calls to mind the Claimants' position that the energy sector is "*highly dependent on the exercise of government's regulatory powers*".[1792] That may be so, but the question remains to what extent does ECT Article 10(1) offer protection to Investors when an Investment is adversely impacted by the exercise of regulatory powers.

897. The Tribunal considers that the dissenting opinion in *Kruck v. Spain* in 2022 is a valuable starting point for analysis of the relevant group of prior awards.[1793] This carefully sets out the *status quo* of contemporary approaches in prior awards pursuant to the ECT (largely) arising out of Spanish solar regulations (up to 2022), rather than cherry-picking the reasoning that follows a particular interpretative approach. The *Kruck* majority decision on jurisdiction, liability and quantum determined breach of the ECT Article 10(1) fair and equitable treatment standard; the dissenting arbitrator

[1792] Cl. Reply, para. 358; **CL-0043**, Wälde/Kolo, *Environmental Regulation*, p. 819.

[1793] *See* **CL-0359**, *Matthias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Dissenting Opinion of Zachary Douglas, 13 September 2022 ("***Kruck v. Spain*, Dissenting Opinion**").

explained why he considered the majority's approach to be akin to imposing 'strict liability' on the host State (i.e., the host State is responsible for the consequences flowing from activity that contravenes Investor expectations even in the absence of fault or intent on the part of the host State).

898. The opening paragraphs of the *Kruck v. Spain* dissenting opinion grasp the essential issue at the heart of claims involving change in regulation without fault (emphasis added):[1794]

> The dispute in this case can be reduced to a single question: does Spain incur international responsibility under the ECT for changing the level of the state subsidy enjoyed by the Claimants' PV facilities under RD 661/2007? ***This in turn raises an issue of fundamental importance about the circumstances in which a State must compensate a foreign investor for a change to a regulatory regime when that change is not tainted by any of the traditional grounds for impugning a State under international law (arbitrariness, discrimination, bad faith, lack of due process, and so on).*** The Tribunal is unanimous that no such grounds apply to Spain's conduct; the sole question is whether the change is a violation of the Claimants' legitimate expectations as protected under the FET standard.
>
> The reason that the "solar cases" against Spain, the Czech Republic, Italy and other countries have provoked controversy is precisely because liability has centred upon the doctrine of legitimate expectations and the contours of that doctrine are far from settled. A close reading of the awards and dissenting opinions reveals that the division in the jurisprudence rests upon two different conceptions of legitimate expectations. The first attributes liability based on a notion of strict liability. ***If it can be said that the State has made a "promise" of an immutable level of subsidy over a particular period of time in a public regulation, and the investor has "accepted" that "promise" by investing, then liability follows if that "promise" is "breached".*** This conception, as the terminology suggests, rests upon an analogy with contract law, which also attributes liability for a breach of contract on the basis of strict liability. The State's public policy reasons for "breaching" its regulatory "promise" are irrelevant to establishing liability and proportionality-type arguments concerning the nature and impact of the change provide no defence.
>
> The second and rival conception of legitimate expectations is based upon fault. The State is liable for breach of legitimate expectations only if the public interest pursued by the change in regulation imposes a disproportionate burden

[1794] **CL-0359**, *Kruck v. Spain*, Dissenting Opinion, paras. 1-6.

on the investor or offends some other criterion of fault (abuse of power, manifest unreasonableness, or the like).

The essence of my dissent is that a State can only be condemned to pay compensation on the basis of fault under Article 10 of the ECT (or indeed under any other investment protection obligation). I thus prefer the second conception of legitimate expectations as outlined above and the first part of my dissent will explain why.

In summary: ***the concept of legitimate expectations has no textual embodiment in the ECT and in investment treaties more generally***. Unless it is accepted that arbitrators have the power to legislate for new grounds for liability under investment treaties (i.e. the power just to make it up), then ***the only path to a doctrine of legitimate expectations through the FET standard is by interpretation***. The terms "fair and equitable" cannot be interpreted to mean the arbitrators' subjective notions of what is fair and equitable on any given day. But the FET standard can conceivably be interpreted as encompassing general grounds for liability in damages against public authorities as recognised by the major legal systems of the world (or by "*civilised nations*" if the more archaic language of Article 38 of the ICJ's Statute is to be preferred). ***No legal system imposes strict liability in damages for a breach of legitimate expectations; it is always based on fault. There is no reason in principle for international investment law to take a radically different approach.***

The failure to incorporate an element of fault into the assessment of legitimate expectations in many decisions has led to the creation of a unique no-fault compensation scheme for foreign investors disappointed with the profitability of their projects. There is no evidence to suggest that state parties to investment treaties ever envisaged such a possibility and there is no legal or moral justification for tribunals to redistribute public funds on this basis.

899. The *Kruck* dissenting arbitrator proceeded to forensically categorise the 25 prior awards and decisions across Spanish solar cases then available, as follows:

a. 12 upheld liability "*simply on the basis of a significant change to the regulatory regime that causes loss and thus reflect a strict liability approach*";[1795]

[1795] **CL-0359**, *Kruck v. Spain*, Dissenting Opinion, para. 49.1:

[1] *9REN Holding S.a.r.l v. Kingdom of Spain* (ICSID Case No. ARB/15/15, Award of 31 May 2019, §§212, 253, 267, 268, 311); [2] *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain* (ICSID Case No. ARB/15/20, Decision* on Jurisdiction, Liability and Partial Decision on Quantum of 19 February 2019, §§427-428); [3] *Eiser Infrastructure Limited and Energia Solar Luxembourg*

b. 10 found liability "*on the basis of fault in the sense that changes to the regulatory regime were held not to be proportionate*";[1796] and

S.a.r.l. v. Kingdom of Spain (ICSID Case No. ARB/13/36, Decision on Jurisdiction and Liability of 17 March 2021, §§393, 398-400); [4] *Foresight Luxembourg Solar 1 S.Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v. Kingdom of Spain* (SCC Case No. 2015/150, Final Award of 14 November 2018, §§390, 397-8); [5] *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain* (ICSID Case No. ARB/14/12, Award of 2 August 2019, §§368-369, 418, 449-451); [6] *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain* (ICSID Case No. ARB/13/31, Award of 15 June 2018, §§560, 562-3, 568-570); [7] *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1, Award of 16 May 2018, §§520-522); [8] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain* (ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles of 12 March 2019, §§596, 598-600); [9] *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain* (SCC Arbitration (2015/063, Final Arbitral Award, 15 February 2018, §§657, 694-5 [although the tribunal paid lip service to a "*balancing exercise*" it actually adopted a strict liability approach on the facts]); [10] *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain* (ICSID Case No. ARB/15/36, Award* of 6 September 2019, §§485, 488-9); [11] *SolEs Badajoz GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/38, Award of 31 July 2019, §§419, 439, 4434, 458, 461-2 [although the tribunal refers to "*proportionality*", it applies a strict liability approach]); [12] *Watkins Holdings S.à r.l. and others v. Kingdom of Spain* (ICSID Case No. ARB/15/44, Award* of 21 January 2020, §§569, 597, 6013 [the tribunal refers to "*proportionality*" but rejects Spain's defence on the basis that the disputed measures were "*not an appropriate solution to the problem*"— which is a merits review that has no place in a proportionality analysis—and needless to say that tribunal did not offer its own solution…]).

[1796] **CL-0359**, *Kruck v. Spain*, Dissenting Opinion, para. 50.1:

[1] *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/16, Decision* on Jurisdiction, Liability and Directions on Quantum of 2 December 2019, §§463, 471, 477480, 496, 500); [2] *Cavalum SGPS, S.A. v. Kingdom of Spain* (ICSID Case No. ARB/15/34, Decision* on Jurisdiction, Liability and Directions on Quantum, 13 31 August 2020, §§619-621, 626, 632, 666); [3] *Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain* (ICSID Case No. ARB/16/4, Decision* on Jurisdiction and Liability, 17 March 2021, §§314319, 358) [4] *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain* (ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum of 9 March 2020, §676 [it is not clear whether the tribunal applied the fault-based test that it articulated]); [5] *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain* (ICSID Case No. ARB/16/18, Decision* on Jurisdiction, Liability and Directions on Quantum of 13 September 2021, §§528, 529, 531, 601-2, 687, 755); [6] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30, Decision* on Responsibility and on the Principles of Quantum of 30 November 2018, §§464-5, 468, 471-2, 550 [although the tribunal mistakenly considers proportionality as part of the assessment of damages]); [7] *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain* (ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum of 30 December 2019, §§550, 553-4, 576-8); [8] *The PV Investors v. Kingdom of Spain* (PCA Case No. 2012-14, Final Award* of 28 February 2020, §§638-9, 648); [9] *Sevilla Beheer B.V. and others v. Kingdom of Spain*, (ICSID Case No. ARB/16/27, Decision* on Jurisdiction, Liability and the Principles of Quantum of 11 February 2022, §§ 715, 717, 872).

c. three found no liability "*on the ground that the State was not in fault, either because the measures were not proportionate or not otherwise unreasonable in the view of public interest*".[1797]

900. The Claimants' position in the present arbitration aligns with the first category, assuming that the host State will be in breach of the fair and equitable standard solely because it changed the legal and regulatory framework, irrespective of motive, and that change caused harm to the Investment. In particular, they argued that:[1798]

a. "*when a State generates a legal and regulatory framework that encourages investors and upon which an investor relies*", that creates "*legitimate expectations*";

b. "*their later frustration breaches the fair and equitable treatment standard*";

c. "*regardless of the motives for any legislative or regulatory change and irrespective of any showing of bad faith*".

901. Unsurprisingly, the prior awards and decisions that the Claimants rely on to demonstrate that their position "*has widespread support in international arbitral practice*", include six of the 12 so-called 'strict liability' Spanish solar cases (among others) and only one that found no liability (i.e., *Charanne v. Spain*), namely (all emphasis added):[1799]

a. *Watkins v. Spain* :[1800] "***no burden on the part of the Claimants to prove bad faith or any ulterior motive on the part of Spain*** *in enacting the various*

[1797] **CL-0359**, *Kruck v. Spain*, Dissenting Opinion, para. 51.1:

> [1] *Charanne B.V., Construction Investments S.A.R.L. v. Kingdom of Spain* (SCC 062/2012, Final Award* of 21 January 2016, §§514, 517, 533-536); [2] FREIF *Eurowind Holdings Ltd. v. Kingdom of Spain* (SCC Case No. 2017/060, Final Award of 8 March 2021, §§525, 531, 571, 589-590); [3] *Stadtwerke München GmbH and others v. Kingdom of Spain* (ICSID Case No. ARB/15/1, Award* of 2 December 2019, §§317-320, 325 [approach based on "*reasonableness*" of measures]).

[1798] Cl. Mem. on Merits, para. 178.

[1799] Cl. Mem. on Merits, paras. 178-179; Cl. Reply, para. 360.

[1800] **CL-0046**, *Watkins v. Spain*, para. 516.

measures in order to determine whether the measures taken by Spain constitute a violation of FET standards";

b. *Eiser v. Spain*:[1801] "*the* [ECT] *Article 10(1) obligation to accord fair and equitable treatment means that* ***regulatory regimes cannot be radically altered*** *as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment's value*";

c. *Novenergia v. Spain*:[1802] "[t]*he legitimate expectations of an investor has* [*sic*] *generally been considered to be* ***grounded in the legal order of the host State as it stands at the time the investor acquires or makes the investment***";

d. *Masdar v. Spain*:[1803] "*an investor may be confident that (i) the legal framework in which the investment has been made* ***will not be subject to unreasonable or unjustified modification***";

e. *Antin v. Spain*:[1804] "*the obligation under Article 10(1) of the ECT … comprises an* ***obligation to afford fundamental stability in the essential characteristics*** *of the legal regime relied upon by the investors in making long-term investments*"; and

f. *9REN v. Spain*:[1805] "*there is* ***no reason in principle why such a commitment of the requisite clarity and specificity cannot be made in the regulation itself*** *where (as here) such a commitment is made for the purpose of inducing investment, which succeeded in attracting the Claimant's investment and one made resulted in losses to the Claimant*".

902. The Tribunal makes no comment as to the correctness of the outcome of any of the Spanish solar cases, not limited to those categorised as based on so-called 'strict

[1801] **CL-0022 / CL-0041**, *Eiser v. Spain*, para. 382.
[1802] **CL-0047**, *Novenergia v. Spain*, para. 532.
[1803] **CL-0048**, *Masdar v. Spain*, para. 484.
[1804] **CL-0092**, *Antin v. Spain*, para. 532.
[1805] **CL-0049**, *9REN v. Spain*, para. 295.

liability'. It does consider, however, that the Spanish solar cases are a useful source of reasoning for the current case because of some basic similarities:

a. they all involve renewables investment in EU Member States based on State changes in regulation as they endeavoured to implement the 1991 EU Renewables Directive;

b. many were determined pursuant to the ECT Article 10(1);

c. the claims were largely based on legitimate expectations arising out of general regulation, as opposed to contracts or direct commitments with the claimants outside the regulation; and

d. the host State changed the regulatory framework and that change (allegedly) caused loss to the claimants.

903. However, there is an important difference: for the most part the Investments in the successful Spanish solar cases were operational and generating revenue, which was diminished by the change in the regulatory framework. Therefore, the Investors in those cases lost actual generated income and expected future income based on past income; they were not in the development stage.

904. The Claimants rely heavily on another dissenting opinion in *Wirtgen v. Czech Republic* made in 2017, which involved neither the ECT nor renewable energy (and the majority award did not find breach of fair and equitable treatment), where the dissenting arbitrator (all emphasis added):

a. acknowledged that "*the obligation of fair and equitable treatment* ***does not generally prevent a state from altering its legislative or regulatory regimes in response to changing economic, technological or other circumstances***", and "***does not give a right to regulatory stability per se***";[1806]

[1806] **CL-0044**, *Wirtgen v. Czech Republic*, Dissenting Opinion, para. 7, citing **CL-0068**, *Micula v. Romania (I)*, para. 666.

b. accepted that "**[t]*he state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability***",[1807] (i.e., "*[i]n order to adapt to changing economic, political and legal circumstances the State's regulatory powers still remain in place*");[1808]

c. opined that "*it is equally well-established that **a commitment to accord fair and equitable treatment provides investors with protections for their legal rights and legitimate expectations**, including a right to compensation where a state's exercise of its legislative or regulatory authority frustrates those rights or expectations*";[1809]

d. quoted a 2006 prior award (noting others "*to the same effect, holding in multiple circumstances that a state's frustration of an investor's legitimate expectations gives rise to liability under a fair and equitable treatment obligation*"), that:[1810]

> where the investor has acquired rights, ***or where the state has acted in such a way so as to generate a legitimate expectation in the investor and that investor has relied on that expectation to make its investment***, action by the state that reverses or destroys those legitimate expectations will be in breach of the fair and equitable treatment standard and thus give rise to compensation.

e. further opined that it is "*well-settled that these principles apply even where a state has not expressly provided assurances of stability or other treatment to an investor: 'there is an obligation not to alter the legal and business environment in which the investment has been made', and 'stable and*

[1807] **CL-0044**, *Wirtgen v. Czech Republic*, Dissenting Opinion, para. 7, citing, *inter alia*, **CL-0068**, *Micula v. Romania (I)*, para. 666.

[1808] **CL-0044**, *Wirtgen v. Czech Republic*, Dissenting Opinion, para. 7, citing **CL-0077**, BG Group Plc. *v. Argentine Republic*, UNCITRAL, Final Award, 24 December 2007 ("***BG Group v. Argentina***"), para. 298.

[1809] **CL-0044**, *Wirtgen v. Czech Republic*, Dissenting Opinion, para. 8.

[1810] **CL-0044**, *Wirtgen v. Czech Republic*, Dissenting Opinion, para. 8, citing, *inter alia*, **CL-0068**, *Micula v. Romania (I)*, para. 667.

equitable conditions are clearly part of the fair and equitable treatment standard under the ECT",[1811]

f. noted that "*the Claimant's reasonable expectations to be entitled to protection under the Treaty need not be based on an explicit assurance*";[1812]

g. relied on the following extracts from prior awards as "*long-settled international authority makes it clear that a state is fully entitled to make binding commitments to foreign investors by way of statutes or other legislative acts*":[1813]

i. "[t]*he investor may rely … on representations and undertakings made by the host state including those in legislation, treaties, decrees, licenses, and contracts*";[1814]

ii. "[w]*hat the investor may legitimately expect must be evaluated in the light of all circumstances in each given case. The expectations may relate not only to the existing contractual or other relations between the investor and the host state, but may also concern the general legal framework in the host state*";[1815]

iii. "*an investor may derive legitimate expectations either from (a) specific commitments addressed to it personally, for example in form of a stabilization clause, or (b) rules that are not specifically addressed to a particular investor but which are out in place with a*

[1811] **CL-0044**, *Wirtgen v. Czech Republic*, Dissenting Opinion, para. 9, citing *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, UNCITRAL, Final Award, 1 July 2004 (available at: https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf), para. 191; **CL-0067**, *Plama v. Bulgaria*, para. 173.

[1812] **CL-0044**, *Wirtgen v. Czech Republic*, Dissenting Opinion, para. 9, citing **CL-0039**, *Saluka v. Czech Republic*, para. 329.

[1813] **CL-0044**, *Wirtgen, v. Czech Republic*, Dissenting Opinion, para. 13.

[1814] **CL-0044**, *Wirtgen, v. Czech Republic*, Dissenting Opinion, para. 13(a), citing **CL-0053**, *Frontier v. Czech Republic*, para. 285

[1815] **CL-0044**, *Wirtgen, v. Czech Republic*, Dissenting Opinion, para. 13(b), citing *Binder v. Czech Republic*, para. 443.

specific aim to induce foreign investments and on which the foreign investor relied in making his investment";[1816]

iv. "[l]*egitimate expectations may follow from explicit or implicit representations made by the host state, or from its contractual commitments. The investor may even sometimes be entitled to presume that the overall legal framework of the investment will remain stable*";[1817]

v. "[t]*hus, withdrawal of undertakings and assurances given in good faith to investors as an inducement to their making an investments (sic) is by definition unreasonable*";[1818] and

vi. "[s]*tability means that the investor's legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host state will be protected. The investor may rely on that legal framework as well as on representations and undertakings made by the host state including those in legislation, treaties, decrees, licenses, and contracts*";[1819]

h. concluded that "*a standing offer to arbitrate by the Czech Republic in the Treaty … confirms that states may make binding commitments, and investors may acquire protected international rights, from 'general' legislative provisions*";[1820] and

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[1816] **CL-0044**, *Wirtgen, v. Czech Republic*, Dissenting Opinion, para. 13(c), citing, *inter alia*, UNCTAD, "*Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreement II*", 2012 (available at: https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf), p. 69.

[1817] **CL-0044**, *Wirtgen, v. Czech Republic*, Dissenting Opinion, para. 13(d), citing **CL-0074**, *Toto-Costruzioni Generali S.p.A v. Republic of Lebanon*, ICSID Case No ARB/07/12, Award, 7 June 2012, para. 159.

[1818] **CL-0044**, *Wirtgen, v. Czech Republic*, Dissenting Opinion, para. 13(e), citing, *inter alia*, **CL-0077**, *BG Group v. Argentina*, para. 343.

[1819] **CL-0044**, *Wirtgen, v. Czech Republic*, Dissenting Opinion, para. 13(f), citing, *inter alia*, **CL-0053**, *Frontier v. Czech Republic*, para. 285.

[1820] **CL-0044**, *Wirtgen v. Czech Republic*, Dissenting Opinion, para. 14.

i. further concluded:[1821]

> In contemporary market economies, operating under the rule of law, it is both commonplace and essential for states to be able to provide undertakings to private parties by way of "general" legislative or regulatory instruments. In many circumstances, modern states cannot as a practical matter negotiate contracts with large numbers of parties, but must instead regulate the conduct of private parties through legislation and regulations. Indeed, this is a distinguishing feature of a system founded on the rule of law, where legislative and regulatory provisions, rather than individual governmental directions, govern private conduct. It would seriously impede the task of governance and regulation, and contradict aspirations for the rule of law, to deny states the ability to make commitments to private parties, including foreign investors, in the form of legislative (or regulatory) guarantees.

905. This dissenting opinion is central to the Claimants' case in the present arbitration, which is why the Tribunal has set it out in some detail.

906. Having carefully reviewed the Claimants' arguments arising out of this dissent, the dissent itself and the cases referred to therein, the Tribunal considers it to be limited in value in the current arbitration because the underlying dispute in *Wirtgen v. Czech Republic*:

a. did not relate to the ECT, but, instead a bilateral investment treaty between Germany and the Czech Republic;

b. concerned a gas fired power plant, not renewable infrastructure;

c. did not raise any concern as to host State implementation of its obligations under another international treaty (e.g., the climate treaties);

d. was rendered in 2017 and relied on prior jurisprudence from 2001 to 2012, but not beyond; and

[1821] **CL-0044**, *Wirtgen v. Czech Republic*, Dissenting Opinion, para. 15.

e. predated and therefore does not take into account any of the subsequent EU Member State renewable cases, including but not limited to the Spanish solar cases considered in the *Kruck* dissenting opinion (or indeed the *Kruck* award).

907. Consequently, the Tribunal takes the view that the discussion of fair and equitable treatment in the context of change in regulation in the *Wirtgen* dissenting opinion,[1822] does not properly represent the current status of discussion of the fair and equitable standard in prior awards, in particular in EU renewable cases from 2020 and especially pursuant to ECT Article 10(1).

908. Instead, the Tribunal considers that the correct approach to the fair and equitable treatment standard of protection is that the host State may be liable for breach of legitimate expectations only if the change in regulation was not proportionate with the public purpose for which it was introduced, or the host State is otherwise at fault ("*abuse of power, manifest unreasonableness, or the like*"). It agrees with the approach of the dissenting arbitrator in *Kruck*: a State can only be condemned to pay compensation on the basis of fault pursuant to ECT Article 10(1). The Tribunal takes this view on the basis of its interpretation of ECT Article 10(1), reassured by the *Kruck* dissent, noting that:[1823]

a. the term "*legitimate expectations*" is not contained in the language of Article 10(1);

b. the only "*path to a doctrine of legitimate expectations through the FET standard is by interpretation*";

c. based on "*fair and equitable*" in administrative law governing decisions of public authorities, there may be general grounds for liability in damages based on fault;

[1822] *See* **CL-0044**, *Wirtgen v. Czech Republic*, Dissenting Opinion, para. 15 (it is "*commonplace and essential for states to be able to provide undertakings to private parties by way of 'general' legislative or regulatory instruments*").

[1823] **CL-0359**, *Kruck v. Spain*, Dissenting Opinion, paras. 5-6.

d. there is no compelling "*reason in principle for international investment law to take a radically different approach*";

e. lack of fault in assessment of legitimate expectations in prior awards "*has led to the creation of a unique no-fault compensation scheme for foreign investors disappointed with the profitability of their projects*"; and

f. "[t]*here is no evidence to suggest that state parties to investment treaties ever envisaged such a possibility and there is no legal or moral justification for tribunals to redistribute public funds on this basis*".

909. The Tribunal considers this approach to be consistent with "*the coherent development of investment law and its sustainability in the future*", encouraged in the *Kruck* dissent, as echoed in *Saipem v. Bangladesh.*[1824] The Tribunal further notes that the Parties' positions are not entirely inconsistent with this. Although the Claimants state that no fault is required, they do base their claim for breach of the fair and equitable treatment standard on allegedly dramatic steps by the Respondent, in what they characterise as an "*overhaul*" of the regulatory framework that resulted in "*fundamentally change*", and put forward arguments based on lack of proportionality, transparency and indeed good faith, as discussed below. The Respondent, for its part, rejects the Claimants' no-fault standard entirely.

910. Before turning to proportionality, transparency and good faith, the Tribunal considers the relevance and role of specific commitments by host States, including in the context of general legislation or regulation. In this regard it notes that even the dissent in *Wirtgin* accepts that general legislation giving rise to legitimate expectations must be in the form of a specific commitment. The Claimants put it as follows (emphasis added):[1825]

> [T]he framework on which the investor grounded its expectations ***contained a specific commitment on the part of the State***, either because it was made to

[1824] **CL-0359**, *Kruck v. Spain*, Dissenting Opinion, para. 8; **CL-0140**, *Saipem v. Bangladesh*, para. 90.

[1825] Cl. Reply, para. 359. See also Cl. Mem. on Merits, paras. 176-178.

> the investor directly or because it was put in place ***with the specific aim to induce foreign investments*** … .

911. In this regard, the Claimants rely on prior awards and decisions in the Spanish solar cases referred to above, as well as:

a. *El Paso v. Argentina*:[1826] that "*a special commitment by the State towards an investor provides the latter with a certain protection against changes in the legislation*", depending on all the circumstances, including potentially where the commitment is specific to its addressee or specific as to its object and purpose (i.e., "*if its precise object was to give a real guarantee of stability to the investor*"), noting that "[u]*sually general texts cannot contain such commitments, as there is no guarantee that they will not be modified in due course*", although "*a reiteration of the same type of commitment in different types of general statements could, considering the circumstances, amount to a specific behaviour of the State, the object and purpose of which is to give the investor a guarantee on which it can justifiably rely*";

b. *Isolux v. Spain*: "*(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*";[1827]

c. *PV Investors v. Spain*: "*the regulatory framework's* leitmotiv*, the essential feature underpinning all of the instruments that were enacted through the years*" and "*the requirement of reasonable profitability restricted the State's power to amend the framework and thereby guaranteed a level of stability of the conditions in which investors operated*";[1828]

[1826] **RL-0173**, *El Paso v. Argentina*, paras. 375-377.

[1827] **CL-0258**, *Isolux v. Spain*, para. 423.

[1828] **CL-0100**, *PV Investors v. Spain*, para. 616.

d. *Kruck v. Spain*:[1829] the majority found that "[a]*t least in circumstances where the explicitly declared purpose of legislation is to invite investors to commit capital to projects in reliance upon guarantees of stability in a regulatory regime, specific commitments can be made by provisions in general legislation*", noting that as "*the great majority of capital costs in an investment are incurred right at the beginning of the project and are to be recouped over the operating lifetime of the project*", it is "*the enactment of RD 661/2007 and RD 1578/2008 that gave rise to the possibility of legitimate expectations upon which potential DSG investors could rely*", and the relevant regulation:

i. "*as it was indeed intended to induce investments in the renewable energy sector by promising attractive and stable regulated tariffs and premiums, … constituted an invitation to potential investors to rely upon that promise*";

ii. "*contained express assurances that its fixed tariffs would apply to qualifying, registered PV facilities for a fixed period, and that changes to the regulatory regime would not apply to facilities already registered*" (in "*press releases and presentations*");

iii. "*was described in the Preamble to* [other regulation] *as having established a new compensation framework 'for the purpose of achieving in 2010 the goals set in the 2005-2010 Renewable Energy Plan and the Spanish Energy Savings and Efficiency Strategy', after previous regulatory regimes had failed to attract the necessary investment*"; which

iv. the tribunal considered "*could reasonably be understood to have guaranteed only that the tariff and premium regime would remain unchanged unless and until it was changed by law*", as "[t]*he precise*

[1829] **CL-0261**, *Kruck v. Spain*, Jurisdiction, paras. 189-190.

tariffs and premiums no doubt represented what Spain considered reasonable at that time: but it was their stability that was the essential key to their intended effect in attracting investments"; and

e. *Triodos v. Spain*:[1830] Spain issued the directive in attempt to "*meet its renewable energy targets under EU Directives as reflected in Spain's domestic renewable energy plans …* [and] *to attract the necessary investment to achieve Spain's renewable energy targets*".

912. These prior rulings are helpful. They reflect that it is not enough to change general regulation or legislation, without more. Any other approach would be impossible to reconcile with the host State's continuing right to regulate, which almost all contemporary awards accept (as do the Claimants and the Respondent) and which is the only logical approach to investment protection under investment treaties.

913. However, given that the Tribunal has found that fault is required, even if specific commitments exist, any change to the regulatory or legislative framework affecting those specific commitments to the detriment of the Investor still would require something more. Nevertheless, the existence and nature of the specific commitments will inform and be directly relevant to of the existence of fault, especially in the context of proportionality and good faith, among others.

iii. Fair and Equitable Treatment and Proportionality

914. As mentioned above, lack of proportionality between the impact of the change on the Investment and the intended public purpose may give rise to breach of fair and equitable treatment. Where a specific commitment exists, questions of proportionality need to be weighed against that.

915. As to the required standard of proportionality, as set out above,[1831] the Claimants describe this as "*suitable to achieve a legitimate policy objective, necessary for that*

[1830] **CL-0262**, *Triodos v. Spain*, para. 668.

[1831] *See* Cl. Mem. on Merits, paras. 187-188.

objective, and not excessive considering the relative weight of each interest involved",[1832] and "*appropriately tailored to the pursuit of the legitimate policy objective with due regard for the consequences imposed on investors*" and not "*disproportionately harm*[ing] *those investments*".[1833]

916. They note that the Respondent does not dispute that "*regulatory measures taken by States must be proportionate, namely the measure under scrutiny must be adequately tailored to the pursuit of a legitimate policy objective with due regard for the consequences of such measures on investors*".[1834]

917. The approach to proportionality in other international law contexts requires the host State measure to have a legitimate aim, be suitable and necessary to achieve that aim and be reasonable in light of competing interests. Where a specific commitment exists, the beneficiary of that commitment requires reasonable consideration of its interests.

918. The real disagreement between the Parties lies in the existence of "*a presumption of legitimacy of State regulatory action*",[1835] in the "*balancing* [of] *competing interests*", including whether or not the host State's "*right to regulate should be systematically favoured over the interests of investors*",[1836] or whether "*in some circumstances, such as the retroactive application of new regulatory measures, tribunals have shown particular respect for investors' pre-existing rights under the former regulatory regime when performing that balancing exercise*".[1837]

919. The Respondent suggests that the Claimants' analysis misunderstands "*the required balancing test of investor interests against competing public interests*",[1838] distinguishing between laws with retroactive effect and laws with "*quasi-retroactive*

[1832] **CL-0052**, *Electrabel v. Hungary*, Award, para. 179.
[1833] Cl. Mem. on Merits, para. 187.
[1834] Cl. Reply, para. 384, referring to Resp. C-Mem., paras. 585, 587-588.
[1835] Resp. C-Mem., paras. 590-593.
[1836] Cl. Reply, para. 386, referring to Resp. C-Mem., para. 590.
[1837] Cl. Reply, para. 386; **CL-0073**, *Cairn v. India*, para. 1816.
[1838] Resp. Rej., para. 540.

effect" (regulating "*facts, rights or legal relationships that have arisen in the past but still continue to exist*"),[1839] such as the WindSeeG. It argues that the latter is "*generally permissible*" in order for host States to "*be able to intervene in matters of life that have not yet been completed to fulfil its democratic responsibility for the general public and to be able to respond to changing circumstances*",[1840] which it submits should be assessed[1841]

> by balancing the State's interest in acting to the benefit of the general public against the interests of the individual, with the State's interest in change coming to the fore and in case of doubt outweighing the interest of the individual.

920. In so far as the Respondent argues that proportionality is measured by weighing up between State and individual interests, and that State interests would always win, that is rejected. That approach would render proportionality meaningless in the context of fair and equitable treatment. The point of proportionality in the context of investment protection in international law is to balance any legitimate expectations that an Investor may have based on specific commitment for continuation of elements of a particular regulatory framework against the public purpose in the State changing that framework.

921. Accordingly, whilst proportionality is not a free-standing protection standard, it is to be taken into account in the current case in determining whether or not the Claimants' legitimate expectations (if any) were disproportionately harmed by the change in legislation in a manner that outweighs the public utility of those changes (i.e., the 2012 SeeAnlV and the WindSeeG).

iv. Fair and Equitable Treatment and Transparency

922. Similarly as to transparency, the Claimants argue that this is a "*key feature of the fair and equitable treatment standard: a State must act transparently and consistently*", as recognised in the first sentence of ECT Article 10(1) relating to the fair and

[1839] Resp. Rej., para. 543; SBT Expert Report, para. 256.

[1840] Resp. Rej., para. 544; SBT Expert Report, paras. 180 *et seq*.

[1841] Resp. Rej., para. 544. *See also* Resp. C-Mem., para. 455.

equitable treatment standard. According to the Claimants this requires that decisions or actions affecting the Investment be: "*(i) carried out based on a legal framework that is readily known to the investor; and (ii) free from ambiguity and uncertainty*".[1842]

923. The Respondent argues that there is a high threshold for breach on the basis of transparency[1843] and that breach requires:

a. a pattern of conduct ("*a continuing pattern of non-transparent actions by a government over time*",[1844] where the State "*entirely disregarded the procedural rules that it must follow within a particular process*"[1845] or displays a "*complete lack of transparency and candour*");[1846] and

b. a claim concerning "*accessibility of public documents and regulations*"; "*clarity and foreseeability of the decision-making process, with the investor having to exercise due diligence*"; or "*an obligation to notify any measure that is targeted at the investor*".[1847]

924. For the reasons set out above concerning the lack of any free-standing obligation in ECT Article 10(1) first sentence, the Tribunal does not accept the Claimants' position that there is any "*standard of transparency enshrined in the first sentence of Article 10(1) of the ECT*"[1848] at all, let alone one that "*requires that any decisions or actions that affect an investor and its investment* [be] *... carried out on the basis of a legal framework that is readily known to the investor ... and ... free from ambiguity and uncertainty*".[1849]

[1842] Cl. Mem. on Merits, para. 184.
[1843] See Resp. Rej., paras. 550-568.
[1844] **CL-0208**, *Stadtwerke v. Spain*, para. 311.
[1845] **RL-0182**, *Nelson v. Mexico*, para. 361.
[1846] **CL-0069**, *Waste Management v. Mexico*, para. 98.
[1847] Resp. C-Mem., para. 551.
[1848] Cl. Reply, para. 375.
[1849] Cl. Mem., paras. 184.

925. Nevertheless, if there were a failure by the host State to provide transparency in the regulation of the OSW sector, negatively impacting the Claimants' Investment, that conceivably could give rise to breach of the fair and equitable standard. The Tribunal agrees with the Respondent that the threshold is a high one, but in a public tender, permitting and development process, transparency is important.

926. In the prior rulings relied on by the Claimants, lack of transparency was at the heart of the claim. If they were able to make that case on the facts of the current arbitration, those prior awards and decisions would be relevant.

v. Fair and Equitable Treatment and Good Faith

927. As to good faith, whilst the Claimants maintain that "*it is not necessary to show bad faith*", they accept that "*a lack of good faith on the part of the State is an important consideration*", and "[i]*nternational arbitral practice confirms that good faith is inherent in fair and equitable treatment*".[1850]

928. This further reinforces the Tribunal's conclusion above that breach of legitimate expectations based on change of regulatory framework, in addition to requiring a specific commitment in the original framework, requires fault on the part of the host State. That fault may be lack of proportionality, lack of transparency or, indeed, lack of good faith.

929. Although the Respondent argues that "*lack of good faith*" is not a recognized criterion in the fair and equitable treatment context,[1851] the Tribunal considers that it may provide the fault required. It would take some doing, as shown in prior awards (see *Lemire v. Ukraine* ("*harassment, coercion, abuse of power or other bad faith conduct by the host State*")),[1852] and *Frontier v. Czech Republic*:[1853]

[1850] Cl. Mem., para. 186; **CL-0030**, Dolzer/Schreuer, *Principles* (2012) (Claimants' excerpt), pp. 156, 158; **CL-0071**, *Lemire v. Ukraine*, para. 254; **CL-0053**, *Frontier v. Czech Republic*, para. 301; **CL-0072**, *Jan de Nul v. Egypt*, para. 185; **CL-0024**, *Duke Energy v. Ecuador*, para. 341; **CL-0037**, *Tecmed v. Mexico*, para. 153; **CL-0069**, *Waste Management v. Mexico*, para. 138.

[1851] *See* Resp. Rej., paras. 569-574.

[1852] **CL-0071**, *Lemire v. Ukraine*, para. 284.

[1853] **CL-0053**, *Frontier v. Czech Republic*, para. 300.

> Bad faith action by the host state includes the use of legal instruments for purposes other than those for which they were created. It also includes a conspiracy by state organs to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the ones put forth by the government, and expulsion of an investment based on local favouritism. Reliance by a government on its internal structures to excuse non-compliance with contractual obligations would also be contrary to good faith.

930. Therefore, the Tribunal concludes that the applicable legal standard for breach of fair and equitable treatment arising out of a change in the legal and regulatory framework in the current arbitration requires legitimate expectations based on a specific commitment, which the host State harmed by regulating in a manner that lacked proportionality, transparency, was in bad faith, or otherwise based on respondent fault, as against those legitimate expectations.

b. The Claimants' Expectations

931. As set out above in Section III.A, a series of policy, legal and regulatory instruments formed the basis for the "*political, legal and regulatory framework*", in place at the date of the Consent Applications on 27 June 2008 and 11 July 2008. The instruments are largely agreed (although their effect in international law remains firmly disputed). In particular, the five policy, regulatory or statutory instruments promulgated by the German government, which were in existence (and in the case of statutory instruments in force), at the date of the original Investment are as follows:

a. the **2002 Offshore Wind Strategy**, which:

i. stated as its objective:[1854]

> The aim of the sub-project "Offshore Wind Farms" is to create the framework conditions to enable the considerable potential of offshore wind farms to be developed as quickly as possible. The German government assumes that renewable energies will be competitive in the long term without subsidies.
>
> > Under the current conditions, a total of at least 500 megawatts of capacity for offshore wind

[1854] **R-0009**, 2002 Offshore Wind Strategy, p. 7.

> every use could be achieved in the start-up phase (first construction stages of wind farms) by 2006 and in the medium term, by 2010, 2,000 to 3,000 megawatts of capacity could be achieved in the areas likely to be available from today's perspective. In the long term, i.e. by 2025 or 2030, about 20,000 to 25,000 megawatts of installed capacity are possible (coastal sea and EEZ) if economic viability is achieved. This requires that investors in offshore wind farms and the electricity industry create the conditions for transporting electricity generated offshore on this scale (sufficient submarine cable capacities, connection to the mainland grid, additional grid capacities on land if necessary).
>
> Such use of wind energy at sea would correspond to 15 percent of electricity consumption - measured against the reference year 1998.

ii. provided as a key strategic point that:[1855]

> The legal situation is in need of improvement both from an environmental and nature conservation perspective and for reasons of planning and investment security. A distinction must be made between sites within the 12-nm zone (German territory) and locations outside the 12-nm zone (exclusive economic zone - EEZ).
>
> The adopted amendment to the Federal Nature Conservation Act contains important new regulations for marine nature conservation in the EEZ. This concerns the designation of protected areas in the EEZ as well as regulations on the designated suitability areas for wind turbines and the licensing procedure according to the Offshore Installations Ordinance [(SeeAnlV)].

iii. gave BMU the mandate to "*develop and implement a targeted strategy for resolving existing conflicts of protection and use and for accelerating the approval procedures*";[1856] and

[1855] **R-0009**, 2002 Offshore Wind Strategy, p. 7.

[1856] **R-0009**, 2002 Offshore Wind Strategy. p. 2.

iv. was not "*not legally binding*", but "*underpinned the legal and regulatory framework for offshore wind on which Mainstream relied when it invested*";[1857]

b. **2006 SeeAnlV Section 3**, which was the "*regulatory approval process for the construction and operation of offshore wind farms in the German EEZ*", whereby "*regulatory approval was granted by the BSH on a 'first come, first serve*" basis (the "*priority principle*") and "*an approval decision by the BSH granted the relevant developer exclusivity over a site*";[1858]

c. **2006 EnWG Section 17(2a)**, as amended by the Act on the Acceleration of Planning Procedures for Infrastructure Projects, to shift responsibility for constructing and operating the Offshore Grid Connection Line to the TSO if construction began before 31 December 2011;[1859]

d. **2004 EEG**, which set out the "*financial subsidy concept, involving the provision of stable fixed-feed-in tariffs, for renewable energy projects in Germany*";[1860] and

e. **2004 ROG**, "*which extended spatial planning to the EEZ*".[1861]

932. Two additional draft amendments to the aforementioned legislation were published but not adopted as at the date of the original Investments, including:

a. **a draft 2008 SeeAnlV Section 3**, which has "*immaterial*" differences from the 2006 SeeAnlV, as both "*provided for a legal right to consent if the legal requirements were met*", with the BSH's role "*limited to checking whether*

[1857] Cl. PHB, para. 11.

[1858] Request for Arbitration, paras. 28, 30-31.

[1859] Request for Arbitration, paras. 28, 32-34.

[1860] Request for Arbitration, paras. 28, 35-36.

[1861] Cl. PHB, p. 15.

the legal requirements for consent were met", with any discretion held by the BSH being "*procedural only*";[1862] and

b. **a draft 2009 EEG**, containing other feed-in tariffs, and with further changes "*on the horizon, with the EEG feed-in tariffs indeed starting to decrease in the mid-2010s*".[1863]

933. The Claimants' table reproduced above (at pages 386 and 401) illustrates the timing of their various business decisions to invest additional expenditure in their Investment against existing legal framework and adopted (and, as yet, unadopted) draft legislation. The Tribunal acknowledges the Claimants' distinction between draft laws and regulations not yet adopted and laws and regulations adopted but not yet in force, including that the former ultimately may not be adopted in full.[1864] The Claimants' witness Mr. Schwencke was clear in his evidence that he relied on laws that had been adopted rather than drafts that were not yet adopted.[1865]

934. The Claimants submitted the Consent Applications against that framework (including the published but unadopted draft legislation). The 2002 Offshore Wind Strategy was prepared specifically for the development of offshore wind. However, the four legal and regulatory "*framework*" instruments at the date of the Consent Applications were not specific to offshore wind. The original SeeAnlV (and likely ROG) was, as noted by the Respondent, designed to regulate offshore oil and gas production. The EnWG, together with the EEG, formed (and continues to form) the legal basis for the German energy industry as a whole. The EnWG first came into force in the 1930s and governs all energy. The EEG is more recent, first coming into force in 2000 (preceded by the 1991 Electricity Feed-In Act, initiating one of the earliest green energy feed in tariffs in the world).

[1862] Cl. PHB, para. 28(i)(a).
[1863] Resp. PHB, para. 104.
[1864] Cl. PHB, para. 34.
[1865] *See*, *e.g.*, Tr. Day 9, 178:16-20.

935. Certainly by 2008, the Respondent appears to have been working towards accommodating offshore wind development more expressly into its existing progressive renewable energy framework, but the evidence demonstrates that this was not an entirely straightforward exercise. For example, necessary reliance on the SeeAnlV and ROG, governing very different energy related activity in the EEZ, shows that in early 2008 the available regulatory framework for offshore wind farm development remained piecemeal and borrowed from other regimes.

936. It is not a criticism of the Respondent that this was so; nor is it any judgment as to competence in developing its renewable, and specifically offshore wind, framework. An unprecedented global energy transition requires nimbleness and an ability rapidly to adapt and repurpose old frameworks for new and evolving solutions and technology.

937. It is similarly not a criticism of the Claimants for relying on that framework for their offshore wind development Projects in Germany. Like regulators, non-State private actors in the energy sector need to adapt, finding innovative approaches to interpreting existing legal frameworks in a manner that aligns with a global energy transition. In this respect, it is often the renewable energy developers who find themselves ahead of the regulators and pressing hard for regulatory change. Arguably there is evidence of precisely that in this case.

938. Against that and before turning to further and subsequent amendments to the "*political, legal and regulatory framework*", including specific changes designed for offshore wind farms, up to the alleged "*overhaul*" in 2017, the Tribunal considers the framework in place at the date of the Consent Applications as a basis for legitimate expectations in accordance with the legal standard set out above.

939. As discussed, the Tribunal considers that in order for an Investor's legitimate expectations to be subject to ECT Article 10(1) fair and equitable treatment protection, these must be based on specific commitments. Such commitments should be ascertainable by objective evaluation of the facts available to the Investor at the time of the Investment.

940. In the current case, the Claimants' evidence focused on their own subjective understanding of the "*policy, legal and regulatory framework*", which led them to expect that such framework was supportive of the expansion of offshore wind farms, "*would remain supportive*", and "*had the Projects developed in accordance with their anticipated timeline, they would have benefitted from FiTs*". The Tribunal does not doubt this was the Claimants' hope and even genuinely held belief at the date of the Consent Applications. But a foreign investor's hope (or even genuinely held belief) alone, does not give rise to State liability in international law.

941. Here, although the Respondent no doubt signalled its intention to develop its legal and regulatory framework to accommodate its intended expansion into and growth of offshore wind farm development, at the time of the Consent Applications those signals remained just that: signals.

942. If the Tribunal were to adopt the approach of some older non-renewable prior awards (or even perhaps the approach adopted in some of the earliest Spanish solar case awards clearly based on a so-called 'strict liability' approach), then the Claimants' genuinely held expectations arising out of the Respondent's signalled intent might have been found to constitute legitimate expectations. But this Tribunal has rejected that approach. It does not consider that to be the applicable legal standard. Instead, the Tribunal considers based on its application of the ordinary meaning, context, object and purpose of the ECT that the Contracting Parties did not intend to accept responsibility at international law for any subjective expectations that an Investor may have held absent an objective specific commitment.

943. At this juncture, before turning to the specific alleged commitments, the Tribunal pauses to consider the Claimants' case that the Respondent's changes to the applicable legal framework in 2012 and 2017 took place against a political context whereby the Respondent "*dismantle*[d] *wind power in order to appease the coal industry*".[1866] The argument implies that the Respondent *reversed* a prior

[1866] CD-0001, Cl. Opening Statement, slide 15; **C-0204**, A. Lawson, "*Germany's last three nuclear power stations to shut this weekend*", *The Guardian*, 15 April 2023; **C-0205**, M. Vujasin, "*Wind farm in Germany is being dismantled to expand*

commitment to investors to promote, encourage, facilitate and protect renewable energy (in particular wind) within its territory as required for energy transition to meet its international commitments. If it were the case that specific commitments were reversed, in manner that was unreasonable, arbitrary, capricious, discriminatory, or otherwise unlawful, the fair and equitable treatment standard of treatment, including based on legitimate expectations may indeed offer remedy to foreign investors in international law. But the evidence in this arbitration does not make out that case.

944. Turning then to the alleged commitments, the Claimants' case is based on separate instruments as to consent (SeeAnlV and ROG), grid connection (EnWG) and economic incentives (EEG), in the context of an omnibus framework including the 2002 Offshore Wind Strategy. Their case is that the Respondent's "*overhaul*" of the entire omnibus framework caused its Projects not to reach financial close; or put another way, they would have reached financial close and realised the Projects value but for the host State measures.

945. As explained above, the Tribunal accepts the Claimants' investment within the meaning of the ECT. However, the procedural position arising out of the Consent Applications made pursuant to that investment, only gave the Claimants preference over the Project areas to the extent they were approved to proceed; that did not confer consent, grid connection or economic incentives, or rights to any of those things, and moreover did not exist until approval was granted.

946. The largely undisputed evidence and expert opinion is that in order to reach financial close, the Projects at least required consent, grid connection and a commitment as to adequate energy generation revenue. Without any one of these, the Projects would not proceed.

947. Therefore, in order to discharge its burden to show legitimate expectations based on specific commitments, the Claimants at least would need to show that the Respondent

coal mine" *Balkan Green Energy News*, 25 October 2022; **C-0206**, W. Preussen, "*German police remove activists protesting coal mine expansion*", *Politico*, 10 January 2023.

had provided all three commitments (consent, connection and economics) for Projects that at the time were protected only by a procedural position, until the 2014 "*overhaul*" changed the landscape.

948. In the manner adopted by the Parties, the Tribunal deals with each of the alleged commitments below. At the same time, it notes that consent, grid connection and economic incentives alone may not be enough to ensure the success and realisation of value for the Projects. Evidence and economic expert opinion suggests that there were additional hurdles including scheduling, supply chain issues, technical issues, and contractual and financial requirements, which needed to be overcome. Any one of those could have prevented the Projects from proceeding even with consent, connection and economic incentives in place.

i. Specific Commitments Based on the Omnibus Framework

949. As set out above, the Claimants focus heavily on the 2002 Offshore Wind Strategy as the 'wrapper', i.e., providing the overall object and purpose of the offshore wind-related laws, regulations and regulatory practice. They rely on the 2002 Offshore Wind Strategy to formulate an outcome-driven interpretation of existing legal and regulatory provisions.

950. Among other things, based on the 2002 Offshore Wind Strategy the Claimants expected that, at the time of the Consent Applications, "[t]*he energy transition and the expansion of offshore wind was Germany's focus*", the Respondent "*needed to incentivise investment*",[1867] and in Germany offshore wind "*energy production* [wa]*s to be promoted, in order to help this technology to grow rapidly and work without subsidies*".[1868]

[1867] Cl. PHB, paras. 14, 16 *et seq*.

[1868] Cl. PHB, para. 13(iv).

951. The Claimants further expected that the Respondent would provide incentives for that investment "*by implementing a favourable legal and regulatory framework*".[1869] The problem is that the regulatory framework up to mid-2008 was not implemented for the purpose of developing offshore wind farm; it was implemented either for oil and gas (in the case of the SeeAnlV and ROG) or energy as a whole (EnWG) or renewables at a time onshore solar and wind projects were the focus (presenting fewer physical and economic barriers to grid connection than offshore wind farms (particularly further distances from shore and in deeper seas)).

952. Despite this, the Claimants continued to expect that they would develop the Projects "*during this time of growth, where financial support was still available*",[1870] predominantly based on the content of the 2002 Offshore Wind Strategy.

953. The 2002 Offshore Wind Strategy does not necessarily support the Claimants' case; as the Respondent points out, that the Project sites were not within the "*suitability areas*" identified for offshore wind in the document.[1871] In response, the Claimants argue that "[t]*his did not mean that it was foreseeable that projects not located therein were considered unlikely to be developed as a result*", relying on assurances from Ms. Nemitz that post-dated the Consent Applications by some years.[1872]

954. The extent to which the Claimants themselves understood their Projects areas to benefit from any omnibus framework, they set out in their 2009 board paper as follows:[1873]

> The Horizont sites are still not in a designated area – which has however no impact of [*sic*] the development/consent process at this stage. However it is much likely [*sic*] that "one day" the Horizont area will be a designated area. Germany has set ambitious targets for offshore (25GW by 2025/2030). To reach them nearly all possible locations will be finally used for offshore. It is thus only a question of time when also Horizont will be in one of the

[1869] Cl. PHB, paras. 16 *et seq*.

[1870] Cl. PHB, para. 13(iv).

[1871] **RD-0001**, Resp. Opening Statement, slide 39.

[1872] Cl. PHB, para. 15; **C-0125**, Letter from BSH to Fourth, Fifth and Sixth Claimants, 24 March 2015, p. 6.

[1873] Cl. PHB, para. 15; **C-0098**, February/March 2009 Mainstream Board Report, p. 2, fn. 1.

> designated areas. The risk to be completely excluded from a designated area is relatively low.

955. Whilst the Claimants were confident about the Project areas ultimately may be designated by the host State (i.e., "*one day*"), this is far from a specific commitment by the Respondent that they would be so designated. The Project areas were obviously within the Consent Application procedure scope and, on that basis, it was objectively reasonable for the Claimants to expect that they likely would be included in the designated area in the future (i.e., it was a decent bet but not a guarantee). But based on the 2002 Offshore Wind Strategy, the most the Claimants could legitimately expect at the dates of the Consent Applications was that the designated sites for offshore wind would be a focus for the Respondent in meeting its renewables targets, and that "*one day*" the Project areas also may be added as suitable for designation.

956. Their procedural position therefore related to Project areas that were not yet within the Respondent's designated area for offshore wind development.

957. As noted above, the Claimants put considerable weight on the 2002 Offshore Wind Strategy, which encouraged them to expect only to face a 'fair wind' in the critical elements of the legal and regulatory framework, including the so-called: (i) "*Consenting Regime*", (ii) "*Grid Connection Regime*"; (iii) "*Economic Incentives*" and (iv) "*Spatial Planning Regime*".

958. Insofar as the 2002 Offshore Wind Strategy itself could form the basis of the necessary specific commitment required for legitimate expectations, the Tribunal finds that it does not. To be fair, it is not the Claimants' case that it did so, at least not in isolation. The 2002 Offshore Wind Strategy was aspirational, setting out targets and intentions but not specifically committing to designate the areas in which the Projects were based, let alone to grant consent, to guarantee grid connection or to provide specific economic incentives in the form of subsidies or a particular tariff for offshore wind in Germany, and in particular to activity in non-designated areas. It was clear in its intention to encourage offshore wind farm development as part of

a boarder renewables strategy, but designated areas which Projects sites were not included in.

959. In the particular context of encouraging and promoting new technologies in renewable energy systems and sources, the 2002 Offshore Wind Strategy is critically important given the Respondent's commitments under other international treaties including the UNFCCC (recalled in the ECT Preamble). The Claimants, developers in the specialist sector of offshore wind, reasonably considered it to provide them with a new and valuable opportunity in the North Sea. However, the Tribunal rejects any suggestion that the 2002 Offshore Wind Strategy alone, or collectively with the additional legal and regulatory framework documents, objectively could be construed to provide a specific commitment to the Claimants that they would realise their Projects at full market value as at financial close. It offered an opportunity, which the Claimants entirely reasonably pursued and explored.

960. The Tribunal does accept that the existence and content of the 2002 Offshore Wind Strategy provides context against which the Tribunal should determine whether or not specific commitments existed regarding the "*three main 'buckets*" in the legal and regulatory framework, namely consent, grid connection and economic incentives. The 2002 Offshore Wind Strategy informs whether or not the legal and regulatory framework instruments provided the necessary specific commitments for the Projects to proceed.

961. The Claimants separately rely on "*legitimate expectations … for each stage at which a decisive step is taken*" in their Investments,[1874] on the basis that "*legitimate expectations evolve over time as further business decisions are made to invest*":[1875]

> A foreign investor may be presumed to know the general regulatory framework … at the time it first embarks upon the investment. But it is not only the framework existing at that early stage that can create legitimate expectations. ***If there are favourable changes to the legal framework during the establishment or during the lifetime of the investment, this may also***

[1874] Cl. PHB, para. 31.

[1875] Cl. Reply PHB, paras. 36-37; **CL-0366**, Schreuer/Kriebaum, *Legitimate Expectation*, pp. 273-274.

create legitimate expectations which will be protected if the foreign investor relies on them in subsequent business decision [*sic*].

962. The 2002 Offshore Wind Strategy itself did not change following the Consent Applications, but the legal and regulatory enabling environment for the implementation of that 2002 Offshore Wind Strategy continued to evolve. The Tribunal therefore has considered the Claimants' legitimate expectations as to the "*three main buckets*" – consent, grid connection and economic incentives – both at the dates of the Consent Applications and the date of each decisive step summarised in the Claimants' chart above, and sets out its overall findings below.

ii. Specific Consent Commitment

963. As explained, at the date of the Consent Applications, the consent elements of the legal and regulatory framework were contained in the SeeAnlV (originally designed for oil and gas) and the 2004 ROG, as follows:

a. 2006 SeeAnlV (and adopted draft 2008 SeeAnlV, which entered into force on 26 July 2008 making, according to Claimants with "*immaterial*" differences), "*provid*[ing] *for a legal right to consent if the legal requirements were met*",[1876] limited only by a procedural discretion by the BSH (and "*did not contain an exclusion clause which would make possible the refusal of approval due to spatial planning objectives*")[1877]; and

b. the 2004 ROG and the 2008 Draft Spatial Planning Ordinance, the latter excluding the Project areas (not yet adopted and according to the Claimants "*stood no chance of being implemented and, even if it had been, would have amounted only to 'consent delayed' rather than 'consent refused'*",[1878] including because it was published without proper coordination,[1879] and OFW planning exclusion was "*only likely to be the case if sufficient areas*

[1876] Cl. PHB, para. 28(i)(a).
[1877] Cl. PHB, para. 28(i)(b)(3).
[1878] Cl. PHB, para. 28(i)(b).
[1879] Cl. PHB, para. 28(i)(b)(1).

are earmarked for wind energy to achieve the targets envisaged in the Federal Government's offshore strategy" and such "*would have made it impossible for the targets in the 2002 Strategy to be met*", as "*acknowledged in the explanatory memorandum to the eventual Spatial Planning Ordinance*",[1880] and only would have delayed consent because the Projects "*would have been necessary for the targets in the 2002 Strategy to have been met*" and even if consent were delayed, the Claimants expected "*other incentives would remain in the future*").[1881]

964. Despite the Claimants' best efforts to present the 2006 SeeAnlV and the 2008 SeeAnlV, together with the ROG and particularly unhelpful 2008 Draft Spatial Planning Ordinance, as providing the Projects with a legal right to consent provided they met the procedural steps in the permitting procedure, this is not supported by the laws themselves or the evidence.

965. At the time of the Consent Applications, based on an objective review of the evidence available to the Claimants, the potential opportunity to develop offshore wind farms in the Project areas was subject to obstacles that needed removing before those Projects could ever proceed to financial close. The Claimants engaged Dr. Prall precisely to assist them to lobby the Respondent to try to get the Project areas designated and to amend 2008 Draft Spatial Planning Ordinance which proposed to exclude the Projects areas (among other things). This unequivocally demonstrates the Claimants were aware that the Projects areas fell outside designated sites and were prepared to proceed nonetheless hoping to change that designation, including the published draft Ordinance.

966. The Claimants' witnesses testified that they relied on actual laws, as adopted and/or in force, and not draft legal instruments in forming their expectations. This does not altogether help the Claimants as their case requires them to draw together a series of communications from the Respondent in various forms. In order to construct the most

[1880] Cl. PHB, para. 28(i)(b)(2).

[1881] Cl. PHB, para. 28(i)(b)(5).

favourable consent (and grid connection and economic incentives) elements of the Respondent's communications from 2002 to 2008, and then from 2008 to 2012 and to 2017, the Claimants need to treat those communications holistically. In fact, the 2008 Draft Spatial Planning Ordinance was published against the backdrop of the 2002 Offshore Wind Strategy, neither of which included the Project areas as designated. The 2002 Offshore Wind Strategy, upon which the Claimants heavily rely, was largely consistent with the 2008 Draft Spatial Planning Ordinance in not including the Project areas. At best, the Claimants might expect still to be able to change that but the signalling for inclusion of their Project areas was against them.

967. Had the 2008 Draft Spatial Planning Ordinance expressly included the Project areas, it likely would have been a central plank in the Claimants' case on consent. Therein lies the weakness of its position; as a developer it might forge ahead hoping for the best possible outcome in the face of head winds, but treaty-based investment protection under international law does not underwrite the risk in that approach.

968. In those circumstances, it is difficult to reconcile the uncertainty hanging over the Projects areas at the time of the Consent Applications with a specific commitment upon which the Claimants could form legitimate expectations to entitle them to investment protection. That uncertainty was cast by the 2002 Offshore Wind Strategy (not designating the Project areas as suitable) and further reinforced by the 2008 Draft Spatial Planning Ordinance (excluding those areas).

969. Uncertainty as to Project areas' designation was not the only barrier to consent. At the date of the Consent Applications, the Claimants still needed to work their way through the consent process.

970. Therefore, the Tribunal does not consider that the legal and regulatory framework at the date of the Consent Applications, considered in light of the 2002 Offshore Wind Strategy and then current final and draft legal and regulatory framework, gave rise to a specific consent commitment to form the basis for legitimate expectations by the Claimants that the Projects would proceed to financial close.

971. Having made their initial Investment (EUR 25,000 per area Consent Application fees), the Claimants moved forward through the consent procedure. The Claimants' table above a paragraph 783 contains the chronological steps taken, alongside the evolving legal and regulatory framework. According to the Claimants, each step in the process should be considered against the applicable legal and regulatory framework at the time the step was taken.

972. Therefore, in order to ascertain whether or not specific consent commitments subsequently arose to form the basis for legitimate expectations, the Claimants consider the prevailing legal and regulatory environment at each of the additional, "*numerous business decisions to invest in Germany through the development of the Projects in reliance on the favourable legal, regulatory, and policy framework*",[1882] as follows.

973. First, on 4 September 2008, the Board approved payment of a EUR 590,000 development expenditure of the Projects for the 2009 financial year.[1883] At that time, the 2008 SeeAnlV had entered into force, but as it had already been adopted at the date of the Consent Applications there was no additional specific commitment by September 2008. There is some dispute between the Parties as to whether or not the 2008 SeeAnlV created additional grounds for the BSH to refuse consent, but there is no suggestion that it improved the position for the Claimants.

974. Secondly, in February/March 2009, the Board approved payment of EUR 1,950,000 additional development expenditure,[1884] to fund "*various surveys and studies that had to be submitted to the BSH to show that the legal requirements for consent were met*".[1885] According to the Claimants, by that time the Respondent had "*announced that the 'exclusion effect' in the Draft Spatial Planning Ordinance would be deleted*

[1882] Cl. PHB, paras. 35 *et seq*. *See also* the timeline at **CD-0001**, Cl. Opening Statement, slides 21-24.

[1883] **C-0096**, September 2008 Mainstream Board Report, p. 1. This expenditure request was approved: *see* **C-0098**, February/March 2009 Mainstream Board Report, p. 1. According to the Claimants, "*The Sunk Costs Analysis reveals that Mainstream incurred little expenditure in 2008, totalling only approximately EUR 80,000 in addition to the Application fees*": Cl. PHB, para. 35(iii).

[1884] **C-0098**, February/March 2009 Mainstream Board Report. This approval was granted: *see* **C-0090**, June 2009 Mainstream Board Report, p. 1.

[1885] **C-0098**, February/March 2009 Mainstream Board Report, p. 1.

in December 2008".[1886] This is important. The announcement shows that the Claimants were not blind to the fact that the Project areas not only had not designated, but had affirmatively been identified for exclusion. Nevertheless, they continued through the permitting process.

975. Thirdly, the Claimants proceeded to prepare for, attend and present at the Application Conference on 30 April 2009.[1887] The existence of corresponding capital expenditure for this preparation is acknowledged, although presumably this fell within the previously Board approved development expenditure.

976. Fourthly, in June 2009, following the Application Conference, the Board approved payment of EUR 2 million for geotechnical studies.[1888] At that time, the Claimants were aware of the published (but not yet adopted) Draft 2009 SeeAnlV, which proposed a new tendering process for the offshore wind in the EEZ. The Tribunal acknowledges that the Draft 2009 SeeAnlV was draft legislation and not approved, adopted or in force at that time. Nevertheless, the Government did issue a draft document, which contained a clear signal that it was considering the introduction of a tender system. This would have been to the detriment of the Claimants.

977. The Draft was followed by strong opposition by the wind industry and, ultimately, not adopted. However, its publication somewhat undermines the Claimants' position that they maintained, or received, specific consent commitments (or even consistently positive signals) in respect of their Project areas during this period.

978. Fifthly, on 22 December 2009, the Claimants submitted "*documents containing evidence that the legal requirements for consent were met to the BSH*".[1889] Again, it is difficult to reconcile the BSH's continuation of this process, which required the Claimants to continue to incur considerable costs, with an unequivocal decision by

[1886] **C-0098**, February/March 2009 Mainstream Board Report, p. 2.

[1887] Schwencke Witness Statement, para. 51; **C-0097**, Minutes of April 2009 Application Conference.

[1888] **C-0090**, June 2009 Mainstream Board Report, p. 2.

[1889] **C-0001**, 2013 Stakeholder Conference Minutes, pp. 1-2. *See also* Cl. Reply, para. 276(vii).

the host State by that time to abolish the existing regime or permanently to exclude the Project areas.

979. The host State's conduct certainly demonstrated a degree of equivocation. Despite the evidently strong wind industry lobby (including on behalf of the Claimants), by December 2009, a specific legal and regulatory framework for offshore wind farms was still not in place; the Project areas remained undesignated and any draft legislation up until that time indicated that they would be excluded and/or that the consent procedure relating to their permitting would be replaced by a tender procedure.

980. This state of play appears to this Tribunal to evidence anything but a specific commitment to the Claimants in respect of their Project areas. Hope remained alive (just) but specific commitments non-existent.

981. Following the submission of those documents, the Claimants continued with surveys and studies,[1890] because "*environmental surveys were required to be undertaken for two years without any interruptions*".[1891]

982. On 15 August 2011, the draft 2012 SeeAnlV was sent to stakeholders. This was the draft law that when adopted (on 15 January 2012), according to the Claimants, terminated their legal right to consent. It was draft legislation, and despite the clear signals it contained, the Claimants nevertheless pressed on.

983. The 2012 SeeAnlV entered into force on 15 January 2012.

984. Sixthly, on 5 December 2012, the Claimants nevertheless proceeded to update their BSH submission documents as a result of the 2012 SeeAnlV,[1892] and invested in further studies for "*feasibility and additional cost of the deployment of Jack-up*

[1890] Sunk Costs Analysis.

[1891] **C-0091**, 15 December 2009 Board Paper, p. 53.

[1892] Cl. Reply, para. 276(x); **C-0001**, 2013 Stakeholder Conference Minutes, pp. 2-3.

vessels (and floating installation) in Horizont" to "*support the sales process*" for the asset.[1893]

985. On 5 March 2013, the Claimants attended and presented at the Stakeholder Conference, by which time they "*had invested EUR 6.1 million (excluding overheads) in the Projects*".[1894] However, that Stakeholder Conference took place over a year after the 2012 SeeAnlV had already entered into force, which on the Claimants' case was the fundamental change to the legal and regulatory framework upon which they relied.

986. This is where the Claimants' case on a specific consent commitment unravels, such as it was intact prior. They claim to have had a specific consent commitment based on the 2006 SeeAnlV, unchanged materially by the 2008 SeeAnlV, which they submitted entitled them to consent provided they proceeded successfully through the consent process, including the Stakeholder Conference. They further submit that they did indeed reach the Stakeholder Conference and in fact fulfilled all of the requirements for consent.

987. Yet over a year before the Claimants reached the Stakeholder Conference stage of their consent procedure, the law already had (in their words), "*fundamentally changed*" to terminate the very procedure they relied upon having completed. Whilst it is not entirely clear why the Stakeholder Conference proceeded at that time, despite the law having rendered the process redundant, what is clear is that the Claimants went through those steps with the opposite of a commitment for consent (although they seemingly (and somewhat contradictorily) retained their procedural position).

988. Therefore, any specific consent commitment upon which the Claimants could rely must be based on the consent-related legal and regulatory environment prior to 15 January 2012, at the latest. And at best, that consent-related legal and regulatory environment was equivocal in respect of the Claimants' Project areas. Those areas were not designated as suitable in the 2002 Offshore Wind Strategy, were excluded

[1893] **C-0057**, 18 December 2012 Board Paper, p. 46.

[1894] Cl. Reply, para. 276(xii); **C-0110** 21 May 2013 Board Paper, p. 63.

from the 2008 Draft Spatial Planning Ordinance, were deprived of the existing consent procedure in favour of a new tender process in the 2009 Draft SeeAnlV and, ultimately, were finally excluded in January 2012 by the enactment of the 2012 SeeAnlV.

989. Rather than a specific commitment in the legal and regulatory environment that the Claimants would be guaranteed consent for the Projects as long as they completed the procedural requirements in the consent process, the Projects were highly speculative from the outset and became more so as time went on.[1895] There was never a legal and regulatory environment that guaranteed consent for offshore wind in the offshore German EEZ Projects areas. Instead, the legal and regulatory environment applicable to offshore wind farms remained in a state of flux for the period from 2002 to 2012, transitioning an existing onshore renewables framework to adapt to a materially different technical, economic and scientific proposition.

990. The Claimants were nevertheless entitled to pursue the consent procedure for the Project areas, based on the regime in place as at 2008. They speculated correctly that the Respondent ultimately would introduce a legal and regulatory framework that would enable them to obtain consent for the Projects and proceed to financial close (subject to the points below). This was an investment risk that the Claimants' shareholders were required to weigh up and act as they deemed appropriate.

991. In light of this, it is not necessary for the Tribunal to determine whether or not the 2008 SeeAnlV or 2009 regimes in fact, "*entailed a legal right (or 'non-discretionary entitlement') to consent if the requirements were met*".[1896] Discretionary or not, the Tribunal has determined that there was no specific consent commitment based on the framework as a whole.

[1895] The speculative nature of the Mainstream Projects distinguishes these from the investments considered in the prior award in *Strabag v. Germany*. In *Strabag*, the relevant projects were already approved and under development prior to the breach and affected expressly by a development freeze: *see* **CL-0347**, *Strabag v. Germany*, paras. 389-390. While the Claimants argue that the Strabag companies made their investments in Germany only after the Mainstream companies made their investments in the current arbitration, the Strabag companies invested in existing projects that the original developer had already taken to a more advanced stage in the approval and development process: *see* Claimants' Observations on *Strabag*, para. 9.

[1896] Cl. PHB, para. 36; Tr. Day 1, 20:14–21:1.

992. In any case, in so far as the Claimants "*successfully demonstrated that the Projects met the legal requirements, then consent would and should be forthcoming*",[1897] and that consent could only be refused "*if the safety and efficiency of navigation is impaired or the marine environment endangered or the requirements of spatial planning or other overriding public interests oppose an approval*",[1898] this was entirely artificial. The 2012 SeeAnlV had been adopted well before the alleged legal requirements for the 2009 SeeAnlV were achieved.[1899] The Claimants could not meet the requirements of a regime that was no longer in force. Their having taken steps to do so evidences little more than that they incurred additional costs at a time when they knew the Projects could not proceed.

993. Even following the Stakeholders Conference the Claimants did not claim to have any guarantee. Dr. Prall indicated that it would be "*extremely unusual*" for consent not to be granted following the Conference but this does not mean it was automatic.[1900] According to the Respondent, the highest she put it was as a "*very important signal*".[1901]

994. Despite the evidence, the Claimants submit that "[i]*t was not foreseeable when* [they] *invested that, in the time between the Applications and the Stakeholder Conference, these valuable incentives would be removed, or that the Projects would be terminated*".[1902] The Tribunal rejects this. Whilst the precise detail of the ultimate legal and regulatory framework from 2017 may not have been foreseen, the risk to obtain consent in respect of the Project areas, which at all times remained outside the designated areas, was plainly foreseeable.

[1897] Cl. PHB, para. 37.

[1898] Cl. PHB, para. 38; Third Nolte Witness Statement, para. 10.

[1899] *See* **CL-0347**, *Strabag v. Germany*. That tribunal found that the regulatory measures taken by Germany as of late 2012, including the 2012 Energy Act, were not on their face incompatible with the FET standard. The breach in that case arose from the way the measures were implemented vis-à-vis the claimants' investments, given the specific facts as to the stage of those investments in the approval and development process.

[1900] Prall Witness Statement, para. 36.

[1901] Resp. C-Mem., para. 325.

[1902] Cl. PHB, para. 82.

iii. Specific Grid Connection Commitment

995. As set out above, the grid connection elements of the legal and regulatory framework were contained in the 2006 EnWG, as well as the BMU paper.[1903] Section 17(2a) of the 2006 EnWG provided in full (emphasis added):[1904]

> **Section 17 Grid Connection**
>
> (2a) Transmission system operators in whose control area ***offshore installations within the meaning of section 10(3) first sentence of the Renewable Energy Sources Act are to be connected to the gri***d ***shall construct and operate the lines from the substation of the offshore installations to the technically and economically most favorable connection point of the nearest transmission or distribution system***; the grid connections must have been constructed by the time the offshore installations are technically ready for operation. A line pursuant to sentence 1 shall be deemed to be part of the energy supply network from the time of its construction. Transmission system operators shall be obliged to reimburse the expenses incurred by the operators of offshore installations for the planning and approval of the grid connection lines up to 17 December 2006, insofar as these expenses were deemed necessary under the circumstances and comply with the requirements of an efficient grid operation pursuant to section 21. The operators of transmission systems shall be obliged to compensate each other for the differing extent of their costs pursuant to sentences 1 and 3 by means of financial settlement; section 9 (3) of the Cogeneration Act applies accordingly.

996. The EnWG Grid Connection provision provided that "*the responsible TSO should construct a grid connection by the time an OWF was ready for commissioning*".[1905] This is the provision that the Claimants rely on for their grid connection legitimate expectation. The Tribunal considers below whether or not this constitutes a specific commitment by the Respondent to provide grid connection for the Projects.

997. The Claimants' case places the onus on the Respondent. They argue that, if the Respondent "*had genuinely held*" the view that "*the right to an individualised grid connection under section 17 (2a) EnWG 2006 was idealistic and not to be taken seriously*", then "*it would not have enacted section 17 (2a) of the EnWG 2006*".[1906]

[1903] Cl. PHB, para. 28(ii).

[1904] **RL-0125**, 2006 EnWG, Sec. 17(2a).

[1905] Cl. PHB, para. 28(ii)(a).

[1906] Cl. PHB, para. 28(ii)(a), referring to Resp. C-Mem., para. 231.

In this regard, they rely on the testimony of Dr. Wustlich, a fact witness for the Respondent, "*who was involved in drafting section 17 (2a)*".[1907]

998. According to the Claimants, Dr. Wustlich and others, "*were of the firm belief that this arrangement would relieve the offshore sector of a multi-billion-euro risk*" with 2006 EnWG Section 17(2a) seen as "*a positive change*" and with the subsequent 2009 BNetzA Position Paper in to "*resolve some of the practical issues*".[1908] The Claimants also rely on the BMU Paper which they argue "*described section 17 (2a) as a 'substantial improvement'*", whilst suggesting that it "*revealed that Germany exaggerated the extent to which the practical problems with the grid connection regime were known prior to the BNetzA Position Paper*", having "*posited that only a 'moderate upgrade' of the network would be required*". The messaging in the BMU Paper, according to the Claimants, "*sought to incentivise investors*".[1909]

999. Section 17(2a) of the 2006 EnWG refers to "*offshore installations*". The Project had not reached installation stage and would never reach installation stage absent consent, which was itself subject to area designation and/or inclusion.

1000. The Tribunal has determined above that there was no specific commitment by the Respondent to provide consent for the Project. Although the Project areas were within the EEZ offshore wind zones identified as available for consideration in the permitting procedure pursuant to the 2006 SeeAnlV (and the 2008 SeeAnlV and the Draft 2009 SeeAnlV), they were not within designated areas in the 2002 Offshore Wind Strategy and were consistently excluded pursuant to draft spatial planning legislation dealing with those offshore zones, culminating in final exclusion in the 2012 SeeAnlV.

1001. Accordingly, even if there were a specific grid connection commitment, it remained subject to the Project receiving consent and the offshore installations being completed (although the grid connection was, pursuant to the 2006 EnWG, to be

[1907] Cl. PHB, para. 28(ii)(b)(1).

[1908] Cl. PHB, paras. 28(ii)(b)(1)-(2); Wustlich Witness Statement, para. 38.

[1909] Cl. PHB, paras. 28(ii)(b)(3)-(4); **C-0306**, BMU Paper, pp. 6, 11.

constructed "*by the time the offshore installations are technically ready for operation*"). The Claimants, having failed to establish a specific commitment sufficient to found legitimate expectations for consent, do not have the required prerequisite for specific gird connection commitment, which necessarily follows consent.

1002. In any event, the Tribunal does not consider that 2006 EnWG Section 17(2a) was a specific grid connection commitment to the Claimants in respect of the Projects. This conclusion is, again, founded on the basis that the Project areas were outside the designated areas in the 2002 Offshore Wind Strategy and excluded from all draft spatial planning legislation and, ultimately, the final 2012 SeeAnlV.

1003. This is particularly important in the context of any offshore grid connection commitment. It is undisputed that the Claimants' Project areas were among the farthest away from shore; the cost and time investment and technical complexity for connecting these was higher than for onshore or nearer to shore areas. The further away the Project areas were from the "*technically and economically most favorable connection point of the nearest transmission or distribution system*", the more challenging it would be to "*construct and operate the lines from the substation of the offshore installations*" for the Projects.

1004. The Tribunal considers that this is why the various draft spatial planning instruments favoured the EEZ zones that were closer to those connection points (i.e., ultimately Zones 1 and 2). As set out above in relation to consent, the Claimants were aware (or should have been aware) of the risks associated with their Project areas, including in particular their less favourable positioning far from shore, and nevertheless proceeded to invest in the Consent Applications and subsequent development. This was a decision that they were entitled to take; the Respondent had after all made the Project areas subject to the permitting procedure and favourable amendments to the spatial planning ordinances in due course may have included them, in which case grid connection would follow under the 2006 EnWG, again provided the Claimants met the required construction date requirements.

1005. This risk was even apparent following the Consent Applications. The TenneT letter of 7 November 2011 made clear to the Claimants that "*the grid connection right under section 17 (2a) EnWG would be amended*".[1910] At that time, the Claimants were aware that there were problems regarding HVDC grid connection technology although they rely on the testimony of Mr. Schampers and Mr. Hellmund to argue that "*the BNetzA Position Paper purported to address the issues caused by that technology*".[1911]

1006. Whether or not there was consensus "*from the beginning*" that the grid connection regime was known to be inadequate (which the Tribunal acknowledges the Claimants consider to have been shown to be "*false, as seen in the BMU Paper*"),[1912] the Tribunal takes the view that without having put the grid connection in place for offshore wind farms in the Project areas, the Respondent could not have known that it was adequate either.

1007. The Claimants' case on grid connection nevertheless requires that, regarding any "*practical problems with that* [grid connection] *regime*", the Respondent "*must bear responsibility for incentivising investment on the basis of it*". The Claimants argue that based on their alleged legitimate expectation of grid connection, the Respondent was required pursuant to international law to ensure that the TSO resolved any problems and guaranteed connection for the Project areas despite their distance from shore and treatment by the Respondent in the 2002 Offshore Wind Strategy and subsequent draft ordinance and clear messaging from the TSO.

1008. The Tribunal does not find a specific commitment in respect of the Claimants' Project areas for grid connection at the date of the Consent Applications or subsequently, and certainly does not find there to be a responsibility in international law that it provide that connection no matter what.

[1910] Cl. Reply PHB, para. 41(vii).

[1911] Cl. Reply PHB, para. 41(viii).

[1912] Respondent's PHB, para. 95; Cl. Reply PHB, para. 41(ix).

1009. Therefore, when the 2012 EnWG entered into force on 28 December 2012, "*replac*[ing] *the previously existing individual entitlement to the construction of a grid connection at commissioning with an entitlement to non-discriminatory allocation of available capacities*", providing that "*construction of offshore grid connection lines would be controlled by the TSOs*" and "*carried out according to the O-NEP and the BFO*",[1913] the Respondent did not revoke a specific commitment that it had previously made to the Claimants. The same applies to draft O-NEP 2013, published in March 2013, providing for grid connection only for offshore wind "*'clusters' located in Zones 1 and 2 by 2023 and for Zone 3 by no later than 2033*".[1914] The Projects were located in Zone 3, which meant that they would not obtain grid connection for another 20 years. The position remained unchanged in final O-NEP 2013, in force from 19 December 2013.[1915]

1010. The Claimants lost neither an existing grid connection nor the right to such connection; the Respondent had never provided any commitment that this would be provided for offshore within the German EEZ area to be zoned as Zone 3, where the Projects were located. Again, the Claimants hoped this would occur but their hopes were unfulfilled.

1011. If the facts were different and, for example, the Project areas were designated by the Respondent within the 2002 Offshore Wind Strategy, included in subsequent evolving spatial planning ordinance instruments, and the necessary consents and permits had been granted to the Claimants pursuant to the permitting procedure, at that stage the Claimants may have been entitled to rely on legislation in place at the date of their investment for grid connection, provided the construction scheduling requirements also could be met.

1012. However, the Projects were far from that stage. The Claimants had a procedural position in the Consent Application process in respect of the Project areas – and

[1913] Cl. PHB, para. 87(ii). Reply, para. 169.

[1914] Cl. PHB, para. 87(ii); **C-0107**, First Draft O-NEP 2013.

[1915] Cl. PHB, para. 87(ii).

developed the Projects through studies and planning based on this – but that did not operate to stabilise grid connection conditions in place at the date of the Consent Applications. Again, this is particularly so because the Project areas were outside the designated areas in the 2002 Offshore Wind Strategy and consistently identified for exclusion in the Draft and final Spatial Planning Ordinances.

1013. It is conceivable that such grid connection specific commitment may have come into existence at some stage in the future, had the Project areas been designated or not excluded, and consent granted. But legitimate expectations cannot rest on a host State commitment that may come into being in the future. It must have been in place at the date of investment.

iv. Specific Economic Incentives Commitment

1014. As set out above, the economic incentive elements of the legal and regulatory framework were contained in the FiTs in the EEG, which according to the Claimants, "*consistently improved from 2004 until the EEG was amended as a result of Germany's change in its political commitment to offshore wind in 2014*".[1916]

1015. As the Claimants explain, the 2017 WindSeeG "*dispensed with FiTs*" and "*terminated the regulatory approvals process for the Projects, which were excluded from the limited transitional provisions it provided*", which the Claimants submit were "*designed to lack teeth for any projects outside of Zones 1 and 2 specifically to reduce the number of OWFs under development, despite the previous inducements made to significantly increase development*".[1917]

1016. As the Projects were in Zone 3, they were finally excluded from any feed-in tariff.

1017. The Claimants' case on economic incentives appears to accept that German feed-in tariffs were not fixed and changed over time. Such change was not necessarily in the operator's favour. Indeed, it was clearly signalled in the 2002 Offshore Wind

[1916] Cl. PHB, para. 28(iii)(a).

[1917] Cl. PHB, para. 87(iv).

Strategy that "[t]*he Federal Government assumes that renewable energies will be competitive in the long term without subsidies*".

1018. The Respondent further points out that pursuant to the EEG, feed-in tariffs "*were not available until commissioning*", making it "*unreasonable for Mainstream to rely on the availability of economic incentives*". In response, the Claimants argue that this ignored that feed-in tariffs "*were created to encourage experienced developers like Mainstream to incur the time-consuming and costly exercise of developing an OWF, because those developers would know that if economic viability was not (yet) reached by commissioning, they would receive economic incentives*", and that "[w]*ithout such assurances of economic incentives, developers simply would not have incurred the costs of development. Germany knew this, which was why it offered economic incentives*".[1918]

1019. The Claimants' position in this regard underscores the need for a specific commitment to the investor at the date of investment. Whilst it is entirely reasonable for the Claimants to argue that that feed-in tariffs or other economic incentives were required to encourage developers to incur the cost of development, it does not follow that there was a commitment regarding feed-in tariffs to the Claimants in respect of the Projects.

1020. It was clear to the Claimants at the date of the Consent Applications, and equally clear (if not more so) at the time of any subsequent decisions to continue to invest in subsequent years, that their Project areas were more speculative than areas in the EEZ that were designated from 2002 and not identified for exclusion from the spatial planning ordinance. At any stage, the Claimants had the necessary information to choose not to invest or not to continue with their investment.

1021. Even if the tariffs at the date of the Consent Applications, or subsequent dates of investment, did constitute specific commitments to certain stakeholders, they did not constitute specific commitments to the Claimants in respect of the Project areas. The

[1918] Cl. PHB, para. 28(iii)(b).

Projects were simply too many steps from the relevant point at which tariffs would become available (if ever) and all stakeholders knew these could (and did) change.

c. The Claimants' Reliance on Expectations

1022. As the Tribunal has found that there were no specific commitments to the Claimants at the date of the Consent Applications, and any subsequent investments in the Projects, so as to give rise to legitimate expectations that, if breached, would constitute failure to afford fair and equitable treatment in international law, there is no need for it to consider reliance.

d. Alleged Breach of the Claimants' Expectations

1023. Similarly, as to alleged breach of the Claimants' expectations, the Tribunal has found that there were no specific commitments to the Claimants at the date of the Consent Applications and any subsequent investments in the Projects, so as to give rise to legitimate expectations, breach is irrelevant.

1024. Even if that were not the case, the Tribunal would have found there to have been no lack of proportionality, transparency or good faith, or other fault, giving rise to breach of fair and equitable treatment.

1025. As to proportionality, if this Tribunal had found the necessary specific commitments as a basis for legitimate expectations, it would nevertheless have needed to be persuaded that the Respondent's introduction of the 2012 SeeAnlV and the 2017 WindSeeG was not proportionate.

1026. It is difficult to consider this in the abstract, having found that the Project areas in particular remained at all times subject to reservations in the development of offshore wind in the German EEZ. It would be outside the scope of its mandate to comment any further as to the proportionality of those in the event that specific commitments were granted, which may or may not have been so for other areas.

1027. The Tribunal simply observes that proportionality requires a weighing up of factors and indeed ensuring that the host State is able "*to effectively combat climate change*

through the expansion of offshore wind", or indeed any other renewable energy, in accordance with the ECT Preamble reference to the UNFCCC in "*relation to the fight against climate change*".[1919] The Tribunal accepts that this would be a relevant factor in claims relating to and arising out of promoting new investment in renewables. However, the balancing exercise in considering proportionality must consider the interests of the investor and the interests of the host State in ensuring that it allocates public funds to maximise the development of renewables.

1028. The Tribunal considers that the conduct of the host State was consistent with this.

1029. The Respondent's commitment "*to meet its domestic and international obligations to combat climate change*" in other international agreements is not a commitment to offshore wind development whatever the cost. A host State decision to prioritise other renewables over offshore wind development in areas far from shore in the EEZ, if reached on the basis of economic and technical feasibility or optimisation of the host State's overall renewables strategy, even if requiring "*radical overhaul of the legal, regulatory and political framework applicable to investments in offshore wind*", is not necessarily a breach of fair and equitable treatment and, moreover, is not necessarily a decision that would make "*energy policy more dependent on conventional energy sources, including in particular coal*". Had that been the case, and had specific commitments been in place, the outcome in this Award may have been different.

1030. For all of the reasons set out above, in particular given that the Claimants' Project areas were never designated areas in the 2002 Offshore Wind Strategy, and were never included in any updates to the SeeAnlV and/or ROG seeking to implement the 2002 Offshore Wind Strategy, and at all times remained in very early stage development and never reaching permitting stage, there was no commitment to the Claimants of the requisite clarity and specificity either directly or in the regulation

[1919] Cl. Reply, para. 350; **CL-0001 / CL-0084**, ECT, Preamble.

itself to give rise to an enforceable "*legitimate expectation*" so as to breach the fair and equitable standard of treatment protection within ECT Article 10(1).

1031. For completeness, in so far as the Claimants maintain an impairment claim the Tribunal also rejects this based on the reasoning above.

B. EXPROPRIATION (ECT ARTICLE 13)

1032. The Tribunal briefly summarises the Claimants' and the Respondent's positions on expropriation below. In relation to the expropriation claim, the Tribunal again has relied on the entire record before it, including the Parties written submissions and oral pleadings. To the extent that some arguments are not reproduced in this Award, they must be considered subsumed in the Tribunal's analysis.

(1) The Claimants' Position

1033. The Claimants allege that the Respondent unlawfully expropriated their Investments, with the final measure having expropriatory effect being the entry into force of the 2017 WindSeeG. It relies both on:

a. expropriatory effect of 2017 WindSeeG "*end*[ing] *the regulatory approvals process for the Projects*";[1920] and

b. indirect (or "*creeping*" expropriation) of the "*culmination of a series of measures by Germany which caused a substantial deprivation in the value of Mainstream's investments*".[1921]

1034. The Claimants further elaborate on the so-called "*creeping*" expropriation as comprising:

[1920] Cl. PHB, para. 90.

[1921] Cl. PHB, paras. 90-91.

a. the 2012 SeeAnlV, meaning they "*could no longer expect consent even if all of the legal requirements were met*";[1922] and

b. the 2012 EnWG, allowing "*the BSH to use its discretion under the SeeAnlV 2012 not to grant consent 'for the moment'*", in addition to extinguishing their "*ability to secure an individualised grid connection on commissioning*";[1923]

both of which "*halted the progress of the Projects and meant that they were unable to benefit from the transitional provisions in the WindSeeG and therefore the regulatory approvals process was terminated, thus completing the creeping expropriation*".[1924]

1035. The Claimants rely on the "*concept of a creeping expropriation*" as set out in the prior award in *Siemens v. Argentina*:[1925]

> By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.

1036. In response to the Tribunal's concerns expressed at the Hearing as to how and why the Claimants would continue to incur development expenditure on the Projects even after steps forming alleged "*creeping expropriation*" had commenced, and how this impacted their case on expropriation,[1926] the Claimants submit in their Post-Hearing Brief that:[1927]

[1922] Cl. PHB, para. 91(i).

[1923] Cl. PHB, para. 91(ii). **C-0125**, Letter from BSH to Fourth, Fifth and Sixth Claimants, 24 March 2015, p. 6.

[1924] Cl. PHB, para. 91(iii).

[1925] Cl. PHB, para. 92. **CL-0065**, *Siemens v. Argentina*, para. 263. *See also* **RL-0070**, *Generation Ukraine, Inc. v. Ukraine,* ICSID Case No. ARB/00/9, Award, 16 September 2003, paras. 20.22, 20.26.

[1926] *See* Tr. Day 9, 188:8–189:20.

[1927] Cl. PHB, para. 93.

a. "*creeping expropriation*" is a "*backwards looking exercise*" considering the process leading to the "*straw that breaks the camel's back*";

b. following the 2012 amendments to the SeeAnlV and the EnWG, the Claimants "*persevered with the Projects even after those initial changes because* [they] *still had a legitimate expectation that the Projects would receive consent*", because:

i. they "*had demonstrated that* [they] *met the legal requirements*", and

ii. "*even with a later grid connection, a consented project was still a saleable asset*";

c. throughout 2013 and 2014, they "*performed the follow-up work from the Stakeholder Conference and actively pursued the BSH to confirm the position on consent*";

d. "[a] *consented project was a valuable and saleable asset, and while the initial changes (in particular the pushing of the grid connection date) adversely affected the Projects, these initial changes were not expropriatory in and of themselves, because they did not terminate the regulatory approvals process*";

e. Ms. Nemitz worked on the consent for the Projects until March 2015, "*and had told Mainstream this*"; and

f. the initial regulatory changes "*represented the start of a process of ensuring the inability of the Projects to be realised, which concluded with the WindSeeG*".

1037. According to the Claimants, the fact that they "*persevered with the Projects after this incremental process began does not mean that Germany did not commit a creeping expropriation*". They argue that it was only in retrospect that "*it bec*[a]*me evident that Germany's measures taken from 2012 were part of a process which culminated not just in the delay of the Projects but also in their termination without effective*

compensation, which, in the aggregate, unlawfully expropriated Mainstream's investments".[1928]

(2) The Respondent's Position

1038. According to the Respondent, it did not expropriate the Claimants' Investments pursuant to ECT Article 13, based on several independent grounds.

1039. First, the Respondent argues that there must have been an investment according to German domestic law in order for it to be expropriated pursuant to ECT Article 13. It reiterates its argument from its *ratione materiae* objection to jurisdiction: there was no investment asset to begin with.[1929]

1040. In its Reply Post Hearing Brief, the Respondent addresses the Claimants' procedural position, i.e., "*the procedural positions in the Approval Procedure*". [1930] Its case on the procedural position is that it is not a protected asset pursuant to ECT Article 1(6), which it argues "*only protects existing or acquired proprietary positions*".[1931] According to the Respondent, the Claimants never acquired proprietary positions because they "*had no right to Approval*" and "*the German Constitutional Court did not rule otherwise*"; the Constitutional Court "*did not address 'procedural steps' within its assessment of expropriation*", because "*this is no asset that can be expropriated*".[1932]

1041. The Tribunal has already rejected this as a matter of jurisdiction as explained in Section IV above. To recap, the Tribunal found that there is an asset in the form of shares.

[1928] Cl. PHB, para. 94.

[1929] Resp. PHB, paras. 113-114. *See also* Resp. C-Mem., paras. 751, 773; Resp. Rej., paras. 663 *et seq*. According to the Respondent, Prof. Dr. Hofmann confirmed that "*permits and approvals are not property and thus do not constitute assets or rights that can be expropriated*" (see Tr. Day 5, 24:4–27:4), and Prof. Dr. Bäumler confirmed that "*this has been the German Constitutional Court's constant jurisprudence*" (*see* Tr. Day 5, 85:7-13).

[1930] Resp. Reply PHB, para. 64, referring to Cl. PHB, paras. 77, 90.

[1931] Resp. Reply PHB, para. 64. See also Resp. Rej., paras. 441 *et seq*.

[1932] Resp. Reply PHB, para. 64; **RL-0017 / C-0021**, BVerfG June 2020 Decision.

1042. Secondly, the Respondent argues that "*there was no governmental interference that could be qualified as expropriation, neither direct nor creeping*".[1933] In this regard it submits that:

a. indirect expropriation by regulatory measures "*can only occur if and to the extent the host State violated legitimate expectations*";[1934]

b. investors "*cannot expect regulatory stasis unless the host State has made a specific commitment not to amend its legislation*";

c. regulatory changes "*form part of the normal commercial risk of a foreign investor and are thus not protected by the law of expropriation*";[1935]

d. the Claimants "*did not have any legitimate expectations regarding regulatory stasis, as there was no specific commitment on behalf of Respondent in this regard*";[1936]

e. instead the Respondent "*had extensively announced and discussed all necessary changes to the regulatory framework well in advance of actually enacting them*"; and

f. the Claimants "*were privy to all of these discussions*".

1043. Therefore, according to the Respondent, absent any legitimate expectations of the Claimants, "*Respondent's regulatory changes cannot constitute an interference leading to indirect expropriation*".[1937]

[1933] Resp. PHB, para. 114.

[1934] Resp. PHB, para. 115. *See also* Resp. C-Mem., paras. 767 *et seq*.

[1935] Resp. PHB, para. 115; **CL-0069**, *Waste Management v. Mexico*, para. 177.

[1936] Resp. PHB, para. 115.

[1937] Resp. PHB, para. 115.

1044. Thirdly, the Respondent argues that the expropriation claim must fail because there was no governmental interference on behalf of Respondent as a matter of fact that "*would have led to a loss of control*".[1938] In this regard, it submits that:

a. "[n]*o shares were expropriated*", as "*on their own accord, Claimants undertook a lot of corporate changes, without Respondent's prompting or interference*", and

b. the Claimants are "*still are able to assign the rights of use to the studies they allegedly made during the Approval Procedure under Sec. 10a, 10b* [WindSeeG].[1939]

1045. In its Reply Post-Hearing Brief, the Respondent further argues that "*there was no governmental interference targeting Claimants in any event*",[1940] because:

a. "[t]*here was nothing that Respondent could or did seize*";

b. "[a]*ll measures that Claimants enumerate were laws of general application with extensive transitional provisions, not targeted solely at Claimants*";[1941]

c. "[p]*lanning justification is not expropriatory*", and the 2012 SeeAnlV was "*not a completely new idea …, with the old regime requesting 'sufficient cause to warrant a decision'*";[1942]

d. "[d]*etermining sufficient cause meant an element of assessment and judgment*";[1943]

[1938] Resp. PHB, para. 116.

[1939] Resp. PHB, para. 116; Tr. Day 1, 43:18-21.

[1940] Resp. Reply PHB, para. 65.

[1941] Resp. Reply PHB, para. 65, referring to Cl. PHB, para. 90.

[1942] Resp. Reply PHB, para. 65; **R-0072**, Dr. Ursula Prall, Draft Memorandum on the status of the Horizont Projects, pp. 6 *et seq*.

[1943] Resp. Reply PHB, para. 65.

e. the Claimants argue that the 2012 SeeAnlV was "*an adverse measure contributing to expropriation, while at the same time repeating that they were entitled to Approval under that very same law*";[1944]

f. "*the introduction of discretion in a law is not expropriatory*", as it is "*a well-known and frequently used element in administrative procedural law*", which is "*not synonymous to arbitrariness, but subject to certain standards and judicial control – something Claimants never made use of*";

g. the Claimants "*never controlled the application process in the first place so that there was no loss of control, either, even assuming the existence of an asset that could be expropriated*";[1945] and

h. the Claimants "*always knew that they had no control over the process, as Dr Ursula Prall advised Claimants that obtaining Approval is no automatism and that even after the Stakeholder Conference 'nothing was cast in bronze'*".[1946]

1046. Fourthly, the Respondent argues that the fact that the Claimants "*continued to spend large sums of money on the development of the Horizont Projects*", shows that "*they did not take issue with these changes throughout their entire active time in Respondent's EEZ and did not think of it as limiting their rights*", which "*further disproves a supposed creeping expropriation*".[1947]

1047. Fifthly, the Respondent argues that "*creeping expropriation*" is "*further refuted by the fact that Claimants never resorted to any of the available legal remedies*".[1948]

1048. For all of these reasons, the Respondent argues that it did not violate ECT Article 13, did not act unlawfully, and that no compensation needs to be paid. Acknowledging

[1944] Resp. Reply PHB, para. 66.
[1945] Resp. Reply PHB, para. 67. *See also* Resp. Rej., para. 694.
[1946] Resp. Reply PHB, para. 67. *See also* Resp. Rej, paras. 10, 238.
[1947] Resp. PHB, para. 117.
[1948] Resp. PHB, para. 117.

that there is a compensation regime under WindSeeG Sections 10a and 10b, the Respondent submits that this:[1949]

a. "*does not offer compensation for expropriation*";

b. was "*introduced to compensate for still usable documents and investigation results*", and according to the German Constitutional Court, "*by virtue of other legal provisions – enacted before the adoption of the Offshore Wind Energy Act – environmental investigations must be repeated after a certain period of time anyway*"; and

c. did not remove development cost risk because "*even without the* [WindSeeG]*, there had been a development risk for any developer that investigations would have to be repeated and previous costs would have been futile*", which "*limited usability of the documents set the stage* [*sic*]" for the limited compensation provisions.

(3) Tribunal's Reasoning and Analysis

1049. The second and final substantive claim is made pursuant to ECT Article 13. Article 13 provides in relevant part:[1950]

> (1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:
>
> (a) for a purpose which is in the public interest;
>
> (b) not discriminatory;
>
> (c) carried out under due process of law; and
>
> (d) accompanied by the payment of prompt, adequate and effective compensation.

[1949] Resp. PHB, para. 118. **RL-0017 / C-0021**, BVerfG June 2020 Decision, para. 173.

[1950] **CL-0001 / RL-0084**, ECT, Art. 13(1)-(2).

> Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").
>
> Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.
>
> (2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).

1050. The legal basis for expropriation is not in dispute in these proceedings. ECT Article 13 requires that:

a. an asset;

b. was "*nationalised, expropriated or subjected to a measure or measures having equivalent to nationalisation or expropriation*"; and

c. for a purpose that was not for public interest; and/or

d. in a manner that was discriminatory, not carried out under due process of law; and/or

e. not accompanied by the payment of prompt, adequate and effective compensation, amounting to the "*fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment*".

1051. Based on the discussion above, the only asset that the Tribunal has identified as capable of investment protection pursuant to the ECT is the shares. The Tribunal has found above that this asset was neither subject to a breach of the fair and equitable treatment standard nor impaired in breach of ECT Article 10.

1052. The remaining question is whether or not the Claimants' investment in relation to the Project areas was taken (i.e., nationalised, expropriated or subjected to measures having that effect), either directly or based on as series of steps amount to indirect (or so-called 'creeping') expropriation.

1053. Based on the facts in the current arbitration, the Tribunal does not accept that any of the events prior to the 2017 WindSeeG had no adverse effect on the Claimants' investment. The value of the investment in the Project entities and shares in the same diminished as a result of the 2017 WindSeeG and the potential increase in value upon completion of development was eliminated entirely.

1054. To the extent that the Project areas were within the German offshore wind development regime, subject to being non-designated by the 2002 Offshore Wind Strategy and excluded from each draft and final Spatial Planning Ordinance dealing with offshore wind development thereafter, the Claimants were permitted to proceed through the permitting procedure to and beyond the Stakeholder Conference with their Consent Applications in respect of those Project areas.

1055. For all the reasons set out above in relation to the finding of no breach of ECT Article 10, the Tribunal reiterates its finding that the fact that the Claimants were permitted to proceed through the permitting process does not confer any additional asset on the Claimants for the purpose of the ECT. As the legal and regulatory regime evolved from 2008, including with the 2012 SeeAnlV, the benefits of the Consent Applications' procedural position subsisted.

1056. Therefore, Tribunal finds that there was no indirect (or 'creeping') expropriation, even using the standard relied on by the Claimants based on the reasoning in the award in *Siemens v. Argentina*, in respect of its protected investment asset in the form of shares prior to 2017.

1057. The 2017 WindSeeG, on the other hand, abolished the regime that provided and protected that Claimants' procedural position in relation to the Consent Applications and did not extend any grandfathering provisions for the Project areas. Without any

grandfathering benefit, as afforded to developers in areas closer to the shore, the Claimants therefore simply lost their procedural position outright. Whilst they did not lose their shares, or indeed their intellectual property used to enhance the Consent Applications, they did lose the value of those shares that was afforded by the existence of the regulatory framework permitting the Consent Applications to proceed in relation to the Project areas.

1058. There is no real evidence to suggest that the Respondent's decision was based on anything other than geography (distance from shore and depth), technical bases and/or cost. The areas closest to shore and existing connection infrastructure were favoured from the time of the 2002 Offshore Wind Strategy and the Claimants were always aware of that fact. The geographical/technical and economic grounds appear to be at least in the public interest, non-discriminatory and carried out under due process of law.

1059. Arguably, the Tribunal should proceed to consider the question of payment of prompt, adequate and effective compensation for the loss of value of the investment (i.e., the shares) based on the loss of the Consent Applications' procedural position. However, that is not the basis upon which the Claimants have put their case. Instead, they argue that "*the procedural positions taken as a result of* [Mainstream's] *development of the Projects from their inception are investments*", and as such those were what has been expropriated and that is the taking that requires compensation.

1060. As explained by the Tribunal above in relation to jurisdiction *ratione materiae*, whilst it accepts that the shares are indeed a qualifying investment, the procedural position arising out of the Consent Applications is not. Therefore, there can be no 'taking' of that procedural position.

1061. In any event, the German Federal Court granted compensation to the Claimants for the value of reports and other materials that were prepared for the Projects areas, to the extent these could be utilised by the Government or a developer going forward.

1062. The Claimants put their case first and foremost on the basis of breach of fair and equitable treatment and their indirect expropriation claim was secondary. The Tribunal does not accept that the Claimants discharged the necessary legal standard to establish expropriation. Accordingly, for the purpose of ECT Article 13, the Tribunal finds there to be no expropriation.

VI. COSTS

1063. The Tribunal sets out below a brief summary of the Parties' costs positions and its decision on costs in the arbitration.

A. THE CLAIMANTS' POSITION

1064. The Claimants seek reimbursement of all recoverable fees and expenses in connection with the arbitration, including the costs of its legal representation and assistance (including expert evidence), the fees and costs of the Tribunal and ICSID, and the costs associated with the Hearing, in the total sums of **EUR 7,345,871.05, USD 674,960.00**, and **GBP 42,071.47**.[1951]

1065. The Claimants' costs include costs that incurred in proceedings before the Berlin Higher Regional Court where Germany applied for an anti-arbitration injunction (the "**Berlin Court Proceedings**"), and subsequent proceedings before the German Federal Court of Justice ("**BGH Proceedings**") and German Federal Constitutional Court ("**BVerfG Proceedings**").[1952]

1066. The Claimants submit, in relation to the costs in various fora arising out of the Respondent's pursuit of its intra-EU objection, that "[l]*eft unrestrained, Germany's conduct risks signalling to the other Contracting States of the ICSID Convention that the autonomous and delocalised nature of ICSID arbitration may be freely disposed of by Contracting States' domestic courts*", which "*undermines some of the*

[1951] Cl. Update on Costs, Appendix, p. 2.

[1952] On 27 July 2023, the BGH found that Article 26 of the ECT does not provide a basis for a valid arbitration agreement in the Arbitration, and that the BGH's decision is "*binding on all Parties to the Arbitration*". On 1 September 2023, Mainstream submitted a constitutional complaint to the BVerfG in the BVerfG Proceedings regarding the BGH's decision, which was registered on 11 September 2023: *see* Cl. PHB, para. 67.

cornerstone principles of the ICSID Convention, including the principles of consent, kompetenz-kompetenz *and the exclusivity of ICSID arbitration*". Accordingly, they submit that they should receive those costs "[r]*egardless of the Tribunal's other decisions on costs*".[1953]

1067. The Claimants further submit that:

a. the Tribunal should award their costs based on its broad discretion in ICSID Convention Article 61(2) and ICSID Arbitration Rule 28(1)(b);[1954]

b. the Respondent's conduct has "*given rise to the present dispute*", forcing the Claimants "*to incur costs in order to enforce* [their] *rights against Germany*", and "[t]*he principle of full reparation requires that* [they] *be made whole or the costs of the arbitration proceedings and its fees and costs, including the costs of legal representation*";[1955]

c. tribunals "*have recognised that a 'costs follow the event' approach is the most consistent with the principle of full reparation*" and "*apportioned costs on this basis*", noting their discretion "*where the respondent State has failed with any objections to jurisdiction*";[1956]

d. the Tribunal should "*exercise its discretion and order that Germany bears all legal fees and costs incurred by* [it]", and is entitled to take the Parties' conduct into account, allocating costs "*where a party's conduct has resulted in an 'unnecessary escalation of the costs of the proceedings'*";[1957]

[1953] Cl. Costs Submission, paras. 4-5.

[1954] Cl. Costs Submission, para. 6, referring to **CL-0129**, *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8, Order of the Tribunal Discontinuing the Proceedings, 14 December 2015, para. 23; **CL-0130**, *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017, para. 712.

[1955] Cl. Costs Submission, para. 7.

[1956] Cl. Costs Submission, para. 8, citing, *inter alia*, **CL-0131**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 ("***Karkey v. Pakistan***"), para. 1060; **CL-0176**, *Bear Creek v. Peru*, para. 730; **RL-0025 / RL-0167**, *ESPF v. Italy*, para. 945; **RL-0212**, *Lion v. Mexico*, para. 902; **RL-0020 / CL-0091**, *Greentech v. Italy*, para. 591; **CL-0211**, *Silver Ridge v. Italy*, para. 635.

[1957] Cl. Costs Submission, para. 10, citing **CL-0109**, *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICISD Case No. ARB/10/15, Award, 28 July 2015, para. 1008.

e. the Respondent's "*unreasonable conduct throughout the Arbitration sought to delay the proceedings and substantially increased the costs incurred*", including "*repeated filing of meritless applications which were routinely rejected*", "*delay in submitting, and the extensive nature of its document production request*" and "*untimely and unreasonable introduction of new witness evidence*";[1958]

f. the intra-EU Objection was "*repeatedly raised*" in multiple applications that were "*all rejected by the Tribunal*", which extended the arbitration and increased the Claimants' costs, and the Respondent continued to pursue applications before the Tribunal and courts;[1959]

g. as acknowledged by the Tribunal in PO8: "[i]*nsofar as the cost associated with the German Court Proceedings causes additional loss to the Claimants, they may be able to identify a legal basis to seek to recover those in these proceedings*";[1960]

h. on 26 January 2023, the Berlin Court issued a costs award in the Claimants' favour, but on 14 December 2023, they received a cost assessment order in connection with the BGH Proceedings, ordering them to pay the Respondent's "*costs in the sum of EUR 612,319.14 plus interest at a rate of base rate plus 5%*" and to "*repay to Germany the amount which* [the Claimants] *received from Germany following the original Berlin Court Decision*" (in which the Claimants had succeeded);[1961]

[1958] Cl. Costs Submission, para. 11.

[1959] Cl. Costs Submission, paras. 12-19.

[1960] Cl. Costs Submission, para. 21, quoting PO8, para. 72.

[1961] Cl. Costs Submission, para. 22; **C-0361**, *Federal Republic of Germany v. Mainstream Renewable Power Limited and others*, Court of Appeal, Case No. 12 SchH 6/21, Cost Assessment Order, 14 December 2023. The Claimants add, "*On 7 March 2023,* [the Claimants] *had received EUR 294,686.09 as a costs payment from Germany, made up of approximately EUR 283,000 for* [the Claimants'] *costs, translation costs of approximately EUR 2,500 and interest*": Cl. Costs Submission, fn.29.

i. on 20 December 2023, the Claimants transferred EUR 924,986.47 (plus EUR 19 to cover any bank charges);[1962]

j. on 8 January 2024, the Berlin Court ordered the Claimants to pay EUR 8,690.56 plus interest at base rate plus 5% from 11 August 2023 onwards (for travel and translations costs), which the Claimants paid on 15 January 2024;[1963]

k. the Berlin Court Proceedings and BGH Proceedings were advanced "*to restrain this Arbitration*", and the Claimants "*necessarily had to bring the BVerfG Proceedings to protect* [their] *rights*", which pursuant to ICSID Convention Article 61(2) are "*in connection with the proceedings*" and is "*a question of full reparation*";[1964]

l. the Tribunal noted in PO8 that:[1965]

> In this regard, the clear tenor of the Respondent's submissions objecting to the provisional measures Application is that the outcome of the Appeal will merely replicate the outcome in the CJEU and other EU member state court decisions and therefore not change the existing status quo. That position does rather beg the question why the German Court Proceedings were commenced, and in particular why they were commenced at a time when this Tribunal was in the process of being constituted. However, that is a matter for costs in due course, as opposed to a basis for provisional measures in this case.

m. the Claimants "*incurred further costs when the European Commission sought leave to intervene as a non-disputing party*", as supported by the Respondent;[1966]

n. the Respondent delayed in submitting its document production, following its (unsuccessful) 6 September 2022 request to postpone, submitting an "*unreasonable request for document production on 7 October 2022, which*

[1962] Cl. Costs Submission, para. 23.

[1963] Cl. Costs Submission, para. 24; **C-0362**, *Federal Republic of Germany v. Mainstream Renewable Power Limited and others*, Court of Appeal, Case No. 12 SchH 6/21, Cost Assessment Order, 8 January 2024.

[1964] Cl. Costs Submission, para. 25.

[1965] Cl. Costs Submission, para. 25, quoting PO8, para. 74.

[1966] Cl. Costs Submission, paras. 26-27.

"further delayed the proceedings and caused Mainstream to incur avoidable costs", making "*an excessive number of requests (nearly 100) in contrast to the Claimants' 23*";[1967]

o. the Respondent's approach was "*neither efficient nor economical, and it unduly burdened*" the Claimants, with the "*vast majority of its requests*" being "*broad, speculative, and non-specific, which ignored the evidential record and the questions which the Tribunal is required to consider in this Arbitration*";[1968]

p. the Respondent's Rejoinder introduced new witnesses of fact (Dr. Guido Wustlich, Mr. Thorsten Falk and Dr. Dirk Wendel) effectively as experts having no "*personal involvement in the facts*";[1969] and

q. the Claimants' costs "*should be borne entirely by Germany on account of its conduct that gave rise to this Arbitration and its conduct during the course of the proceedings*", particularly "*given the additional costs*" they incurred "*due to Germany's repeated bringing of meritless applications, its vague and extensive document production request, and its untimely introduction of* [new witnesses]".[1970]

1068. The Claimants further submit that if the Respondent is not ordered to pay all of their costs, it "*should at least be ordered to pay parts of* [the Claimants'] *costs in this Arbitration*".[1971]

1069. The Claimants' schedule of costs is as follows:[1972]

[1967] Cl. Costs Submission, para. 28.
[1968] Cl. Costs Submission, para. 29.
[1969] Cl. Costs Submission, para. 30.
[1970] Cl. Costs Submission, para. 33.
[1971] Cl. Costs Submission, para. 34.
[1972] Cl. Update on Costs, Appendix.

Cost item	Amount (EUR)	Amount (USD)	Amount (GBP)
ICSID lodging fee and Advance(s) on Costs	-	674,960	-
Legal fees (ICSID Arbitration)	3,861,044.75	-	-
Legal fees (Berlin Court Proceedings/BGH Proceedings/BVerfG Proceedings)	472,145.80	-	-
Costs awarded to Germany following the BGH Proceedings	639,325.30[44]	-	-
German court costs	362,163	-	-
BGH attorney fees (BGH Proceedings)	534,731.70	-	-
BVerfG attorney fees (BVerfG Proceedings)	100,000	-	-
Witness fees	114,339	-	-
Witness expenses	1,247.80	-	-
Brattle fees	764,467.37	-	-
Professor Hofmann fees	95,000	-	-
Schampers/Hellmund fees	61,164	-	-
Opus2 hosting	-	-	10,572.75
Notary fees	116.50	-	-

Cost item	Amount (EUR)	Amount (USD)	Amount (GBP)
Translation fees (ICSID Arbitration)	51,537.33	-	1,710
Translation fees (Berlin Court Proceedings/BGH Proceedings/BVerfG Proceedings)	1,886.91	-	-
Witness, expert, and Mainstream travel (including for Hearing)[26]	14,800.14[27]	-	9,515.99
Hogan Lovells travel (ICSID Arbitration)	5,887.73[28]	-	-
Hogan Lovells travel (BGH Proceedings)	546.68[29]	-	-
IT costs	63,314.86	-	-
Mainstream additional expenses	795.68	-	20,272.73[30]
Total	**7,345,871.05**	**674,960.00**	**42,071.47**

1070. In response to the Respondent's Costs Submission, the Claimants submit that:

a. "*tribunals should take into account the reasonableness of the costs claimed, in particular in relation to the size, complexity and significance of the case, but also in relation to the costs claimed by the other party*";[1973]

b. ICSID Arbitration Rule 28(2) "*makes specific reference to statements of costs detailing the 'costs reasonably incurred' by a party*";[1974]

c. there is a discrepancy between the Respondent's costs in the arbitration and in the in the German court proceedings where, on 9 February 2024, State Secretary Dr. Philipp Nimmermann set out the costs incurred by Germany in "*current* […] *arbitration proceedings against the Federal Government*" as follows (which "*does not match the schedule of costs that Germany has put before this Tribunal*"):[1975]

> In connection with the arbitration proceedings ARB/21/26 (Mainstream due to offshore wind energy), which have been ongoing since 13 May 2021, the Federal Republic of Germany has incurred legal defence costs of EUR 8,794,263.28 to date.
>
> The costs are broken down by type of expenditure as follows:

Legal costs:	586,039.68 euros
Legal fees:	4,363,402.54 euros
Costs for Forensic Accountant:	2,096,616.40 euros
Costs for expert appraisers:	648,423.15 euros
Legal representatives before national courts:	456,220.06 euros
Personnel costs:	309,167.95 euros
Travel expenses of the authorities:	29,136.44 Euro
Translations:	10,570.97 Euro
Other (national court proceedings Court of Appeal):	294 686.09 euros
Total:	**8,794,263.28 euros**

[1973] Cl. Reply Costs Submission, para. 3, referring to **CL-0369**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, para. 738(iv); **CL-0370**, *Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U., and Kimberly-Clark BVBA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/18/3, Award, 5 November 2021, para. 250; **CL-0371**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex)*, ICSID Case No. ARB/10/18, Award, 24 September 2021, para. 343; **CL-0372**, *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award, 14 December 2017, para. 514.

[1974] Cl. Reply Costs Submission, para. 3.

[1975] Cl. Reply Costs Submission, paras. 4-5; **C-0408**, Bundestag Document 20/10292, 9 February 2024.

d. the Respondent's legal fees are EUR 277,918.09 higher than those of the Claimants, despite:[1976]

   i. the Claimants having the burden of proof; and

   ii. the Respondent engaging the same counsel in *Strabag SE and others v. Germany* (ICSID Case No. ARB/19/29), where it incurred legal fees of EUR 6,912,150.01, in proceedings relating "*to the same measures taken by Germany*";

e. the Respondent's "*fees and costs for Alvarez & Marsal and Secretariat combined (presumably, therefore, both Mr Slark and Mr Demuth) total over EUR 2 million*", almost three times of those incurred by the Brattle Group;[1977]

f. the Respondent's fees for its legal experts were EUR 150,539.56, nearly 60% higher than Prof. Hofmann's fees;[1978]

g. the Respondent's schedule of costs set out fees for Umlaut of EUR 485,773.77 for one report by Mr. Schampers and Mr. Hellmund, for eight times the cost of two reports from Mr. Neupert and Mr. Stöver;[1979] and

h. the Respondent's in-house costs "*related to the staff of the German Government who were responsible for the Arbitration of EUR 309,167.*96", which are "*unreasonable: no basis has been provided for their inclusion or how they were calculated*".[1980]

B. THE RESPONDENT'S POSITION

1071. The Respondent requests that the Tribunal order the Claimants to bear their own costs and to reimburse the Respondent for its costs in their entirety, plus interest from the

[1976] Cl. Reply Costs Submission, para. 6.
[1977] Cl. Reply Costs Submission, para. 7.
[1978] Cl. Reply Costs Submission, para. 8.
[1979] Cl. Reply Costs Submission, para. 9.
[1980] Cl. Reply Costs Submission, para. 10.

date at which such costs were incurred until the date of payment. It submits that it was entitled to recover its costs pursuant to ICSID Convention Article 61(2), in line with the "*costs follow the event*" principle. The Respondent incurred costs in the total amount of **EUR 8,075,940.18**.[1981]

1072. It further submits that if it does "*not prevail entirely*", the Tribunal should consider the Claimants' conduct in these proceedings.[1982]

1073. The Respondent reiterates its submission that[1983]

> [t]he Tribunal lacks jurisdiction *ratione voluntatis* because Art. 26 ECT does not contain a valid arbitration offer for intra-EU investor-State disputes. Pursuant to the established jurisprudence of the CJEU, it is clearly and unequivocally clarified with *erga omnes* and *ex tunc* effect that a resolution of intra-EU investor-State disputes via arbitration is not in accordance with EU law and thus inadmissible. The Tribunal also lacks jurisdiction *ratione materiae* because Claimants' business activities do not qualify as investment pursuant to Art. 1 (6) ECT or Art. 25 (1) ICSID Convention.

1074. The Respondent proceeds to submit that the claims "*must be dismissed because they are based on incorrect factual and legal assumptions*":[1984]

a. the Respondent "*took the necessary steps to further develop the regulatory framework for an extremely premature energy sector while protecting any legitimate expectations of the market participants*";

b. "[f]*rom the very beginning of their activities, Claimants were informed both directly and indirectly about impending regulatory changes as well as the practical difficulties of developing an OWF in Respondent's EEZ*";

c. "[d]*espite the information available, Claimants voluntarily engaged in high-risk business endeavors, ignoring the technological and regulatory risks as well as the well-known practical and legal difficulties present at the time*";

[1981] Resp. Update on Costs, para. 12.

[1982] Resp. Costs Submission, para. 4.

[1983] Resp. Costs Submission, para. 6.

[1984] Resp. Costs Submission, paras. 7-9.

d. the Claimants provide an "*inaccurate description of the approval procedure for OWFs to support their allegation of legitimate expectations*" (as per the testimony of Dr. Nico Nolte and Ms. Martina Nemitz, both from the BSH, and Dr. Ursula Prall, the Claimants' legal counsel), as they "*never reached a position in the Approval process that warranted specific protection*";

e. the Respondent accorded "*fair and equitable treatment, did neither directly nor indirectly expropriate Claimants, granted constant protection and security and refrained from impairment by unreasonable or discriminatory measures*";

f. the Respondent "*did not provide any legally binding assurances regarding Claimants' business activities*";

g. "[n]*one of the alleged measures taken on behalf of Respondent or statements made by public authorities fulfilled either the constitutional or legal requirements for such assurance*";

h. there is "*no causal link for the damages claimed*", which are "*unjustified and highly overblown*" and their "*damages calculation suffers from numerous flawed evaluation standards, a plethora of technical errors and a lack of evidence for key assumption*s"; and

i. as the Tribunal "*lacks jurisdiction and Claimants' claims have no merits, Claimants' claims should be dismissed in their entirety*" and Claimants should bear Respondent's costs "*as well as all fees and expenses of the members of the Tribunal and the charges for the use of the facilities of ICSID in line with the 'costs follow the event' principle and reimburse Respondent for all costs and expenses that Respondent incurred*".

1075. According to Respondent, even if it does "*not prevail entirely*", the Tribunal should consider party procedural conduct in costs, and regarding the Claimants' conduct:[1985]

a. "*Claimants' behavior throughout this arbitration warrants ordering Claimants to bear the cost burden irrespective of the outcome of the arbitration*";

b. "[i]*t would in any event be neither reasonable nor appropriate to order Respondent to bear Claimants' costs since Respondent is a sovereign State acting in good faith*";

c. ICSID Convention Article 61(2) provides that the tribunal shall "*assess the expenses incurred by the parties in connection with the proceedings*" and "*decide how and by whom those expenses […] shall be paid*", but the ICSID Convention and Rules "*do not determine any specific factors to be considered by tribunals for the decision on costs*";

d. "[i]*t is well established by international arbitral practice that ICSID tribunals have wide discretion in determining the allocation of costs of the arbitration*";[1986]

e. prior awards have "*overwhelmingly expressed the view that the parties' conduct and behavior during the proceedings and the circumstances of the individual case should be taken into account in the allocation of costs*";[1987]

f. "[t]*here is no basis for burdening Respondent's taxpayers with the costs of this arbitration, neither Claimants' costs for bringing and maintaining their unjustified claims, nor the costs incurred by Respondent to prevent Claimants' unjustified claims being awarded*";[1988]

[1985] Resp. Costs Submission, paras. 10-11.

[1986] Resp. Costs Submission, para. 11, referring to **RL-0025 / RL-0167**, *ESPF v. Italy*, para. 943; **RL-0164**, *RWE v. Spain*, para. 140.

[1987] Resp. Costs Submission, para. 12, referring **RL-0025 / RL-0167**, *ESPF v. Italy*, para. 943; **RL-0304**, *Muhammet Çap and Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021, para. 989.

[1988] Resp. Costs Submission, para. 13.

g. the Claimants "*bear the cost burden as result of their procedural conduct*", which "*increased the costs of the arbitration in an unreasonable and unnecessary manner*", as reflected in their "*refusal to consider the jurisdictional concerns in relation to intra-EU investor-State arbitration*", their "*failure to meet the burden of proof*" and their "*belated submission of certain documents*";[1989]

h. as to the jurisdictional objections, "[p]*ursuant to the jurisprudence of the CJEU, it is clearly and unequivocally clarified that a resolution of intra-EU investor-State disputes via arbitration is not in line with EU law*", making it "*unreasonable not to accept Respondent's jurisdictional objection*";[1990]

i. by failing to accept bifurcation, the Claimants "*have unnecessarily complicated and prolonged this arbitration*";[1991]

j. as to the burden of proof, the Claimants bear the burden of proof and "*ignored this established principle and failed to meet this burden throughout the proceedings*";[1992] and

k. as to belated introduction of documents, the Claimants "*increased the costs by submitting new factual exhibits and new arguments into this arbitration outside of the regular filing schedule*", and the "*inefficiency and impropriety of this conduct is evident*" and "*readily illustrates Claimants' uneconomical approach to filing deadlines and their disregard for procedural efficiency which again increased the costs of the arbitration and Respondent's defense in particular*".[1993]

[1989] Resp. Costs Submission, para. 14.

[1990] Resp. Costs Submission, paras. 15-16.

[1991] Resp. Costs Submission, para. 17.

[1992] Resp. Costs Submission, para. 18.

[1993] Resp. Costs Submission, paras. 19-21.

1076. In addition, the Respondent submits that it is "a *sovereign State acting in good faith and the public interest*", and the motives and intentions of the Parties are relevant to reasonableness of costs, as noted in prior awards.[1994] It notes further that:[1995]

> When shaping the regulatory framework for its offshore wind energy sector, Respondent acts and acted in the public interest. The legislative changes subject to this arbitration were made in good faith to achieve a gradual amendment of the regulatory framework towards a coordinated and efficient future offshore expansion, as it became apparent that the pre-2012, developer-led procedure was leading to de- lays and dysfunction. Respondent took the necessary steps to further develop the regulatory framework for an extremely premature energy sector while also protecting the legitimate expectations of market participants. Respondent exercised its right to regulate in a transparent manner and made careful use of its prerogative to choose the appropriate means of action, after balancing the different competing interests against one another. Respondent also created a fair compensation regime for any OWF developers negatively impacted by these changes.

1077. On those bases, the Respondent submits that even if it were found to have breached the ECT, "*it would not be appropriate to order Respondent to bear Claimants' costs*" and "*[n]or would it be appropriate to order Respondent to bear its own costs*".[1996]

1078. As to the amount of those costs, the Respondent submits that its "*costs and expenses were necessary and reasonable*", it "*conducted itself in this arbitration in an expeditious and cost-effective manner*", and this "*particularly is true regarding Respondent's in-house costs, i.e., the costs incurred by the staff of the different Federal Ministry of Economic Affairs and* [Energy] *directly in charge of the present arbitration*", which were "*necessary as the work of the inhouse staff was an essential part of the defense, also going beyond the regular work to be performed by the Federal Ministry of Economic Affairs and* [Energy]".[1997]

1079. In its Reply Costs Submission, the Respondent rejects the Claimants' assertion that it did not conduct this arbitration efficiently, argues that the Claimants seek to

[1994] Resp. Costs Submission, para. 22, referring to **RL-0379**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 621.

[1995] Resp. Costs Submission, para. 23.

[1996] Resp. Costs Submission, para. 24.

[1997] Resp. Costs Submission, para. 25.

recover costs outside the arbitration (and unspecified IT costs), and reiterates its requests for reimbursement of costs submitted with its Costs Submission.

1080. As to its conduct, the Respondent submits that:

a. it "*at all times conducted the arbitration efficiently and exercised its procedural rights in a reasonable manner*";[1998]

b. the exercise of "*procedural rights* per se *cannot constitute an abuse of rights and, thus, can never be 'unnecessary'*";[1999]

c. the Respondent's applications "*were justified and necessary given the clear position of the CJEU*",[2000] and further:

i. the Rule 41(5) Application "*was necessary to alert the Tribunal at the earliest possible stage of the lack of jurisdiction of the Tribunal*";[2001]

ii. "*all EU Member States are obliged to raise all available objections in intra-EU arbitration proceedings to give full effect to EU law*";

iii. "[t]*his includes the obligation to effectively challenge the jurisdiction of arbitral bodies which are based on invalid arbitration agreements, as confirmed by the CJEU in* [the PL Holdings Judgment]";[2002]

iv. "*to end this inadmissible arbitration as early as possible, Respondent also had to request bifurcation of the jurisdictional phase*", and "*associated costs are necessary as well as reasonable costs of the arbitration*";[2003] and

[1998] Resp. Reply Costs Submission, para. 3.
[1999] Resp. Reply Costs Submission, para. 4.
[2000] Resp. Reply Costs Submission, para. 4.
[2001] Resp. Reply Costs Submission, para. 5.
[2002] Resp. Reply Costs Submission, para. 5, referring to **RL-0014**, *PL Holdings* Judgment, para. 52.
[2003] Resp. Reply Costs Submission, para. 5.

v. the Claimants' allegation that the Respondent's having settled another intra-EU ICSID arbitration in March 2021 "*shows that Respondent does not consider itself bound by the prohibitions of EU law*" is "*false*" as the other claim "*was discontinued after an agreement had been concluded by Respondent and nuclear power plant operators in the Federal Republic of Germany*";[2004]

d. the Respondent "*conducted the document production in an efficient manner*", and Claimants "*unnecessarily increased the costs of the document production by their delayed production of documents*",[2005] as follows:

i. "*the number of document requests was not limited, and each Party was free to decide how to structure and number its requests, e.g., by using or not using sub-categories*";[2006]

ii. the Claimants "*also submitted many and very complex document requests*";[2007]

iii. the Claimants' 23 requests "*disguises the* […] *many sub-requests*" made by the Claimants which comprised an actual total of 35 requests;[2008]

iv. the Claimants' own "*inefficient conduct rendered the entire document production phase uneconomical*";[2009]

v. the Claimants "*disregarded the deadlines set by the Tribunal in the PO 4*" and "*unilaterally and without prior authorization by the Tribunal only submitted a significant number of documents on 10*

[2004] Resp. Reply Costs Submission, para. 6, referring to Cl. Costs Submission, para. 15.
[2005] Resp. Reply Costs Submission, para. 4.
[2006] Resp. Reply Costs Submission, para. 8.
[2007] Resp. Reply Costs Submission, para. 9.
[2008] Resp. Reply Costs Submission, para. 9.
[2009] Resp. Reply Costs Submission, para. 10.

February 2023, which resulted in additional work and the accrual of unnecessary costs for Respondent";[2010] and

vi. the Respondent "*had to make more personnel available to review the documents submitted by Claimants*" and "*had to instruct personnel to double-check whether the additional documents had been submitted for the first time or had already been submitted in January 2023*";[2011] and

e. the Respondent's introduction of new witnesses "*was timely and admissible and did not cause any prejudice to Claimants*",[2012] as follows:

i. the Witness Statements of Dr. Wustlich, Mr. Falk and Mr. Wendel with Respondent's Rejoinder were not "*untimely and unreasonable*", there being "*no rule in PO 1 or for that matter in international arbitration practice which would limit the Parties' right to file witness statements to the first round of written submissions*";[2013]

ii. the Respondent filed the new witness statements "*in accordance with the guidelines of PO 1*", as the Claimants did "*when they submitted new expert evidence together with their Reply, i.e. the Schampers/Hellmund Report*"; [2014]and

iii. there is no basis that these were "*in substance, expert reports*", as they were "*accounts of the respective witness' direct perceptions and impressions of the legal framework relevant for this arbitration*", and the three "*were personally involved in the development of the*

[2010] Resp. Reply Costs Submission, para. 10.
[2011] Resp. Reply Costs Submission, para. 10.
[2012] Resp. Reply Costs Submission, para. 4.
[2013] Resp. Reply Costs Submission, para. 11.
[2014] Resp. Reply Costs Submission, para. 12.

respective regulations, and thus related their personal experience".[2015]

1081. The Respondent further submits that the Claimants' costs in connection with the Berlin Court Proceedings are not reimbursable, because:

a. they "*do not pertain to the arbitral proceedings*" within ICSID Convention Article 61(2) and instead "*are costs related to proceedings separate and distinct from these proceedings here*";[2016]

b. the application and the ensuing Berlin Court Proceedings do not "*constitute a violation of the ICSID Convention*", "[a]*s there is no valid arbitration agreement, the pathway to the ICSID Convention was never opened and hence could not have been violated by Respondent*", so the "*integrity of the ICSID Convention was never affected by the German Court Proceedings*";[2017]

c. "*Sec. 1032 para. 3 German Code of Civil Procedure explicitly provides that the contested arbitration proceedings may continue irrespective of the German Court Proceedings*";[2018]

d. the Respondent "*does not dispute arbitration under the ICSID Convention* per se*, but only in intra-EU settings, where EU law is binding for both Parties to the dispute and thus prohibits arbitration without giving the CJEU an opportunity to ensure uniformity of interpretation*";[2019]

[2015] Resp. Reply Costs Submission, para. 13.
[2016] Resp. Reply Costs Submission, para. 15.
[2017] Resp. Reply Costs Submission, para. 16.
[2018] Resp. Reply Costs Submission, para. 16.
[2019] Resp. Reply Costs Submission, para. 16.

e. the Respondent is "*obliged to ensure effective compliance with EU law in the arbitration proceedings*", and has "*at all times complied with its obligations under the German Constitution, EU law and public international law*";[2020]

f. the Claimants "*chose to disrespect EU law*", filing this claim "*after the CJEU had long handed down its* Achmea *Decision*" and being "*fully aware that Art. 26 ECT would not provide them with a valid arbitration agreement*";[2021]

g. the Claimants' allegation "*that the German Court Proceedings constitute a 'breach of the Tribunal's exclusive authority under Art. 26 ICSID Convention' is therefore baseless*" and the Tribunal "*also never found such breach*";[2022]

h. the Respondent "*had every right to file an application under Sec. 1032 para. 2 German Code of Civil Procedure, as confirmed by the German Federal Court of* Justice", and those costs are "*unrelated to this arbitration and cannot be reimbursed*";[2023]

i. the German courts "*rendered a cost decision for the costs of the German court proceeding, in accordance with German law*" and tribunals "*cannot revisit cost decisions issued in other proceedings without infringing the 'sanctity of* res judicata'";[2024] and

j. the Claimants' alleged cost item for the "*BVerfG Proceedings*" in particular is not reimbursable as they are "*unsubstantiated and disproportionate*", given that the "*BVerfG Proceedings*" "*started less than six months ago, with the complaint being served on Respondent only in January 2024*".[2025]

[2020] Resp. Reply Costs Submission, para. 16.

[2021] Resp. Reply Costs Submission, para. 17.

[2022] Resp. Reply Costs Submission, para. 17.

[2023] Resp. Reply Costs Submission, para. 17.

[2024] Resp. Reply Costs Submission, para. 19, referring to **RL-0215**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, para. 206.

[2025] Resp. Reply Costs Submission, para. 20.

1082. As to the Claimants' unspecified "*IT costs*" of EUR 63,314.86, they "do *not provide any explanation what exactly those 'IT costs' are and why and to what extent they were 'incurred in connection with the proceedings'*".[2026] According to the Respondent, "[c]*ost items which are not directly connected with the proceedings but incurred in the ordinary course of business are not reimbursable*" and "*IT costs are incurred by any large company in the ordinary course of business and it is not readily apparent how they are directly connected with the conduct of this arbitration*".[2027]

1083. The Respondent's costs incurred until 16 February 2024 are listed as follows (and, according to the Respondent, "*reflect the complexity of an offshore wind energy sector dispute and are below the costs for an average ICSID arbitration*"):[2028]

	Subtotal	Total
Tribunal/ ICSID		
		586,039.68
Costs of legal representation		
Fees	4,138,962.84	
Travel expenses	27,000.82	
Further expenses	30,080.84	
		4,196,044.50
Costs of experts		
Umlaut		
Fees	485,773.77	
Travel expenses	4,837.49	
		490,611.26
Alvarez & Marsal		
Fees + expenses	1,246,696.84	
		1,246,696.84
Secretariat Advisors Germany GmbH		
Fees + expenses	844,991.96	
Travel expenses	15,845.85	
		860,837.81
Profs. Schomerus/Bäumler/Terhechte		
Fees	150,539.56	
Travel expenses	7,272.33	

[2026] Resp. Reply Costs Submission, para. 21, referring to Cl. Costs Submission, Appendix: Schedule of Costs, p. 2.

[2027] Resp. Reply Costs Submission, para. 22.

[2028] Resp. Costs Submission, para. 26 (in EUR).

	157,811.89
Costs of translation	9,510.68
Inhouse costs (Staff BMWK responsible for ARB/21/26)	309,167.96
Further expenses (Travel expenses civil servants)	28,716.74
Total	**7,885,437.36**

1084. In its Update on Costs, the Respondent summarizes its additional costs incurred between 16 February 2024 and 17 June 2025 as follows:[2029]

Respondent's Further Costs Incurred Since 16 February 2024 Until 17 June 2025	
Position	**Amount**
In-house costs (Federal Ministry for Economic Affairs and Energy from March 2024 to 17 June 2025)	EUR 72.241,81
Legal fees and expenses invoiced to Respondent (attorneys' fees)	EUR 118,261.01
Total	**EUR 190,502.82**

1085. The Respondent requests the Tribunal to:[2030]

a. order Claimants to bear their own costs, all costs and expenses; and

b. order the Claimants to reimburse the Respondent for all costs mentioned in its Costs Submission, i.e., in the sum of **EUR 8,075,940.18**, plus any further costs invoiced to the Respondent in this arbitration proceeding, including interest at a reasonable commercial rate from the date of the award to the date of payment.

[2029] Resp. Update on Costs, para. 11.

[2030] Resp. Update on Costs, para. 14.

C. TRIBUNAL'S REASONING AND ANALYSIS

1086. ICSID Convention Article 61(2) provides as follows:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

1087. The Tribunal has carefully considered the Parties' four rounds of costs submissions. They almost mirror one another in their respective criticisms of the other Party's alleged inefficient conduct in the proceedings.

1088. For its part, the Tribunal considers the conduct of the Parties' legal counsel in the proceedings to have been exemplary. The Tribunal makes no criticism of the Respondent in taking the steps required of it by EU law, despite the impact of those steps on the timing and cost of these investor-State arbitration proceedings. The intra-EU objection to jurisdiction in investor-State arbitration is a complex one, as demonstrated by the depth of discussion in this Award. Ultimately, this particular procedural issue will be resolved by the EU Member States' withdrawal from the intra-EU treaties, subject to the sunset provisions therein.

1089. Similarly, the Tribunal does not consider the timing of witnesses or the process of document production to be unusual or inappropriate for a claim of complexity and magnitude. It considers the pleadings, for the most part, to have been careful and concise, extremely well footnoted and prepared with skill and care.

1090. The Tribunal further accepts that, especially in the face of a claim in the size quantified in these proceedings, the Respondent was entirely justified in using every procedure available to it to defend the claim. That said, the costs incurred by each of the Parties reflects this thorough approach. Moreover, whilst the Claimants prevailed in the Award in each of the jurisdiction points taken against them, the Respondent successfully defended the substantive claims against it.

1091. On balance, the Tribunal exercises its discretion to order that costs in this arbitration lie where they fall. That is, each Party will be responsible for its own costs and its own share of the costs of ICSID. It does so on two primary bases. First, taking into account the relative success of the Parties, the Claimants – whilst ultimately unsuccessful in their claims – succeeded in defending each and every one of the jurisdictional challenges against them. As can be seen from the discussion above, much of the Parties' and Tribunal's time and effort was expended on those jurisdictional points, which were all determined in the Claimants' favour.

1092. Secondly, this dispute arose out of a change in the regulatory framework governing Germany's offshore wind energy in the interest of climate and environmental protection. The offshore wind regulatory regime change was dramatic and occurred only after the Claimants had invested in the scaling up of renewables in Germany. Whilst the Claimants did not ultimately succeed in their ECT investment protection claim, given the significance of climate change and the need for investment in renewables to mitigate its effects, the claims warranted careful consideration as a matter of international law.

1093. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Ms. Wendy Miles KC	528,688.64
Mr. Antolín Fernández Antuña, FCIArb	355,739.61
Dr. Charles Poncet, M.C.L.	187,155.86
ICSID's administrative fees	230,000.00
Direct expenses	228,980.49
Total	**1,530,564.60**

1094. The above costs have been paid out of the advances made by the Parties in equal parts. As a result, each Party's share of the costs of arbitration amounts to USD 765,282.30.[2031]

VII. DECISION

1095. On the basis of the above considerations, the Tribunal:

a. declares, by majority, that the dispute is within the jurisdiction and competence of ICSID and the Tribunal;

b. declares, by majority, that all of the Claimants have standing to bring these claims;

c. declares that the Respondent has not violated its international legal obligations pursuant to ECT Article 10(1);

d. declares that the Respondent has not violated its international legal obligations pursuant to ECT Article 13;

e. directs that each Party bear its own costs and fees, and that each Party bear half of all procedural costs, including the costs of the Tribunal and ICSID, evenly; and

f. all other claims, requests, and submissions are dismissed.

[2031] The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account. The outstanding balance will be reimbursed to the Parties in proportion to the advance payments that they have made to ICSID.

[signed]

Mr. Antolín Fernández Antuña
Arbitrator
(*subject to the attached Concurring and Dissenting Opinion*)

Date: 19 MAY 2026

Dr. Charles Poncet
Arbitrator

Date:

Ms. Wendy Miles KC
President of the Tribunal

Date:

[signed]

Mr. Antolín Fernández Antuña
Arbitrator
(*subject to the attached Concurring and Dissenting Opinion*)

Date:

Dr. Charles Poncet
Arbitrator

Date: 13 MAY 2026

Ms. Wendy Miles KC
President of the Tribunal

Date:

Mr. Antolín Fernández Antuña
Arbitrator
(*subject to the attached Concurring and Dissenting Opinion*)

Date:

Dr. Charles Poncet
Arbitrator

Date:

[signed]

Ms. Wendy Miles KC
President of the Tribunal

Date: 13 MAY 2026

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mainstream Renewable Power Ltd and others

v.

Federal Republic of Germany

(ICSID Case No. ARB/21/26)

CONCURRING AND DISSENTING OPINION

Antolín Fernández Antuña, FCIArb

Arbitrator

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I. INTRODUCTION AND SUMMARY

1. I hereby express my concurring and dissenting Opinion with respect to the Award rendered in the present investor-State arbitration, a matter of considerable complexity in which a number of fundamental issues in international investment law have been addressed. I further express my appreciation to my fellow members of the Tribunal for the rigorous and insightful deliberations that have accompanied the resolution of this case.

2. I agree with my esteemed colleagues as to the final outcome of the merits part of the Award. The purpose of the German Offshore Wind Energy Act of 2017 ("*WindSeeG*")[1] was to expand the use of wind energy in the interest of climate and environmental protection through more effective provisions, the State lawfully exercised its legitimate regulatory powers in the public interest, and the disputed measures did not breach any investment protection standard established under the Energy Charter Treaty ("ECT").[2] Accordingly, no liability on the part of the Respondent arises.

3. However, I do not join the majority in declaring jurisdiction and competence. For the reasons stated below, I respectfully dissent as to one important *ratione voluntatis* objection: I find that there is no consent to intra-European Union ("EU") investor-State arbitration under the ECT (Part II of this Opinion) and that, consequently, there is no jurisdiction or competence in the present case.[3]

- ***Jurisdiction Ratione Voluntatis: Intra-EU Lack of Consent***

4. In investment arbitration, under public international law, jurisdiction is exceptional and the default position is the lack of it; thus, consent should not be presumed or interpreted

[1] *Gesetz zur Entwicklung und Förderung der Windenergie auf See*.

[2] CL-1, Energy Charter Treaty, signed on 17 December 1994 and entered into force on 16 April 1998.

[3] With respect to the protected investment (jurisdiction *ratione materiae*), for the sake of clarity, it is my view that there is an inherent and objective notion of investment that encompasses certain criteria (e.g. contribution, duration, and risk), which the shares in the companies satisfy in the circumstances of the present case, as demonstrated by the facts in the evidentiary record. Considering the foregoing, and that the Award recognizes only the shares as a protected investment (Award, ¶ 716: "*In sum, the only investment asset is the shares in the Fourth, Fifth and Sixth Claimants*"), there is no need to elaborate further on this point.

broadly in the absence of a specific justification.[4] International adjudicatory jurisdiction depends on the validity and scope of such consent, which must be construed through proper interpretation in light of the treaty's context, object and purpose, and not in a vacuum.

5. In my opinion, consent should not be assumed from a reading that takes the words "*of another Contracting Party*" in Article 26(1) ECT[5] in isolation from the rest of the Treaty thereby creating an unnecessary conflict between the ECT and the EU Treaties[6] requiring resolution. Instead, a systemic interpretation of consent in accordance with the rules set out in the 1969 Vienna Convention on the Law of Treaties should prevail.[7]

6. This systemic interpretation of consent is firmly grounded in the text of the Treaty itself. Indeed, there is no dispute that the ECT expressly: (i) acknowledges the transfer of competences from the Member States to the EU and the binding nature of the supranational EU legal order (Article 1(3) ECT); (ii) provides that the Treaty is to apply differently to relations *inter se* between EU Member States, in light of their legal and economic integration (Article 25 ECT); and (iii) defines its object and purpose by explicit reference to the *European* Energy Charter (Article 2 ECT), an instrument which the drafters expressly conceived as "*[a]ware of the obligations under major relevant multilateral agreements*" and as requiring implementation "*in conformity with the relevant international laws*", as the Charter itself provides.

7. Under Article 31 VCLT, interpretation is a single integrated operation conducted "*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*", while also taking into account "*any relevant rules of international law applicable in the relations between the parties*".[8]

[4] *See* Sections II.(i)–(ii) of this Opinion.

[5] Article 26 ECT ("*Settlement of Disputes between an Investor and a Contracting Party*") reads as follows: "*(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former […].*"

[6] Primarily, the Treaty on European Union ("TEU") and the Treaty on the Functioning of the European Union ("TFEU").

[7] *See* Section II.(viii) of this Opinion.

[8] *See* Section II.(ii) of this Opinion.

There is no hierarchy among these elements. The "*ordinary meaning*" of words does not exist independently of context, object, purpose, and the systemic integration. Accordingly, Article 26 cannot be read as a clause divorced from the ECT's definitional provisions, structure, and the international legal environment expressly anticipated by the ECT in its Articles 1(3) and 26(6).

8. Turning to those definitional provisions, the ECT does not define "*Contracting Party*" as States alone; it expressly includes an "REIO" (Regional Economic Integration Organisation, Article 1(2)) and then defines an REIO as an organisation constituted by States to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them (Article 1(3)). This is more than descriptive: it is a binding interpretative instruction applicable throughout the Treaty and must be given *effet utile*, consistent with good faith and effectiveness. The deliberate reference to binding decision-making authority signals that the Treaty recognises a category of Contracting Parties whose Member States are already governed, *inter se*, by a distinct and binding supranational legal order in the very fields addressed by the ECT. Once that definitional reality is integrated into Article 26, the expression "*of another Contracting Party*" can coherently be understood, in the intra-REIO setting, as referring to a Contracting Party outside the same integrated legal order, i.e., an extra-EU Contracting Party. This interpretation introduces no additional terms in the text. Rather, it delineates the semantic scope of "*another Contracting Party*" by reference to the Treaty's own definitional framework.

9. This structural logic is reinforced by Article 25 ECT, which provides that the Treaty shall not be construed to extend the preferential treatment enjoyed within the EU. Therefore, Article 26 must be interpreted consistently with that differentiated structure rather than as if all Contracting Parties stood in the same legal relationship to each other. The ECT does not operate on the assumption of uniform legal relations across all Contracting Parties in all respects. On the contrary: Article 25 confirms that, under the Treaty itself, internal intra-EU relations are fundamentally distinct from external extra-EU relations.

10. Systemic integration then supplies a further step. Article 31(3)(c) VCLT requires that, together with context, interpreters take into account "*any relevant rules of international law applicable in the relations between the parties*". In an intra-EU dispute, EU law is precisely such a body of binding *inter se* rules, and the ECT itself acknowledges the existence of binding REIO rules through Article 1(3). An interpretation of Article 26 that includes intra-EU disputes would place the Member States under treaty-based obligations incompatible with the allocation of authority and binding judicial structure of the EU legal order, notwithstanding that the ECT anticipated such a system. A harmonious alternative interpretation is available, where intra-REIO/EU disputes fall outside the scope of the "*another Contracting Party*" formulation, when properly interpreted through the Treaty's definitional and contextual lens.

11. This systemic approach is internal to the ECT, not an external override, because Article 26 ECT, the very provision governing dispute settlement, mandates that the Tribunal "*shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*" (Article 26(6) ECT). It further confirms that the ECT's dispute settlement mechanism operates within the wider international legal system and cannot be construed to mandate outcomes that force States into breach of applicable *inter se* obligations.

12. Despite the above, the majority of the Tribunal (as well as the majority of prior awards addressing this issue) have adopted an expansive and decontextualised interpretation of the term "*another*", and of consent, whilst adopting a restrictive interpretation of the reference to conformity with international law (or presumption against conflict).

13. Moreover, the broad interpretation presuming consent gives rise to the paradox that it is contrary even to the express interpretation adopted by the Contracting Parties concerned in the present dispute: Ireland as the home State of the investor, and Germany as the host State of the investment. While the ECT is indeed a multilateral treaty, the provision at issue, entitled "*Settlement of Disputes between an Investor and a Contracting Party*", applies exclusively to "*[d]isputes between a Contracting Party and an Investor of another Contracting Party*" (Article 26(1) ECT). Accordingly, Article 26 is premised on

bilateral legal relationships and only two Contracting Parties are concerned in such a dispute: the home State of the Investor; and the host State of the investment.

14. Further instruments (the 1997 Statement, forming part of the context under Article 31(2)(b) VCLT; the 2019 Declaration signed by EU Member States, including Germany and Ireland, constituting subsequent agreement and practice under Article 31(3)(a)–(b) VCLT) also confirm the systemic reading.[9]

15. In addition, EU law and CJEU jurisprudence evidence the binding *inter se* legal order recognised by Article 1(3) ECT and relevant under Article 31(3)(c) VCLT and Article 26(6) ECT. The cited line of cases[10] is used to show how the EU's autonomous legal order, its primacy, and its judicial system are aimed at uniform interpretation, the rule of law, and equality before the law.

16. This connects to the ECT's object and purpose under Article 2, which frames the Treaty as promoting long-term cooperation in the energy field in accordance with the objectives and principles of the 1991 *European* Energy Charter. The ECT is a European project intended to complement and extend cooperation rather than to regulate or disrupt the internal legal relations of an existing supranational order and the internal energy market that the Treaty itself explicitly recognises and accommodates. It was negotiated as an instrument of the EU's external energy policy with a view to establishing a framework for energy cooperation with third countries. By contrast, the EU's internal energy policy consists of an elaborate system of rules designed to create an integrated internal market.

17. The object and purpose of the Treaty, as well as considerations of good faith (Article 31(1) VCLT), require that consent be construed strictly. A reading that isolates

[9] *See* Section II.(vi) of this Opinion; *see* also the Agreement on the interpretation and application of the Energy Charter Treaty, not yet in force (Official Journal of the European Union, 27 March 2026; ELI: http://data.europa.eu/eli/agree_internation/2026/757/oj).

[10] *See* Section II.(iv).c. of this Opinion. In particular: *Flamino Costa v. E.N.E.L.*, Case 6/64, Judgment, 15 July 1964, ECLI:EU:C:1964:66; *Commission of the European Communities v. Ireland*, Case C-459/03, Judgment, 30 May 2006, ECR I-04635, ECLI:EU:C:2006:345; Opinion 2/13 of the Court (Full Court), 18 December 2014, ECLI:EU:C:2014:2454; *Slowakische Republik v. Achmea BV*, Case C-284/16, Judgment, 6 March 2018, ECLI:EU:C:2018:158; *République de Moldavie v. Komstroy LLC*, Case C-741/19, Judgment, 2 September 2021, ECLI:EU:C:2021:655.

Article 26(1) from its definitional, structural and systemic context would risk disrupting the internal energy market and give rise to unfair and discriminatory outcomes, both internally and externally. In particular, it would allow some EU investors to escape the uniform interpretation of EU law while continuing to benefit from the rights derived from EU integration, in tension with the principle of equality before the law and the level playing field that the EU legal order is designed to guarantee.

18. Two readings of "*another Contracting Party*" are possible, but only the systemic one aligns with the Treaty's context, object and purpose. The broad reading depends on isolating Article 26 from the Treaty's definitions, structure, and object and purpose, thereby depriving key provisions of effect and creating unnecessary conflict. The systemic reading emerges from interpreting Article 26 together with Articles 1(1)–(3), 2 and 25, integrating applicable international law through Article 31(3)(c) VCLT and the ECT's own applicable-law clause (Article 26(6)), and aligning with contextual instruments and subsequent Member State declarations.

19. In any event and in the alternative, I am not persuaded that, even assuming a conflict (*quod non*), Article 16 ECT would be the governing conflict-resolution rule, displacing Articles 30(4) VCLT and 351 TFEU, and the primacy of EU law. Moreover, Article 16 ECT applies only "*where any such provision [of the ECT] is more favourable to the Investor or Investment*", a condition neither evident in the abstract nor established in the circumstances of the present arbitration. Its application is not justified. [11]

20. It follows that two competing interpretations of the term "*of another Contracting Party*" in Article 26 ECT may be identified and compared,[12] but only the systemic interpretation gives full legal effect to the Treaty as a coherent instrument operating within the international legal system, rather than as a collection of disconnected clauses. It guarantees equality before the law and preserves a level playing field where rights and obligations are properly aligned.

[11] *See* Section II.(vii) of this Opinion.

[12] *See* the comparative table set out in Section II.(viii) of this Opinion.

21. For all these reasons, I am inclined to opine that the interpretation which complies with the mandatory rule of treaty interpretation codified in Article 31 VCLT, namely, an interpretation that integrates good faith, text, context, object and purpose, together with any relevant rules of international law applicable in the relations between the parties, is the interpretation that does not find consent to intra-EU investor-State arbitration in the ECT.

- ***Merits: The FET and Expropriation Standards***

22. With regards to the merits, the Award unanimously finds no breach of the fair and equitable treatment ("FET") or expropriation standard. Part III of this Opinion is dedicated to providing additional grounds why liability, and in particular expropriation, cannot be found in this case.

23. In my opinion, any alleged reduction in the value of the Claimants' shares would be, in the particular circumstances of this case, irrelevant.

24. The *WindSeeG* was enacted to promote the expansion of offshore wind energy in the interests of climate and environmental protection. Moreover, the legislature enjoys a broad margin of appreciation in regulating the common good and is not required to shield economic actors from every disadvantage arising from legal reform, particularly in a dynamic regulatory field where change is foreseeable.

25. In this context, the absence of fault is determinative.[13] Compensation for loss of value does not eliminate the loss; it merely transfers it to the public purse, ultimately to the pockets of the taxpayers of the host State. Such a transfer requires a solid legal basis. Not every economic impairment is compensable: only loss occasioned by fault may generate liability. A fundamental distinction exists between private contractual relations, which cannot be altered unilaterally, and public regulation, which may be amended in the exercise of sovereign authority.

[13] *See* Section III.(ii) of this Opinion.

26. The State's sovereign right to regulate is an essential feature. Consistently with the police powers doctrine under customary international law, proportionate and non-discriminatory regulation adopted in good faith, for a public purpose and in accordance with due process, cannot constitute indirect expropriation merely because it results in economic loss.[14] To hold otherwise would render the State's regulatory powers illusory, as virtually all regulatory measures have some adverse economic effect. The *WindSeeG* pursued legitimate public interests, namely, the secure, efficient and environmentally compatible supply of electricity, and was enacted and implemented as a *bona fide* regulatory measure proportionate to those aims.

27. Finally, under the circumstances of the present case, the rejection of the FET claim precludes a finding of expropriation. The same measures that do not breach the FET standard cannot conceivably constitute an expropriation.[15]

II. JURISDICTION RATIONE VOLUNTATIS: INTRA-EU LACK OF CONSENT

(i) The Issue: Interpretation of Article 26 ECT

28. To begin with, it is worth recalling that, in investment arbitration under public international law, jurisdiction is the exception rather than the norm.[16] The default position is the lack of jurisdiction, which may be established only where consent has been given.

[14] *See* Sections III.(ii)–(iii) of this Opinion.

[15] *See* Section III.(iv) of this Opinion.

[16] *See Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶¶ 173–175 (Section VI.C.1.b, "*Consent as the cornerstone of all treaty commitments*"): "*While the article [31(1) VCLT] does not explicitly mention consent, the reference to "good faith" nevertheless reinforces the duty of tribunals to limit themselves to interpretations falling within the bounds of the framework mutually agreed […] respect for State consent is also manifested by the fundamental principle of public international law according to which international courts and tribunals can only exercise jurisdiction over a State on the basis of its consent. As noted by the Permanent Court of International Justice in one of its first judgments […] [a]gainst this background, it is not possible to presume that consent has been given by a state. Rather, the existence of consent must be established […] [n]on-consent is the default rule […] consent is the exception […] [w]hat is true of the very existence of consent to have recourse to a specific international dispute resolution mechanism is also true as far as the scope of this consent is concerned*"; available at: https://jusmundi.com/en/document/decision/en-daimler-financial-services-ag-v-argentine-republic-award-wednesday-22nd-august-2012#decision_540.

In the context of treaty-based jurisdiction, such consent must be clearly expressed in the relevant international instrument.

29. With regard to the powers and functions of the Tribunal, Article 41 of the ICSID Convention provides that "*[t]he Tribunal shall be the judge of its own competence*". This provision embodies the cornerstone principle of *kompetenz-kompetenz* in international arbitration. There is no binding precedent by any court or tribunal,[17] domestic or international, permanent or *ad hoc*, that constrains the Tribunal in the exercise of this power. Rather, the Tribunal is bound solely by the applicable law, which must be interpreted in accordance with the rules of treaty interpretation set out in the customary international law rules as codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.

30. In the present case, the Claimants are nationals of Ireland investing in Germany. Both Ireland and Germany are Member States of the EU. The Claimants are therefore EU investors investing within the EU, rendering this dispute an intra-EU dispute. Furthermore, Ireland, Germany and the EU are all Contracting Parties to the ECT: Ireland and Germany in their capacity as States, and the EU in its capacity as an REIO, a concept incorporated and defined as a Contracting Party by the ECT in its Articles 1(2)-(3). Notably, the EU was the principal promoter of the ECT and the only REIO to have become a Contracting Party to the ECT in its more than 25 years of history.

31. Accordingly, the question arises as to whether the ECT contains an intra-EU offer to arbitrate under Article 26 of the ECT, which refers to disputes between a Contracting Party and an Investor "*of another Contracting Party*".[18]

[17] While investment tribunals frequently refer to prior awards, arbitral decisions do not constitute sources of law under Article 38 of the ICJ Statute.

[18] The ECT provision to interpret, Article 26 ECT ("*Settlement of Disputes between an Investor and a Contracting Party*"), requires an Investor "*of another Contracting Party*" and reads as follows: *"(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former […]*."

(ii) Article 31 VCLT: The Vienna Convention Rule for Treaty Interpretation

32. In order to provide a meaningful answer to that question, the relevant provision of the ECT must be interpreted in accordance with the rules of treaty interpretation set out in the VCLT.

33. An isolated and mechanical reading of the first paragraph of Article 26 ECT might, *a priori*, accommodate the view that an Irish investor investing in Germany may submit a dispute to arbitration, on the basis that there would be "*one*" Contracting Party (Ireland) and "*another*" Contracting Party (Germany) involved (or, strictly speaking, three, if the EU is taken into account).

34. However, a proper interpretation of the treaty terms, in accordance with the mandatory rules of public international law codified in the VCLT, requires a more elaborated exercise. Article 31(1) of the Vienna Convention requires that the 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:[19]

[19] Article 31 VCLT reads as follows:

"*Article 31*

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

Article 32 VCLT contains the "*supplementary means*" of interpretation (preparatory work, circumstances of the conclusion) when the interpretation according to Article 31 is ambiguous or unreasonable. That is not the case here.

> "*Article 31*
>
> *General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. […]
>
> 3. There shall be taken into account, together with the context: […]
>
> (c) any relevant rules of international law applicable in the relations between the parties."

35. Article 31 of the VCLT is entitled the "*general rule*" of interpretation, in the singular, underscoring that all interpretative elements must be considered together, as part of a single operation and without any hierarchy of value. The International Law Commission ("ILC") Commentary rejects the existence of any hierarchy among the elements listed in Article 31. Accordingly, Article 31 of the VCLT codifies and consolidates the mandatory elements of treaty interpretation, including, without any order of precedence: good faith, the treaty text, context, and object and purpose. These elements must be assessed altogether, with the same status, and with no hierarchy, in order to give a coherent meaning as the outcome of the interpretative process. For this reason, the interpreter can give no meaning to the words until they are considered in conjunction with the context, object and purpose, since words have no independent material meaning. That is why Article 31(1) refers to the ordinary meaning "*to be given*" to the terms in their context, object and purpose.

36. As observed by the tribunal in *Aguas del Tunari v. Bolivia*, interpretation is not solely a matter of dictionaries:

> "The meaning of a word or phrase is not solely a matter of dictionaries and linguistics. As Schwarzenberger observed, the word 'meaning' itself has at least sixteen dictionary meanings.[51] Rather, the interpretation of a word or phrase involves a complex task of considering the ordinary meaning of a word or phrase in the context in which that word or phrase is found and in light of the object and purpose of the document."[20]

[20] CL-255, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 91. Footnote 51 in this paragraph reads: "Georg Schwarzenberger, *Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties*,

37. In the same vein, the ILC has emphasised that the ordinary meaning of a term (such as "*of another Contracting Party*") cannot be determined in the abstract:

> "[C]ommon sense and good faith; the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose."[21]

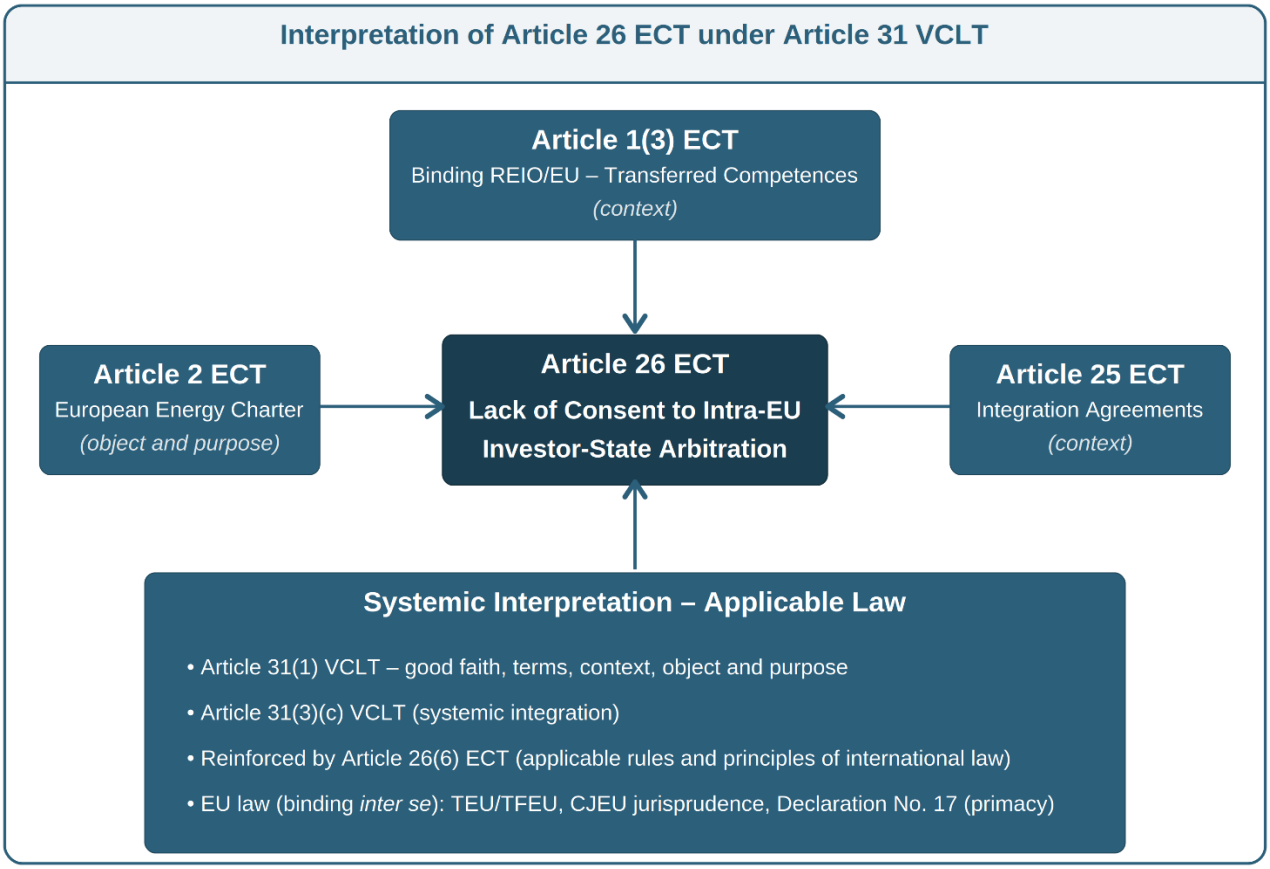
38. It follows that purely formalistic interpretations are inconsistent with the Vienna Convention. The treaty interpretation exercise is a higher one, one that has to consider all those elements to produce a meaningful, consistent and coherent outcome. Single words have no prevalence over context, object and purpose. Accordingly, it is essential to analyse the context, object and purpose of the treaty to extract the proper meaning, the one fulfilling the mandatory rule for treaty interpretation of the Vienna Convention, rather than just reading isolated words of a section in an article of a treaty while disregarding other elements of a proper interpretation.

39. In the present case, i.e., an intra-EU case under the ECT, all these elements must therefore be examined within a comprehensive interpretative framework. The figure[22] below depicts the interpretation of Article 26 ECT in accordance with Article 31 VCLT as a single, integrated operation. The meaning of consent to arbitration does not arise from a mechanical or word-by-word reading in isolation, but emerges from the interaction between the Treaty's text, its context, its object and purpose, and relevant rules of international law. In the specific context of the ECT, this interpretative process necessarily encompasses Articles 1(3), 2, 25, and 26(6) ECT, read together with Article 31(3)(c) VCLT, including EU law, and agreements and practice between the Contracting Parties concerned. Interpretation under Article 31 VCLT constitutes a single, non-hierarchical operation in which text, context, object, purpose, and relevant rules of international law are applied together.

22 CURRENT LEGAL PROBLEMS 205, 219 (1969). Barak writes: '*From the standpoint of language, one meaning does not have preference over another. Any meaning which is possible in a semantic sense is also permissible semantically. It would be a mistake to base a doctrine of legal interpretation on dictates, as it were, of linguistics.*' AHARON BARAK, JUDICIAL DISCRETION 341-342 (1987)."

[21] ILC, "*Draft Articles on the Law of Treaties with commentaries*" (1966), p. 221, ¶ 12; available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf.

[22] Own elaboration.



(iii) Article 1(3) ECT: By ECT Definition, EU Member States Are Bound Inter Se by the EU Legal Order

40. The majority of arbitral awards addressing intra-EU arbitration under the ECT so far have tended to disregard the Treaty's definitional provisions, to treat consent as conceptually autonomous from competence, and to prioritise assumptions over a systemic interpretation of the Treaty. Those awards generally rest on the implicit assumption that Article 26 ECT may be assessed in isolation from the Treaty's definitional and structural provisions, effectively treating it as if it were contained in a treaty concluded exclusively between non-integrated States. However, that is incompatible with a Treaty that expressly includes an REIO, the EU, as a Contracting Party and devotes its very first article to defining the consequences of transferred competences.

41. Accordingly, in order to give to Article 26 ECT a meaning that is compliant with the interpretative rule codified in the VCLT, it is essential to acknowledge that the

Contracting Parties expressly agreed, in Article 1 of the ECT, some "*[d]efinitions*" giving "*mean[ing]*" to terms "*[a]s used in this Treaty*". Indeed, the ECT Contracting Parties:

> "**HAVE AGREED AS FOLLOWS:**
>
> **Part I: Definitions and Purpose**
>
> **Article 1: Definitions**
>
> As used in this Treaty:
>
> (1) "Charter" means the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991; signature of the Concluding Document is considered to be signature of the Charter.
>
> (2) "Contracting Party" means a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which the Treaty is in force.
>
> (3) "Regional Economic Integration Organisation" means an organisation constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters."

42. Pursuant to Article 31(1) VCLT, these elements, as text, context, object and purpose of the Treaty, constitute mandatory elements to integrate and to define the contours of the "*meaning to be given to the terms of the treaty*" when interpreting all subsequent provisions of the ECT including Part III, regulating investment promotion and protection, and Part V, regulating dispute settlement. Definitions are not merely preliminary or explanatory; they constitute binding interpretative instructions applicable to the entire Treaty, including Article 26, which contains consent to arbitration for disputes between a Contracting Party and an investor "*of another Contracting Party*". That term in the Treaty must therefore be interpreted in light of the definitions contained in Article 1 ECT.

43. In other words, the Contracting Parties to the ECT agreed to commence the Treaty by setting out: (i) a series of definitions that form part of the Treaty's text and context and also constitute "*special meanings*";[23] and (ii) the object and purpose of the Treaty.

[23] *See* Article 31(4) VCLT.

44. Significantly, the very *first definition* refers to the object and purpose of the Treaty, as it defines the meaning of "*the Charter*" (the 1991 *European* Energy Charter), a term used in Article 2 ECT to align the purpose of the Treaty with the objectives of the Charter ("*Article 2: Purpose of the Treaty […] in accordance with the objectives and principles of the Charter*").

45. The *second definition* of the ECT incorporates the concept of an REIO and differentiates between two categories of Contracting Parties, by providing that "*Contracting Party*" means a State or an REIO which has "*consented to be bound*" by this Treaty.

46. The *third definition* of the ECT goes further still. Article 1(3) ECT defines an REIO as an organisation constituted by States to which they have "*transferred competence*" over certain matters a number of which are governed by this Treaty, "*including*" the authority to take decisions "*binding on them*" in respect of those matters.[24] This provision is not limited to institutional description. It expressly characterises the legal relationship between the REIO and its member States. The reference to decisions that are "*binding on them*" is not linguistically necessary to define an REIO as such; its deliberate inclusion therefore carries interpretative relevance and must be given effect in accordance with the principle of effectiveness (*effet utile*) inherent in good-faith interpretation under Article 31(1) VCLT. Article 26 ECT cannot be interpreted independently of the structural limitation set out in Article 1(3) without rendering the definitional clause legally redundant (*quod non*).

47. Article 1(3) is thus not merely descriptive. By recognising the existence of organisations endowed with transferred competences and binding decision-making authority in fields covered by the ECT, the Treaty expressly acknowledges that, for certain Contracting Parties, the legal relations governing those matters are structured within a distinct and binding supranational legal order. The ECT was therefore concluded in full awareness

[24] Notice here: (i) how the Treaty employs, in two consecutive paragraphs, (2) and (3), of Article 1, two forms of the same root verb "*to bind*", linked explicitly to consent ("*consented to be bound*" in Article 1(2)); and (ii) how it expressly inserts in Article 1(3) ECT ("*including*") a clause that dictates, by definition, that the member States of the REIO are bound by the REIO ("*binding on them*"). This is an "*including*" that was not needed merely to define an REIO and that, in good faith, should be given effect (*effet utile*).

that, in the relations between Member States of such an organisation, binding rules of law already govern the same subject matter as that addressed by the Treaty. Article 1(3) ECT identifies, within the Treaty itself, a category of Contracting Parties whose mutual relations are governed by a legally binding integration framework that the Treaty explicitly recognises. This textual recognition constitutes a necessary starting point for the systemic interpretation required by Article 31 VCLT.

48. In that specific *inter se* context, the ordinary meaning of the phrase "*of another Contracting Party*", when read together with Article 1(2) and (3), reasonably admits an interpretation whereby it refers to a Contracting Party external to the same REIO/EU legal order (that is, an extra-EU Contracting Party), rather than to a Member State whose relations are already governed, in the relevant field, by binding EU law. This interpretation does not introduce new language into the Treaty. Rather, it delineates the semantic scope of "*another Contracting Party*" by reference to the Treaty's own definitional framework. Article 1(3) ECT defines the legal reality and actual framework that cannot be ignored when interpreting consent. When that definition is properly integrated, as required by Article 31 VCLT, into the interpretation of Article 26 ECT, the absence of intra-EU consent to arbitration thus follows from the Treaty's internal structure.

49. In this regard, I agree with the recent opinion of Prof. Kohen in *Eiser v. Spain* (referring also to the awards in *ESF v. Spain* and *Sapec v. Spain*):[25]

> "19.[…] This is not a matter of establishing the primacy of EU law or that its decisions prevail over the ECT. Rather, it is a matter of interpreting and applying the Treaty,

[25] *Eiser Infrastructure Limited and Energia Solar Luxembourg s.a r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36 (Resubmission Proceeding), Dissenting Opinion of Prof. Marcelo Kohen, 16 October 2025 ("Kohen Dissenting Opinion"), ¶¶ 19 and 23–24 (Section III, "*A Partial Reading of the* ESF *and* Sapec *Awards*"); available at: https://jusmundi.com/en/document/opinion/en-eiser-infrastructure-limited-and-energia-solar-luxembourg-s-a-r-l-v-kingdom-of-spain-dissenting-opinion-of-marcelo-g-kohen-thursday-16th-october-2025#opinion_4395. *See* footnote 14 citing *European Solar Farms A/S v. Kingdom of Spain*, ICSID Case No. ARB/18/45, Award, 11 October 2024, ¶¶ 199, 201. *See* further footnote 13, citing *Sapec, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/19/23, Award, 11 October 2024, ¶¶ 218, 267 ("*its primacy is mandated by the terms of the ECT itself*"; "*none of this is to say that EU law prevails over the ECT: it is rather the ECT itself that has incorporated by reference the constitutional structure of the EU, including the rules on the conferral and division of powers and the rules governing how the EU institutions and its judicial system are to operate*").

taking into account the existing correlation between the REIO, as a Contracting Party to the ECT, and its Member States, which are also Contracting Parties. […]

23. I consider the following analysis —drawn from *ESF v. Spain*— to be of vital importance in interpreting the implications of Article 1(3) of the ECT for determining the scope of Article 26, particularly with respect to the *inter-se* relationship among EU Member States that are Contracting Parties to the ECT.

> 'The transfer of competence thus entails that the Member States of the REIO no longer bear the obligations of the Treaty in respect of the subject-matter over which competence was transferred. Indeed, no coherent interpretation can allow otherwise, for the obligations that a Contracting Party owes under the ECT cannot attach to a competence that the Treaty itself does not consider it to enjoy. If a Contracting Party has transferred to a REIO a competence the subject-matter of which is governed by the ECT, this Contracting Party cannot owe obligations under the ECT in respect of this matter because, as the ECT recognizes, it has divested itself of the competence to act independently. […] Such exercise of competence may relate to matters of substance, such as investment promotion and protection, or to other matters also governed by the Treaty, such as settlement of disputes between an investor and a State: Article 1(3) permits of a REIO making rules as to both such matters. Thus, for example, the REIO may rule that disputes between an investor of one member State against another member State are to be resolved within the institutional framework of the REIO. Such a rule is recognized by Article 1(3) to fall within the authority of the REIO, and for this reason it would bind the member States of the REIO not only as member States of the REIO but also as Contracting Parties under the ECT. Put differently, the ECT recognizes the obligation of Contracting Parties who are member States of the REIO to be bound by the rule of the REIO.'

24. I consider this interpretation of the ECT to be correct, and that it disposes of the case. However, I shall examine other elements that also support the same conclusion".

50. The Award in the present case states that *"[a]s a Contracting State, an REIO (here the EU) is subject to the same rights and obligations as any other Contracting Party*"[26], and cites *Vattenfall v. Germany* when it states that "*it would have been necessary to include*

[26] Award, ¶ 492.

explicit language".[27] Possibly this flaw in the argumentation is the source of the Award's failure to integrate Article 1(3) ECT into the interpretation of Article 26.

51. First, reliance on "*explicit language*" alone falls short of a proper interpretation pursuant to Article 31 VCLT, particularly where all roads (i.e., text, context, object and purpose) "lead to Rome".

52. Secondly, the Contracting Parties to the ECT do not possess identical rights and obligations. The ECT, both structurally and by definition from its first article, distinguishes two categories of Contracting Parties: REIOs (the EU) and States. Moreover, among States, it expressly differentiates between those that are members of a REIO and those that are not. These categories entail distinct rights and obligations. This differentiation permeates the Treaty as a whole, and Article 25 ECT provides a clear illustration of it.

53. The absence of an express reference to dispute settlement in Article 1(3) is immaterial, since treaty interpretation does not proceed word-by-word in isolation. Definitions constitute the meaning of the terms used in operative clauses; they are not peripheral explanations but determine the ordinary meaning of treaty terms throughout the instrument. To treat Article 26 as unaffected by Article 1(3) is therefore an interpretative choice that privileges one part of the Treaty at the expense of another.

54. This structural reading of Article 1(3) ECT is reinforced by Article 25 ECT, which confirms that the Treaty expressly accommodates differentiated legal relations for Contracting Parties participating in an economic integration agreement. This provision confirms that the REIO definition in Article 1(3) is not merely descriptive but structurally operative, and that the scope of Article 26 ECT must be interpreted consistently with that architecture. The ECT does not operate on the assumption of uniform legal relations across all Contracting Parties in all respects. Rather, Article 25 confirms that, under the

[27] Award, ¶ 497.

Treaty itself, internal intra-EU relations are fundamentally distinct from external extra-EU relations.

55. Given the separation of "*the internal functioning of the Community from its external obligations under the [ECT]*,"[28] after safeguarding the constitutional foundations of the EU via the definition of the REIO in Articles 1(2)-(3) ECT, the ECT contains yet another exception clause "*which the Community need[ed] (as described in point 11 [of the 1993 Communication])*"[29] to conclude the Treaty.

56. That clause concerns the first "*key principle*", i.e., the "*non-extension of Community treatment to third countries*"[30] embodied in Article 25 ECT, entitled "*Economic Integration Agreements*". Article 25 establishes an exception to most-favoured-nation treatment in respect of obligations deriving from an Economic Integration Agreement and provides:

> "(1) 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 their being parties thereto.
>
> (2) For the purposes of paragraph (1), 'EIA' means an agreement substantially liberalising, inter alia, trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame."

57. This approach is grounded in logic, since "*[a]ny extension to all the other Contracting Parties of the Community's own rules on freedom of establishment and provision of*

[28] European Commission, Communication forwarded to the Council titled "*The European Energy Charter: Fresh Impetus from the European Community*" dated 4 November 1993, Document 51993DC0542; available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:51993DC0542.
Note that the references to the European Union are to be understood also as references to its predecessor, the European Economic Community and, subsequently, the European Community, until the latter was superseded by the European Union.

[29] *Ibid*.

[30] *Ibid*.

services would be tantamount to bringing them into the Community integration process".[31]

58. All ECT Contracting Parties thus understood that EU Member States were engaged in a process of "*integration*" that was significantly more advanced than the "*cooperation*" provided by the rights and obligations contained in the ECT framework.

59. Article 25 ECT explicitly acknowledges that the network of legal relations among the States party to an EIA/REIO (intra-REIO, i.e., intra-EU) is fundamentally different from relations external to that framework. The Treaty "*shall*" be construed so as to permit differential "*treatment applicable between the parties*" to such an agreement. Accordingly, the ECT as a whole, including Article 26, must be interpreted in a manner that accommodates differentiated treatment of intra-EU and extra-EU relations.

60. This special *inter se* situation of EU Member States, and the "*preferential treatment applicable between the parties to that EIA*", is expressly recognised in Article 25 and necessarily informs the interpretation of Article 26, which governs investor-State dispute settlement.

61. As a further contextual element accepted by the other Contracting Parties within the meaning of Article 31(2)(b) VCLT, reference should be made to the Declaration with respect to Article 25 contained in the Final Act of the European Energy Charter Conference, adopted by the European Communities and their Member States, which provides:[32]

> "DECLARATION
>
> With respect to Article 25
>
> The European Communities and their Member States recall that, in accordance with Article 58 of the Treaty establishing the European Community: […] the application of

[31] *Ibid*. Two points are noteworthy in this regard. First, when referring to "*the other Contracting Parties*", the Commission consistently excluded EU Member States, notwithstanding that they were formal signatories to the ECT. Secondly, EU integration rules were regarded as prevailing over the rights conferred by the ECT, a position considered compatible with setting "*the highest possible levels of protection for investors*".

[32] Final Act of the European Energy Charter Conference, Declaration 5. ECT, p. 76.

> Article 25 of the Energy Charter Treaty will allow only those derogations necessary to safeguard the preferential treatment resulting from the wider process of economic integration resulting from the Treaties establishing the European Communities."

62. This Declaration confirms that:

a. the European Communities operate within a distinct legal order that must be respected (including, in this case, article 58 of the Treaty establishing the European Community—the Treaty of Rome);

b. it is "*necessary*" or mandatory "*to safeguard*" the "*preferential treatment*" resulting from that EU legal order or "*the Treaties establishing the European Communities*"; and,

c. such treatment results from a "*wider process of economic integration*".

63. That wider process of economic integration includes, in particular, the internal energy market and the autonomy and primacy of EU law.

(iv) Systemic Integration of EU Law: Article 31(3)(c) VCLT, Reinforced by the Applicable-Law Clause in Article 26(6) ECT

a. Article 31(3)(c) VCLT

64. A further decisive interpretative step follows from Article 31(3)(c) VCLT, which provides that, together with the context, there *shall* be taken into account "*any relevant rules of international law applicable in the relations between the parties.*" This requirement is mandatory and forms an integral part of the interpretative process.

65. In the present setting, Article 1(3) ECT makes it indisputable that, in the relations between Member States of an REIO, binding rules of international law govern matters covered by the Treaty. Those rules are neither incidental nor external to the ECT's operation; rather, they are expressly anticipated by the Treaty's own definition of an REIO as an organisation endowed with transferred competences and binding decision-making authority.

66. Accordingly, where an investor-State dispute arises wholly within such an organisation, Article 31(3)(c) requires that the Treaty be interpreted in a manner that integrates those binding *inter se* rules into the determination of the Treaty's meaning.

67. An interpretation of Article 26 ECT that encompasses disputes between Member States bound by the same REIO legal order would place those States under obligations incompatible with the binding legal framework and allocation of authority governing their mutual relations, notwithstanding the Treaty's express recognition of that framework in Article 1(3). Such an outcome would fail to give effect to the systemic interpretation under Article 31(1) VCLT.

68. An alternative interpretation is both available and coherent with the Treaty as a whole: in disputes arising within an REIO, the term "*another Contracting Party*" in Article 26 ECT refers to a Contracting Party external to that same integrated legal order. This interpretation preserves the full effectiveness of Article 26 ECT in extra-REIO relations, while ensuring that the Treaty operates consistently with the binding legal system it expressly recognises in Article 1(3).

b. Article 26(6) ECT

69. Article 26(6) ECT confirms that this systemic approach is not external to the Treaty but inherent in its applicable law framework since it provides in the imperative form that the Tribunal:

> "[S]hall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

70. Indeed, the comprehensive interpretation is reinforced by Article 26(6) ECT, which requires tribunals to decide disputes in accordance with the Treaty and applicable rules and principles of international law. The systemic integration mandated by Article 31(3)(c) VCLT therefore operates not as an external override, but as a component of the applicable law framework expressly contemplated by the ECT itself.

71. Article 26(6) ECT thus confirms that the ECT's dispute settlement mechanism operates within, not outside, the broader international legal system. That mandate is hard to

reconcile with the idea of an award inconsistent with "*applicable rules and principles of international law*" binding the parties to the dispute.[33] In the present case, the investor is from Ireland and investing in Germany; EU law is obviously applicable and binding both States as EU Member States. An ECT award that is inconsistent with, or violates, EU law would therefore be at odds with the mandate of Article 26(6) ECT.

72. For the sake of completeness, there is debate as to whether Article 26(6) ECT applies only to the merits (since according to Article 26(1) ECT "*disputes*" concern a breach of an obligation under Part III) or whether it also applies to jurisdiction (since jurisdiction is too "*in dispute*"). The case-law is divided on this point. Nevertheless: (i) Article 26(6) ECT contains no qualification to that effect; (ii) there is no compelling reason to imply such a limitation; and (iii) the provision is included in an article, and a part of the Treaty, devoted to regulating "dispute settlement", which is jurisdictional in nature.

73. In summary, the prominence of international law, specifically EU law, as a mandatory element of interpretation is beyond question. Under Article 26(6) ECT, the Tribunal must apply the Treaty together with applicable international law. Under Article 31(3)(c) VCLT, those applicable rules of international law must be integrated into the interpretative process. Therefore, the meaning of "*another Contracting Party*" and the scope of Article 26 must be determined in a manner that avoids placing the parties in breach of their binding *inter se* international obligations. The Treaty cannot be interpreted as conferring consent to arbitration where such consent would necessarily contradict obligations recognised by the Treaty itself through its REIO clause.

[33] *See* RL-281, *Blasket Renewable Investments, LLC v. the Kingdom of Spain*, United States District Court for the District of Columbia, Memorandum Opinion dated 29 March 2023, Civil Action No. 21-3249 (RJL). The Memorandum Opinion of Richard J. Leon, United States District Judge, reflects that: "*Article 26 of the ECT requires an arbitral tribunal established under its authority 'to decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law' […] ECT art. 26(6). The most straightforward reading of that provision is that any award issued by an arbitral tribunal established under the authority of Article 26 must be consistent with both the ECT itself and any other 'rules and principles of international law' that apply to a dispute between the parties*" (p. 14); and that "*the text of Article 26 of the ECT prohibits a tribunal established under its authority from disregarding a rule of international law applicable to the parties to the dispute before it*" (p.17).

c. EU Law and CJEU Jurisprudence

74. As evidence of the EU Member States' *inter se* obligations, it is worthwhile to make a reference, albeit briefly, to the consistent and long-standing jurisprudence of the Court of Justice of the European Union ("CJEU"). The relevance of the CJEU's judicial reasoning lies in its articulation of the content and effects of EU law, which Article 1(3) ECT itself expressly recognises as binding *inter se* between EU Member States, including, in particular, the legal consequences flowing from the transfer of competences.

75. In *Costa* (1964), the CJEU held that, by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane, and transferring powers from the States to the Community, the Member States have limited their sovereign rights, and have thus created a body of law which binds both their nationals and themselves.[34]

76. In *MOX Plant* (2006), the CJEU emphasised that an international agreement cannot affect the autonomy of the Community legal system and the exclusive jurisdiction of the Court, referring to Articles 220 and 292 EC.[35]

77. The primacy of EU law was codified by the Declaration No. 17 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon (2007), which states:[36]

> "It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community."

[34] *Flamino Costa v. E.N.E.L.*, Case 6/64, Judgment, 15 July 1964, ECLI:EU:C:1964:66.

[35] *Commission of the European Communities v. Ireland*, Case C-459/03, Judgment, 30 May 2006, ECR I-04635, ECLI:EU:C:2006:345, ¶ 123: "*The Court has already pointed out that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC. That exclusive jurisdiction of the Court is confirmed by Article 292 EC, by which Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein (see, to that effect, Opinion 1/91 [1991] ECR I-6079, paragraph 35, and Opinion 1/00 [2002] ECR I-3493, paragraphs 11 and 12).*"

[36] Declaration No. 17 concerning primacy, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007. Official Journal 115, 09/05/2008 P. 0344 – 0344.

78. With the occasion of the *Accession of the EU to the ECHR*, the CJEU opined (2014) that accession cannot affect the specific characteristics of the EU and EU law, which include the constitutional structure of the EU and the specific characteristics arising from the very nature of EU law, particularly its primacy. These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are engaged in a "*process of creating an ever closer union among the peoples of Europe*" (Article 1 TEU). In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the EU Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law, and to ensure judicial protection of an individual's rights under that law. In particular, the judicial system has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which has the object of securing uniform interpretation of EU law. The Court has consistently held that an international agreement cannot affect the allocation of powers fixed by the Treaties or the autonomy of the EU legal system. That principle is notably enshrined in Article 344 TFEU, according to which 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.[37]

79. Finally, in *Achmea* (2018), concerning an intra-EU BIT, the CJEU reaffirmed that, according to settled case-law of the Court, an international agreement cannot affect the allocation of powers fixed by the EU Treaties or, consequently, the autonomy of the EU legal system which is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU. It is for the national courts and tribunals and the Court of Justice to ensure the judicial protection of the rights of individuals. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure which, by setting up a dialogue between one court and

[37] Opinion 2/13 of the Court (Full Court), 18 December 2014, ECLI:EU:C:2014:2454, ¶¶ 164–167, 174–176, and 183. *See*, also: judgment in *Costa*, EU:C:1964:66; judgment in *van Gend & Loos*, EU:C:1963:1, p. 12; Opinion 1/09, EU:C:2011:123; Opinions 1/91, EU:C:1991:490, and 1/00, EU:C:2002:231; judgments in *Commission v. Ireland*, C-459/03, EU:C:2006:345, and *Kadi and Al Barakaat International Foundation v. Council and Commission*, EU:C:2008:461.

another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation. Given the nature and characteristics of EU law, that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States. The *Achmea* judgment also considers that the characteristics and effects of arbitration proceedings such as those referred to in the investment treaty are essentially different from commercial arbitration proceedings. Lastly, it concludes that Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal.[38]

80. In *Komstroy* (2021), addressing the ECT specifically, the CJEU reiterated that autonomy flows from the fact that the European Union possesses a constitutional structure and framework that is unique to it. That framework covers, *inter alia*, the provisions of the EU and FEU Treaties, which include, in particular, rules governing how the EU institutions and its judicial system are to operate, and fundamental rules in specific areas, structured in such a way as to contribute to the implementation of the process of integration described in Article 1 TEU.[39]

81. Indeed, the primacy of EU legal order is therefore not merely a legal principle but a reflection of the political and economic integration of the EU. It is necessary to ensuring the consistent and uniform intra-EU application of Union law, and guarantees that all EU citizens, irrespective of nationality, are treated equally before the law. In conclusion, the primacy of EU law is inherent to the principle of equality before the law and paramount to ensure a level playing field.[40]

[38] *Slowakische Republik v. Achmea BV*, Case C-284/16, Judgment, 6 March 2018, ECLI:EU:C:2018:158, ¶¶ 32–41, 54–55 and 60.

[39] *République de Moldavie v. Komstroy LLC*, Case C-741/19, Judgment, 2 September 2021, ECLI:EU:C:2021:655, ¶¶ 43–45 and 52.

[40] Report on the implementation of the principle of primacy of EU law 7.11.2023 - (2022/2143(INI)). European Parliament resolution of 21 November 2023 on the implementation of the principle of primacy of EU law (2022/2143(INI)).

(v) Article 2 ECT: Object and Purpose of the Treaty, a European Project

82. The object and purpose of the ECT further confirm that it was not designed to create any conflict with other rules of international law; on the contrary, it was conceived by the European Communities "*in conformity with the relevant international laws*".[41] Accordingly, an interpretation premised on harmony rather than conflict should prevail.

83. The ECT was not designed to regulate the internal legal relations of States already bound by an advanced integration framework. Article 2 ECT, which is expressly devoted to the "*Purpose of the Treaty*", must therefore be taken into account both as part of the context and as evidence of the object and purpose of the Treaty. It reads as follows:

> "**Article 2: Purpose of the Treaty**
>
> This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."

84. *First*, it must be observed that EU Member States already enjoyed a EU legal order that established not only "*cooperation*" but an *integration* process between them, which already includes and goes much further than mere *cooperation*. Consequently, the purpose of the ECT is not meant to bind EU Member States *inter se* with ECT obligations, or to regulate the internal functioning of the EU (States which are already bound by the EU legal order, as expressly acknowledged by Article 1(3) ECT).[42]

85. *Secondly*, Article 2 ECT specifies that the Treaty's purpose is to establish a legal framework in order to promote "*cooperation*" in a particular manner: in accordance with the objectives and principles of "*the Charter*" (namely, the 1991 *European* Energy Charter). The relevance of the Charter for the ECT is underscored also by its definition

[41] The Charter, Title II: Implementation.

[42] *See* the Agreement on the interpretation and application of the Energy Charter Treaty, recalling "*the consistently reiterated position of the European Union that the Energy Charter Treaty was not meant to apply in intra-EU relations and that it was not, and could not have been, the intention […] that the Energy Charter Treaty would create any obligations among them since it was negotiated as an instrument of the European Union's external energy policy with a view to establishing a framework for energy cooperation with third countries whereas, by contrast, the European Union's internal energy policy consists of an elaborate system of rules designed to create an internal market in the field of energy which exclusively regulates relations between Member States in that field*" (Official Journal of the European Union, 27 March 2026; ELI: http://data.europa.eu/eli/agree_internation/2026/757/oj).

in the first paragraph of the Treaty, and by the ECT Preamble (also, part of the context, according to Article 31(2) VCLT).[43] The Preamble reiterates that the purpose and desire of the ECT is "*to establish the structural framework required to implement the principles enunciated in the European Energy Charter*"; and recalls the origins of the ECT, noting that "*all signatories to the Concluding Document of the Hague Conference undertook to pursue the objectives and principles of the European Energy Charter and implement and broaden their cooperation as soon as possible by negotiating in good faith an Energy Charter Treaty.*" The ECT is also explicit as to "*the basic concept of the European Energy Charter*" namely the adoption of measures "*to liberalise*" energy markets (extra-EU, since intra-EU it was already fully liberalised). In light of the consistent and repeated references to the 1991 *European* Energy Charter, a proper interpretation of the object and purpose of the ECT necessarily requires an examination of that instrument. The Concluding Document of the Hague Conference on The European Energy Charter where the Prime Minister of The Netherlands and the Commissioner for Energy of the European Commission addressed the Conference states as follows:

"EUROPEAN ENERGY CHARTER

[43] The Preamble of the ECT reads:

"*The Contracting Parties to this Treaty,*

Having regard to the Charter of Paris for a New Europe signed on 21 November 1990;

Having regard to the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991;

Recalling that all signatories to the Concluding Document of the Hague Conference undertook to pursue the objectives and principles of the European Energy Charter and implement and broaden their cooperation as soon as possible by negotiating in good faith an Energy Charter Treaty and Protocols, and desiring to place the commitments contained in that Charter on a secure and binding international legal basis;

Desiring also to establish the structural framework required to implement the principles enunciated in the European Energy Charter;

Wishing to implement the basic concept of the European Energy Charter initiative which is to catalyse economic growth by means of measures to liberalise investment and trade in energy;

Affirming that Contracting Parties attach the utmost importance to the effective implementation of full national treatment and most favoured nation treatment, and that these commitments will be applied to the Making of Investments pursuant to a supplementary treaty;

Having regard to the objective of progressive liberalisation of international trade and to the principle of avoidance of discrimination […]

Recalling the United Nations Framework Convention on Climate Change […]"

> The representatives of the signatories meeting in The Hague on 16 and 17 December 1991, […]
>
> Assured of support from the European Community, particularly through completion of its internal energy market;
>
> Aware of the obligations under major relevant multilateral agreements […]
>
> HAVE ADOPTED THE FOLLOWING DECLARATION CONSTITUTING THE "EUROPEAN ENERGY CHARTER"
>
> Title I: Objectives
>
> The signatories are desirous of improving security of energy supply […].
>
> Within the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic cooperation, they undertake to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns. They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy.
>
> To this end, and in accordance with these principles, they will take action in the following fields:
>
> 1. Development of trade in energy consistent with major relevant multilateral agreements […]
>
> 2. Cooperation in the energy field, which will entail: […]
>
> - formulation of stable and transparent legal frameworks […]
>
> Title II: Implementation
>
> […] 4. Promotion and protection of investments
>
> In order to promote the international flow of investments, the signatories will at national level provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade. […]"

86. Against this background, two elements incorporated expressly into the purpose of the Treaty through Article 2 ECT require particular emphasis.

87. *First*, as quoted, the Charter (and consequently, the ECT) expressly acknowledges and respects the "*support from the European Community*" and "*its internal energy market*". It follows that the purpose of the ECT cannot include to regulate or to affect matters regarding EU's internal energy market, including via the resolution of intra-EU energy disputes.

88. Secondly, the Charter expressly notes that it is *"[a]ware of the obligations under major relevant multilateral agreements*". It repeatedly emphasises that cooperation in the energy field will entail "*formulation of stable and transparent legal frameworks*" and, in accordance with these principles, the signatories will take action "*consistent with major relevant multilateral agreements*". These features of the objectives and principles of the European Energy Charter, and thus of the ECT, are difficult to reconcile with any interpretation under which the ECT would create *inter se* obligations among EU Member States that conflict with EU law or the EU legal order, still less an interpretation under which any such conflict would be resolved by undermining the foundations of the EU Treaties.

89. These references demonstrate that, at the time of its conclusion, the ECT's drafters were perfectly aware that certain Contracting Parties were already engaged in a process of economic and legal integration exceeding the form of cooperation it envisaged. The ECT was intended to complement and extend cooperation, particularly in external relations and in relation to States undergoing market transition, rather than to duplicate or regulate the internal functioning of an existing supranational legal order.

90. The object and purpose of the ECT therefore support an interpretation that avoids construing it as establishing obligations capable of disrupting the internal legal relations of an integrated legal order expressly acknowledged by itself.

(vi) Further Instruments Confirming the Systemic Interpretation

a. <u>The 1997 Statement at the Time of the ECT Ratification</u>

91. A further contextual instrument accepted by the other Contracting Parties (again, mandatory element to integrate in the interpretation, under Article 31(2)(b) VCLT) is the

Statement submitted on 17 November 1997, at the time of ratification, by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) ECT.[44] As an instrument made in connection with the conclusion of the Treaty, the Statement forms part of the context and provides:

> "The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination.
>
> The Court of Justice of the European Communities, as the judicial institution of the Communities, is competent to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder, including international agreements concluded by the Communities, which under certain conditions may be invoked before the Court of Justice."

92. This 1997 Statement explicitly supports a systemic interpretation to the terms of Article 26 ECT. The reference to "*an Investor of another Contracting Party*" in that sentence above must be, as a matter of logic and coherence, an Investor of a different Contracting Party which is not "*[t]he Communities and the Member States*". It reflects a contemporaneous understanding that, where the Communities and their Member States act within the scope of transferred competences, questions concerning the application and interpretation of the Treaty fall within the EU legal order. The Statement thus presupposes an investor of "*another Contracting Party*" external to that integrated framework, reinforcing the conclusion that Article 26 ECT was neither designed nor understood to generate consent to arbitration for disputes arising exclusively within an REIO.

93. Moreover, the subsequent paragraph of the 1997 Statement affirms that the CJEU "*is competent to examine any question relating to the application and interpretation of […] international agreements concluded by the Communities, which under certain conditions may be invoked before the Court of Justice*." Therefore, this confirms that in the EU legal order, intra-EU, the CJEU is also competent to examine the application of the ECT. That

[44] Article 26(3)(b)(ii) ECT established that all Contracting Parties listed in Annex ID had to provide, for transparency reasons, a written statement of their policies, practices and conditions which do not allow an investor to resubmit the same dispute to international arbitration at a later stage in accordance with Article 26(3)(b)(i) ("*The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b)*").

was the understanding of the Treaty accepted by all Contracting Parties, including non-EU States.

94. In accordance with the principles of good faith interpretation, systemic integration, and the presumption against conflict, Article 31 VCLT requires preference to be given to an interpretation that avoids forcing States into mutually inconsistent international obligations, where such an interpretation is available and consistent with the Treaty's text and purpose.

b. The 2019 Declaration Signed by EU Member States

95. This interpretation is further confirmed by the Declaration of 15 January 2019, signed by 22 EU Member States,[45] including the two States concerned in these proceedings, namely Germany (host State) and Ireland (home State). That Declaration may be characterised as both a "*subsequent agreement*" and "*subsequent practice*" within the meaning of Article 31(3)(a) and (b) VCLT. It reflects the authentic and shared understanding of both the home and host States in this arbitration, expressed years before the commencement of these proceedings, and reads as follows:

> "International agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the Treaties. Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States. […] Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied [...]."

96. For the sake of completeness, it should be noted that there is some doctrinal debate as to the scope of the term "parties" in Article 31(3)(a) and (b) VCLT in the context of multilateral treaties. While the ECT is indeed a multilateral treaty, the following considerations are relevant: (i) the obligations at issue in the present dispute are *bilateral* or reciprocal in nature; (ii) Article 26 ECT is premised on bilateral legal relationships between Contracting Parties and investors of other Contracting Parties; (iii) in an intra-EU dispute, EU law and its legal order constitute an essential element of that relationship;

[45] RL-6, Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection.

(iv) the dispute arises between an investor from one Contracting Party and the Contracting Party receiving the investment; and (v) other Contracting Parties are not affected by the dispute, its interpretation or its outcome.

97. Indeed, the provision at issue, Article 26 ECT, entitled "*Settlement of Disputes between an Investor and a Contracting Party*", applies exclusively to "*[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former*" (Article 26(1) ECT). Accordingly, only two Contracting Parties are concerned in such a dispute: the home State of the Investor; and the host State of the investment.

(vii) Article 16 ECT

98. The Award's analysis regarding the intra-EU objection proceeds on the assumption of a conflict between the ECT and EU law, rather than seeking first to interpret the Treaty in accordance with the VCLT. This is apparent from the structure of the reasoning: the Award initially seeks to resolve the presumed conflict (in the first section of its analysis) and only thereafter turns to consider whether Article 26 ECT contains consent to intra-EU investment arbitration. Notably, it devotes substantially more attention to the former exercise than to the latter.

99. In regard to Article 16 ECT, which the Award treats as resolving the presumed treaty conflict and which forms a pivotal element of its reasoning, the Award reads: "*As stated in the prior decision in Vattenfall: 'Article 16 [ECT] poses an insurmountable obstacle to Respondent's argument that EU law prevails over the ECT'. This is because EU law is subject to EU law dispute resolution and the ECT is subject to ECT dispute resolution*."[46]

100. First, the Award fails to acknowledge that, if consent were accepted, EU law would in effect become subject to ECT dispute resolution even in an intra-EU dispute setting. Such

[46] Award, ¶ 422. Footnote omitted.

a consequence would risk undermining the uniform application of EU law within the EU and the principle of equality before the law.

101. Secondly, in any event and in the alternative, I am not persuaded that, even assuming a conflict (*quod non*), Article 16 would be the governing conflict-resolution rule, displacing Article 30(4) VCLT, Article 351 TFEU,[47] and the primacy of EU law.[48]

102. Thirdly, and critically, Article 16 ECT would only apply "*where any such provision [of the ECT] is more favourable to the Investor or Investment*" (Article 16(2)). It is neither evident, nor explained in the Award, why or how the protections afforded by the ECT would necessarily be "*more favourable*" than those available under the EU legal order. Not in general terms,[49] and still less so in the particular circumstances of the present arbitration.

(viii) Conclusion: Lack of Consent to Intra-EU Investor-State Arbitration

103. To recapitulate, two competing interpretations of the term "*of another Contracting Party*" in Article 26 ECT, regarding consent, may be identified and compared as follows:

A) Isolated interpretation	**B) Systemic interpretation**

[47] For the reasoning by which Articles 30 VCLT, 16 ECT and 351 TFEU lead to the lack of jurisdiction, *see* Kohen Dissenting Opinion, ¶¶ 56–83.

[48] *See* the Agreement on the interpretation and application of the Energy Charter Treaty, Article 2.1.(b): "*[T]he primacy of European Union law, recalled in Declaration No 17, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, as a rule of international law governing conflict of norms in their mutual relations, with the result that, in any event, Article 26 of the Energy Charter Treaty does not and could not apply as a basis for intra-EU arbitration proceedings*" (Official Journal of the European Union, 27 March 2026; ELI: http://data.europa.eu/eli/agree_internation/2026/757/oj).

The Agreement on the interpretation and application of the Energy Charter Treaty also recalls that, in line with the case-law of the Permanent Court of International Justice (Permanent Court of International Justice, *Question of Jaworzina (Polish-Czechoslovakian Frontier)*, Advisory Opinion, [1923] PCIJ Series B, No. 8, p. 37) and of the International Court of Justice (International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] I.C.J. Reports, 15, p. 20), the right of giving an authoritative interpretation of a legal rule belongs to the parties to an international agreement in relation to that agreement.

[49] *See* Kohen Dissenting Opinion, in particular ¶¶ 70–80.

1. Relies on an isolated reading of Article 26(1) ECT which disregards other relevant provisions and deprives central elements of the Treaty of legal effect.	1. Is based on a comprehensive reading of Articles 1(1)-(3), 2, 25, and 26(1)-(6) ECT, taking into account the text, context, object and purpose of the Treaty.
2. Contradicts the interpretation of the Contracting Parties concerned and compels States to disregard binding international obligations which the Treaty itself expressly recognises.	2. Coincides with the interpretation of the Contracting Parties concerned, who can comply with their obligations in a harmonious manner.
3. Creates unnecessary conflict between legal orders and fragmentation of international law, contrary to the interpretative framework established by the Vienna Convention.	3. Acknowledges the systemic integration of international law (Article 31(3)(c) VCLT) and the application of relevant rules of international law to the dispute (Article 26(6) ECT).
4. Jeopardises the EU legal order and its constitutional integrity.	4. Respects the EU legal order, its constitutional nature and unique judicial system.
5. Discriminates between EU investors of different Member States by allowing some EU investors to escape from the uniform interpretation of EU law while continuing to benefit from economic and political integration and EU rights.	5. Guarantees equality before the law, gives effect to the rule of law, and preserves a level playing field where rights and obligations are aligned.

104. The five points compared above are not isolated criticisms; they form a single, integrated objection. Only the systemic interpretation gives full legal effect to the Treaty as a coherent instrument operating within the international legal system, rather than as a collection of disconnected clauses.

105. In light of the foregoing, I am inclined to opine that the interpretation which complies with the mandatory rule of treaty interpretation codified in Article 31 VCLT, namely, an interpretation that integrates good faith, text, context, object and purpose, together with any relevant rules of international law applicable in the relations between the parties, is the interpretation that does not find consent to intra-EU investor-State arbitration in the ECT.

III. MERITS: THE FET AND EXPROPRIATION STANDARDS

106. The Tribunal has unanimously found that "*this asset [the shares] was neither subject to a breach of the fair and equitable treatment standard nor impaired in breach of ECT Article 10*"[50] and it "*does not accept that the Claimants discharged the necessary legal standard to establish expropriation*".[51]

107. Further, the expropriation section of the Award states that "*[w]hilst they did not lose their shares […] they did lose the value of those shares*",[52] as if this could make a difference.

108. However, in my opinion, under the particular circumstances of the present case, any alleged loss of value of the shares would be, in any event, irrelevant. Indeed, I shall set out further reasons which, from different perspectives, exclude the existence of any expropriation. Before doing so, it is appropriate to recall certain aspects of the factual and legislative background.

[50] Award, ¶ 1051.
[51] Award, ¶ 1062.
[52] Award, ¶ 1057.

(i) Background[53]

109. As observed by the Federal Constitutional Court ("*Bundesverfassungsgericht"* or *"BVerfG")*, the purpose of the *WindSeeG* was to expand the use of offshore wind energy in the interest of climate and environmental protection.

110. Prior to the entry into force of the disputed measures, the approval of offshore wind farms ("OWF") within the exclusive economic zone ("EEZ") was granted without any State site planning and without coordination with the construction of the grid connection. The *WindSeeG* has regulated the expansion of offshore wind energy in a manner that it is now preceded by State-managed site development and a central tender process. The construction of OWF, which would be futile in the absence of a connection to the electricity grid, and the expansion of the offshore transmission lines, are now coordinated.

111. The legislative objective was to enable a steady increase in the volume of climate-friendly wind energy produced on the sites of the EEZ that is economical and provides planning certainty. In pursuing that aim, the legislature assessed the projects by type on the basis of their proximity to the coast.

112. The Claimants' interests must be balanced against the public interests pursued by the change of the law. The weight to be accorded to the Claimants' interests may be assessed by reference to the scale of the investments made. The Claimants have incurred expenditure amounting to several million Euros in connection with their projects. However, the greater part of that expenditure relates to the exploration of sea areas and to the preparation of reports concerning soil and environmental conditions. That sum stands in marked contrast to the overall costs of constructing a wind farm, which are estimated to be between EUR 1 billion and EUR1.5 billion.

113. There are no serious doubts as to the proportionality of the measures. The approval regime pursues the objectives of environmental and climate protection, which are of particular importance. The legislature enjoys a broad margin of appreciation in discharging its

[53] *See* RL-17 / C-21, German Federal Constitutional Court, Case Nos. 1 BvR 1679/17 and 1 BvR 2190/17, Decision, 30 June 2020 ("BVerfG June 2020 Decision"), ¶¶ 1–10, 29, 106, 132–133, and 165–171.

responsibility to promote the common good within its democratic responsibility. In particular, when introducing a new legal regime or amending existing legislation, the legislature is not obliged to insulate affected persons from every burden. Furthermore, in areas of law characterised by frequent or periodic legislative amendment, individuals cannot legitimately expect the same degree of legal stability as may exist in more settled fields of law.

114. Moreover, having regard to the complexity and dynamic nature of this regulatory field, legislative reform in relation to the construction of offshore wind farms was to be expected. Given the complex processes involved in the development of a wind farm and the necessary expansion of grid infrastructure, which require close coordination, it was reasonably foreseeable that a more coordinated and market-oriented approval system would be introduced. Accordingly, the Claimants' prospects were uncertain from the outset.

(ii) No Liability Without Fault

115. In the context of that background, the Tribunal has found unanimously no breach of the ECT.

116. In particular, with regards to the FET standard contained in Article 10(1) ECT, the Award "*considers that the dissenting opinion in Kruck v. Spain in 2022 is a valuable starting point for analysis*", an opinion that considers that "*[n]o legal system imposes strict liability in damages for a breach of legitimate expectations; it is always based on fault*" and that "*[t]here is no reason in principle for international investment law to take a radically different approach*".[54]

117. In my view, two considerations are of particular relevance.

118. First, when addressing the issue of loss of value, it must be borne in mind that where a tribunal orders compensation for such loss, the loss does not thereby vanish (or, to adopt

[54] Award, ¶¶ 897-898, quoting CL-359, *Matthias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Dissenting Opinion of Zachary Douglas, 13 September 2022 ("Douglas Dissenting Opinion"), ¶¶ 1–6.

the language of *Chorzów Factory*, is not "*wiped out*"). Rather, it is transferred from the investor to the taxpayers of the respondent State. It follows that strong legal grounds are required to justify such a transfer from one pocket to another. By way of *reductio ad absurdum*, it cannot be the case that every loss, however occasioned, is compensable. Only losses that are legally wrongful, i.e., those caused with fault, may properly found a claim to compensation.

119. Secondly, there exists a fundamental distinction between public law regulation and private law contract. The default position in respect of a private law contract is that it may not be altered unilaterally by either party. By contrast, the default position in respect of public regulation is that it may be amended unilaterally by the State in the exercise of its sovereign powers.[55]

120. In that regard, I agree that "*there is no legal or moral justification for tribunals to redistribute public funds on this basis*",[56] namely on the basis of strict liability akin to that applicable in private law (strict versus fault-based liability).

121. The same fault-based conception of liability may, in principle, be applied to the expropriation standard. It is for that reason that Prof. Douglas, in his dissent, observed: "*The essence of my dissent is that a State can only be condemned to pay compensation on the basis of fault under Article 10 of the ECT (or indeed under any other investment protection obligation)*".[57]

122. By parity of reasoning, the absence of fault in the State's conduct in the present case entails the absence of liability under the expropriation standard.

(iii) The State's Right to Regulate and the Police Powers Doctrine

123. An essential attribute of a State's sovereignty is its right to regulate its own society, economy and environment. Consequently, the host State's sovereign right to regulate forms part of the legal framework within which an investor operates. It follows that

[55] *See* CL-359, Douglas Dissenting Opinion, ¶¶ 28–30.
[56] *Id.*, ¶ 6.
[57] *Id.*, ¶ 4.

expropriation must be distinguished from legitimate, non-compensable regulatory measures.

124. Contrary to the so-called "sole effects" doctrine, the predominant line of reasoning in investment arbitration recognises the State's right to regulate and the operation of its police powers. A mere loss in value is not sufficient to constitute expropriation. The depreciation of an investment resulting from regulatory measures adopted by the host State in the normal, *bona fide*, proportional and non-discriminatory exercise of its regulatory powers, for the benefit of the general interest, does not amount to expropriation. Were it otherwise, the host State's right to regulate would be rendered illusory, since virtually every State measure has some adverse effect upon investments; it is impossible to avoid all depreciation of investments within the territory of a host State.

125. By way of illustration, the tribunal in *Feldman v. Mexico*, already in 2002, observed:[58]

> "[G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this."

126. The *Feldman* award thus distinguished compensable measures from reasonable regulation as a matter of customary international law. In a similar vein, the tribunal in *Methanex v. United States* referred to general international law and identified three elements characteristic of non-compensable regulation: due process, non-discrimination and public purpose:[59]

> "[A]s a matter of general international law, a non-discriminatory regulation for a public purpose which is enacted in accordance with due process and, which affects, inter alios a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given […]."

[58] RL-202, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 103.

[59] CL-181, *Methanex Corporation v. United States of America*, UNCITRAL/NAFTA, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter D, ¶ 7.

127. More recent awards have referred to: (i) the interpretation of the treaty pursuant to Article 31(3)(c) VCLT; (ii) the State's police powers under customary international law; and (iii) the requirements of *bona fide* conduct, due process, non-discrimination, proportionality and public purpose, in order to distinguish between indirect expropriation (or a compensable taking) and legitimate regulation under international law. The tribunal in *Marfin v. Cyprus* stated:[60]

> "826. The Tribunal considers that the economic harm consequent to the non-discriminatory application of generally applicable regulations adopted in order to protect the public welfare do not constitute a compensable taking, provided that the measure was taken in good faith, complied with due process and was proportionate to the aim sought to be achieved.
>
> 827. In this respect, the Tribunal notes that […] the Treaty is drafted in broad terms and does not include any exception for the exercise of a State's regulatory powers. However, the provisions of the Treaty must be interpreted in accordance with Article 31(3)(c) of the VCLT, i.e., in light of '[a]ny relevant rules of international law applicable in the relations between the parties'. These rules include customary international law.
>
> 828. While every application of a regulation that causes some economic damage to an investor could be seen as giving rise to a duty to compensate, under customary international law, a distinction exists between the reasonable *bona fide* exercise of police powers, which does not amount to a compensable taking, and indirect expropriation. The Tribunal thus aligns itself with the long line of arbitral awards finding that the characterization of a measure as expropriatory depends on the nature and purpose of the State's action. In this respect, '[i]t is... established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare'.
>
> 829. The Tribunal further subscribes to the view that, 'in order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken *bona fide* for the purpose of protecting the public welfare, must be non-discriminatory and proportionate'."

[60] *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018, ¶¶ 826–829 (available at: https://jusmundi.com/en/document/decision/en-marfin-investment-group-holdings-s-a-alexandros-bakatselos-and-others-v-republic-of-cyprus-award-redacted-thursday-26th-july-2018).

128. The *Marfin* tribunal also referred to seminal cases such as *Saluka v. Czech Republic*,[61] *Tecmed v. Mexico*,[62] *Invesmart v. Czech Republic*,[63] and *Philip Morris v. Uruguay*. In the latter case, the tribunal held:[64]

> "As indicated by earlier investment treaty decisions, in order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken *bona fide* for the purpose of protecting the public welfare, must be non-discriminatory and proportionate."

129. In the present case, the *WindSeeG* 2017 pursued genuine and legitimate public interests, namely the expansion of offshore wind energy in order to provide a secure, efficient and environmentally compatible grid-based supply of electricity to the general public. It therefore pursued legitimate policy objectives and was enacted for a valid public purpose. The expansion is now being carried out in an orderly and technically feasible manner, and the prioritisation of zones closer to the shore facilitates grid connection and contributes to the effective operation of offshore wind farms. In conclusion, the Respondent's disputed measures consisted of a series of *bona fide* regulatory acts adopted in the public interest of ensuring reliable offshore wind energy.

(iv) The Lack of FET Breach Precludes Expropriation

130. An additional perspective is to consider the relationship between the FET standard and expropriation. Although being two conceptually separate treaty protection standards, frequently their analysis overlaps in practice.

131. In short, if the State has not breached the FET standard, it follows, *a fortiori*, that it has not expropriated the investment. If no breach of FET can be established in the present case, it is even less tenable to suggest that an expropriation has occurred, particularly in

[61] CL-39, *Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006.

[62] CL-37, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003.

[63] RL-159, *Invesmart v. Czech Republic*, UNCITRAL, Award, 26 June 2009.

[64] RL-178, *Philip Morris Brand SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶ 305.

circumstances where they retain full control of the asset that constitutes the investment (the shares in this case).

132. The Award concludes that the applicable legal standard for breach of FET arising out of a change in the legal and regulatory framework "*requires legitimate expectations based on a specific commitment, which the host State harmed by regulating in a manner that lacked proportionality, transparency, was in bad faith, or otherwise based on respondent fault*".[65]

133. After carefully assessing the factual matrix of this case, the Award has unanimously found "*that there were no specific commitments*" and that "*[e]ven if that were not the case, the Tribunal would have found there to have been no lack of proportionality, transparency or good faith, or other fault, giving rise to breach of fair and equitable treatment*".[66]

134. When the facts are examined through the lens of the FET standard and are found to disclose no wrongfulness, they cannot amount to expropriation, whether individually or cumulatively. Indeed, measures which are reasonable, and consistent with FET cannot properly be characterised as measures tantamount to expropriation.

135. This approach is reflected in *del Valle v. Spain*, where the tribunal held:[67]

> "755. [T]he Claimants not having shown that Spain carried out a formal taking of the Claimants' investments, as the notion of direct expropriation normally requires.
>
> […]
>
> 758. […] [T]he measures alleged to constitute a creeping expropriation are those also invoked in support of a breach of FET. This being so, the Tribunal's analysis may be relatively brief, as it has already examined each of these acts in the context of FET and found that none of them was illegitimate, unreasonable or otherwise contrary to FET. It is true that, in a creeping expropriation, the single acts composing the expropriation do

[65] Award, ¶ 930.

[66] Award, ¶¶ 1023–1024.

[67] *Antonio del Valle Ruiz and others v. Kingdom of Spain*, PCA Case No. 2019-17, Final Award, 13 March 2023, ¶¶ 755, 758, and 763–764 (available at: https://jusmundi.com/en/document/decision/en-antonio-del-valle-ruiz-et-al-v-kingdom-of-spain-wednesday-26th-june-2019#lvl_355418).

> not need to be expropriatory in themselves, because it is their combination that results in an expropriation. However, in the Tribunal's opinion, a combination of legitimate acts cannot, without more, amount to an expropriation. Here, the Tribunal has held in its analysis of FET that none of the acts complained of could be validly challenged. It is thus difficult to see how the sum of these acts could constitute a 'measure equivalent to expropriation' within the meaning of […] the Treaty.
>
> […]
>
> 763. A further reason lies in the fact that the resolution was a valid exercise of police powers for which no compensation is required. […]
>
> 764. Under the circumstances, the resolution […] constituted an exercise of regulatory powers for a legitimate and urgent purpose. If an administrative action like the resolution of Banco Popular could, without more, be deemed a 'measure equivalent to an expropriation', then the complex legal framework on the recovery and resolution of credit institutions would be undermined and resolution authorities would be precluded or severely limited in the exercise of their powers."

136. The final paragraph cited above reflects the broader reasoning that an exclusive focus on the sole effects would risk undermining the State's right to regulate and unduly constraining its police powers. In the same vein, in the present case, to characterise the exercise of the State's regulatory powers pursued for the legitimate objective of promoting the efficient generation of clean wind energy as a measure tantamount to expropriation would similarly undermine, or severely restrict, the State's right (and indeed *duty*)[68] to regulate in furtherance of the necessary energy transition.

137. Lastly, in *Discovery Global v. Slovak Republic*, the tribunal addressed claims advanced in parallel under the FET and expropriation standards and, having rejected the FET claim, proceeded to examine expropriation. It began by noting that the claimant retained ownership of its shares. In those circumstances, and having already rejected the FET

[68] *See*, e.g., CL-375, Advisory Opinion of 23 July 2025 of the International Court of Justice on the Obligations of States in Respect of Climate Change. In addressing the content of the customary duty to prevent significant harm to the environment, the Court made clear that the obligation extends to the climate system and entails concrete regulatory duties. In particular, at ¶¶ 280–282, it opines that due diligence means that States must "*put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question, and … exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective*" quoting the 2024 Advisory Opinion of the International Tribunal for the Law of the Sea (ITLOS) on Climate Change, ITLOS Reports 2024, p. 89, ¶ 235.

claim in respect of the same measures, the tribunal concluded that no expropriation had occurred:[69]

> "691. The Tribunal starts by noting that Discovery still owns the shares in AOG and that AOG relinquished the Medzilaborce and Snina Exploration Licenses in April 2018 and did not seek an extension of the Svidník Exploration License, which expired in July 2021.
>
> 692. The measures which the Claimant impugns here are the same measures of which it complained in the context of its FET, arbitrary and discriminatory treatment, and effective means claims. All of these measures have been extensively examined above and none has been held to rise to the level of a treaty breach. For reasons of judicial economy, the Tribunal refers to its discussion above. A measure that does not breach FET or a similar standard cannot conceivably constitute an expropriation. The same is true of the cumulative effect of a series of measures. If none represents a breach individually, their addition will not turn them into a breach. Or, differently put, adding zeros will still give zero."

138. The present situation is analogous. First, the Claimants continue to own the shares, which constitute their only investment (and they neither obtained a licence or permit, nor sought to participate in the relevant tender). Secondly, the measures relied upon in support of the expropriation claim are identical to those advanced under the FET claim. Thirdly, a detailed and granular analysis of the FET standard has led to the conclusion that no breach has been established.

139. Under those circumstances, measures that do not breach the FET standard cannot conceivably constitute an expropriation. Moreover, if none of the disputed measures amounts to a breach individually, their aggregation cannot transform them into one. As the above-quoted paragraphs reflect, the sum of zeros remains zero.

* * *

[69] *Discovery Global LLC v. Slovak Republic*, ICSID Case No. ARB/21/51, Award, 17 January 2025, ¶¶ 691–692 (available at: https://jusmundi.com/en/document/decision/en-discovery-global-llc-v-slovak-republic-award-friday-17th-january-2025#decision_71722).

ICSID 21/26-CBO

[signed]

Mr. Antolín Fernández Antuña
Arbitrator

Date: 13 MAY 2020