INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mainstream Renewable Power Ltd and others

v.

Federal Republic of Germany

(ICSID Case No. ARB/21/26)

PROCEDURAL ORDER NO. 7

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

Secretary of the Tribunal
Ms. Martina Polasek

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30 May 2023

I. RELEVANT PROCEDURAL BACKGROUND

1. On 22 November 2021, the Tribunal issued Procedural Order No. 1 ("**PO 1**") setting forth the relevant procedure to govern this arbitration.

2. On 9 January 2023, the Tribunal issued Procedural Order No. 4 ("**PO 4**") concerning the production of documents. Section 30(c) of PO 4 provides that each Party shall produce the documents of which production is ordered to the requesting Party by 27 January 2023.

3. On 30 January 2023 and 2 February 2023, the Respondent and the Claimants, respectively, made applications to the Tribunal for orders arising out of the other Party's production of documents (the "**Respondent's Original Application**" and the "**Claimants' Original Application**", respectively). The Tribunal ruled on those applications in its Procedural Order No. 6 ("**PO 6**") dated 6 March 2026.

4. In PO 6, the Tribunal decided, *inter alia*, that it "[did] *not make any further orders or adjustments to the schedule in PO 1 (as amended)*"[1] and directed, *inter alia*, the Respondent "*to the extent it has not already done so, to provide the Claimants with* […] *the proposed confidentiality terms regarding any responsive documents that are subject to a specific commercial or technical sensitivity*".[2]

5. On 10 March 2023, the Respondent filed what it referred to as a "*Protest against PO 6*", (the "**Respondent's Further Application**"), together with Legal Authorities RL-0249 through RL-0252. The Respondent therein "*protest*[ed] […] *in particular against the Tribunal's orders nos. 15./17.a. and 16.b.ii, as they do not adequately sanction Claimants' arbitrary violation of the Procedural Timetable and do not take into account the data privacy law obligations, which Respondent as a State is obligated to adhere to and which forbid the production of 20 documents for the grounds specified in detail by Respondent in its privilege log*". The Respondent also requested that the Tribunal order the Claimants "*to*

[1] PO 6, paras. 15, 17(a).
[2] PO 6, para. 16(b)(ii).

produce certain documents that they withheld from production by incorrectly invoking legal privilege" and reminded the Tribunal that "*its decision regarding public access*" to the September 2023 hearing "*is still outstanding*".[3]

6. Upon invitation from the Tribunal, on 16 March 2023, the Claimants provided their response to the Respondent's Further Application (the "**Claimants' Response**"). The Claimants argued there were no exceptional circumstances warranting a change to the procedural calendar as requested by the Respondent and requested that the Tribunal reject the Respondent's request as it relates to the procedural timetable. The Claimants further submitted that the Respondent had not fulfilled its own obligations under PO 4 and PO 6 regarding document production and they requested the Tribunal order the Respondent to do so. With regard to their own obligations under PO 4 and PO 6, the Claimants requested that the Tribunal confirm that they are not required to disclose the documents set out in their privilege log. Finally, the Claimants reiterated their objection to a public hearing, concluding therefore that they considered this matter closed.

7. On 24 March 2023, the Respondent submitted its comments on the Claimants' Response (the "**Respondent's Reply**"). In this response, it argued that it had fully complied with POs 4 and 6. Further, the Respondent argued that the Claimants have failed to give adequate reasons for not disclosing correspondence involving their fact witness [redacted] on the basis of a contemplated litigation privilege.

II. THE PARTIES' SUBMISSIONS

A. THE RESPONDENT

8. The Respondent's Further Application raises three separate issues. These include: (i) objections to the Tribunal's orders in PO 6 relating to document production; (ii) objections to the Claimants' privilege log; and (iii) the outstanding issue of public access to the Hearing. Each will be addressed in turn.

[3] Respondent's Further Application, p. 1.

(i) Objections to PO 6

9. The Respondent's Further Application raises five objections to the PO 6. These primarily, although not exclusively, relate to the Tribunal orders at paragraphs 15, 16.b.ii and 17.a which the Respondent submits did not "*adequately sanction*" the Claimants' failure to comply with the procedural timetable.[4]

10. First, the Respondent notes that the version of PO 6 that was transmitted to the Parties retained the word "*Draft*" in the file name; it requests clarification whether that version is indeed the final version rendered by the Tribunal.[5]

11. Secondly, in relation to the Tribunal's orders at paragraphs 15 and 17.a, the Respondent submits that the Tribunal's assumption that the Claimants' two-week delay in completing their document production would not adversely impact the Respondent demonstrates that the Tribunal did not "*adequately consider Respondent's position*".[6] In particular, the Respondent submits that this two-week delay disadvantaged the Respondent because:

a. the Respondent "*legitimately relied on the compliance by both Parties with the deadlines set out in Annex C to the Procedural Order No. 1*" (as updated);

b. any shortening of the agreed deadlines "*leads to an additional burden for Respondent, as numerous Federal Ministries, agencies and officials are involved in this arbitration*";

c. a time-slot was "*reserved for a comprehensive, all-encompassing internal ministerial document review*" and "*scheduled for the 11 February 2023 and following two weeks*";

d. the German Federal Ministry for Economic Affairs and Climate Action is "*in charge of developing and implementing measures to cope with the energy crisis*"

[4] Respondent's Further Application, p. 1.
[5] Respondent's Further Application, p. 2.
[6] Respondent's Further Application, p. 3.

and "*coordinating the Government's activities and initiatives in this regard*", as well as being the Federal Ministry in charge of "*ICSID arbitration proceedings*" pending against Germany, and therefore the "*Russian invasion in Ukraine causes significant challenges*" and means that "*almost the entire staff … is still tied up working to find solutions and implement measures related to the energy crisis …*"; and

e. the Tribunal did not consider changing the due date for the Respondent's Rejoinder from 3 August 2023 to 18 August 2023, as requested, but instead only addressed a change to the due date of the Claimants' Reply.[7]

12. Against those factors, the Respondent has requested that the Tribunal:

a. reconsider PO 6 with respect to the orders at paragraphs 15 and 17.a regarding adjustments to the procedural timetable in Annex C to PO 1 (as updated on 13 September 2022);

b. schedule the deadline for the Claimants' Reply for 21 April 2023, instead of 5 May 2023, with the deadline for the Respondent's Rejoinder remaining 3 August 2023; and

c. in the alternative, extend the time for the Respondent's deadline to file the Rejoinder from 3 August 2023 to 18 August 2023.

13. Thirdly, the Respondent submits that it had already provided the Claimants with a "*brief summary of the scope and nature of its document search*", as ordered by the Tribunal in PO 6, paragraph 16.b.i.[8] The Respondent refers in particular to its letter of 7 February 2023, which states:

> *Respondent conducted "reasonable and proportionate searches" for responsive documents as required by Sec. 28 of PO 4. For each and every of Claimants' requests, Respondent underwent great*

[7] Respondent's Further Application, pp. 3-4.

[8] Respondent's Further Application, p. 5.

> *efforts to contact various different ministerial units and public agencies to request the handover of documents from those various custodians. Despite the significant workload currently experienced by various Federal Ministries and their units, every ministerial unit and public agency that could reasonably be expected to be in possession of documents responsive to any of Claimants' requests was contacted to conduct searches. A large number of custodians reviewed an immense volume of documents in an extremely narrow time window. Where the respective unit or agency identified responsive documents, said documents were transmitted to the responsible unit within the Federal Ministry of Economic Affairs and Climate Action and consequently, after being structured and coordinated by said unit, to Counsel for Respondent.*[9]

14. The Respondent further submits that it has fulfilled the directives set out in PO 6 because:

a. it had conducted a "*thorough search*", which "*involved a large number of possible internal custodians in its document search, and confirmed full compliance with its disclosure obligations under the PO 4*";

b. the "*far-reaching scope and large number of possible custodians did not prevent Respondent from conducting a thorough search and comply with its disclosure obligations on time*"; and

c. it "*provided Claimants with a summary of the scope and nature of its document search in Respondent's Letter to Claimants of 2 March 2023*", contacting the "*respective ministerial units and public agencies that could potentially be a custodian for the different requests who then searched for responsive documents in their possession in accordance with the wording and goal of the requests*", which were "*then passed on for review to ensure all avenues of finding responsive documents had been exhausted. This approach was more than reasonable*".[10]

[9] Respondent's Further Application, p. 5, referring to Letter from the Respondent to the Tribunal dated 7 February 2023.

[10] Respondent's Further Application, pp. 5-6.

15. Against those factors, the Respondent submits that it has already fulfilled the order in PO 6 regarding the necessary summary.

16. Fourthly, the Respondent submits that the Tribunal had taken no decision as to whether or not the Respondent had validly withheld documents from production on the basis of data privacy law and commercial confidentiality. In particular, the Respondent notes that:

    a. it withheld "*20 documents from its document production on the grounds of data privacy law and commercial confidentiality*";

    b. it "*listed these 20 documents in the privilege log transmitted to Claimants on 27 January 2023 stating the basis and grounds for its objections in detail in the columns 'Objection' and 'Grounds for Objection'*"; and

    c. the "*Objections*" column specified "*both data privacy and commercial confidentiality as basis for the objections for all 20 documents*".[11]

17. The Respondent submits that paragraph 16.b.ii. of PO 6 only deals with commercial confidentiality, asking the Respondent to propose confidentiality terms to the Claimants, and does not consider or address the Respondent's data privacy objections.

18. According to the Respondent, its Privilege Log and letter of 7 February 2023 both indicate that the 20 documents were also "*withheld because of data privacy reasons to protect the personal data of third parties*", in accordance with the German Constitution. The third-party privacy protections could not be overcome by redaction or "*counsel eyes only*" designation.[12]

[11] Respondent's Further Application, p. 6.
[12] Respondent's Further Application, pp. 6-7.

19. Therefore, the Respondent requests that the Tribunal "*clarify*" PO 6, paragraph 16.b.ii, to make clear that "*documents withheld by Respondent due to data privacy do not have to be produced to Claimants*".[13]

20. Fifthly, the Respondent submits that paragraph 16.b.iii of PO 6 is "*obsolete*" on the basis that no documents were withheld by the Respondent on the grounds of political or institutional sensitivity.[14]

21. The Respondent declares itself "*not obligated under PO 4 and/or PO 6 to provide a political and institutional sensitivity log and/or a description as to the nature of that sensitivity*", and seeks no additional relief from the Tribunal in this regard.[15]

(ii) Objections to the Claimants' Privilege Log

22. The Respondent's Further Application also requests that the Tribunal order the Claimants to produce documents, which it submits they "*withheld from production by incorrectly invoking legal privilege*".[16] In particular, the Respondent submits that the Claimants' Privilege Log contained 105 documents "*withheld from Claimants' document production on the grounds of an alleged legal impediment or privilege*".[17]

23. As to the communications between the Claimants and their witness, [redacted], identified in Claimants' Privilege Log Nos. 2-3, 9-30, 33-35, 38, 42-80, 84-101 and 104, and withheld on the grounds of legal privilege, the Respondent submits that "[b]*y calling* [redacted] *as a witness and submitting her witness statement, Claimants waived any legal privilege attached to the legal advice provided by* [redacted]" and are "*estopped from claiming legal privilege*".[18]

[13] Respondent's Further Application, p. 7.
[14] Respondent's Further Application, p. 8.
[15] Respondent's Further Application, p. 8.
[16] Respondent's Further Application, p. 1.
[17] Respondent's Further Application, p. 8.
[18] Respondent's Further Application, p. 9.

24. In support of this contention, the Respondent refers to Section 15.1 of PO 1, and the IBA Rules on the Taking of Evidence in International Arbitration (2020) ("**IBA Rules**"), Articles 3 and 9, and in particular Articles 9.4(b), (d) and (e), arbitral decisions on privilege,[19] as well as rulings by domestic courts.[20] It appears to make two primary arguments.

25. First, the Respondent submits that [redacted] First Witness Statement "*deliberately and intentionally disclosed specific information regarding the legal advice provided by* [redacted] *to Claimants*", in a manner that "*is inconsistent with the maintenance of the legal privilege they now claim*" and is a "*cherry-picking approach*" that "*seriously disadvantages Respondent in the future cross-examination of* [redacted] *and Respondent's ability to assess the allegations made by Claimants regarding their alleged reasonable expectations*".[21] In essence, the Respondent submits that it would be contrary to principles of fairness and equality as between the Parties to permit the Claimants selectively to disclose certain communications and not others.[22]

26. Secondly, the Respondent argues that "[redacted] *position as a witness in this arbitration waives privilege over the entire range of privileged communications regarding the subject matter of* [redacted] *testimony*", and cites to two cases in support of this contention.[23]

[19] Respondent's Reply, p. 5, citing *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 6 (Decision on Common Interest Privilege, Limited Waiver of Privilege and Subject Matter Waiver of Privilege), 18 January 2019 ("***Global Telecom v. Canada***"), **RL-0251**, p. 55, para. 4; *Glamis Gold, Ltd. and United States of America*, UNCITRAL, Award, 8 June 2009 ("***Glamis Gold v. United States***"), **RL-0170**, para. 234; *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("BAPEX") and Bangladesh Oil & Gas Mineral Corporation ("PETROBANGLA")*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Procedural Order No. 22 (Privilege Asserted Against the Production of the Deloitte Documents), **RL-0253**, paras. 68 *et seq*.

[20] *North Riv. Ins. Co. v. Columbia Cas. Co.*, 1995 WL 5792, *6, 1995 U.S. Dist. LEXIS 53, *17 (S.D.N.Y. 1995) ("***North River v. Columbia Casualty***"), **RL-0252**; *Sheldon Blank v. Canada (Minister of Justice)*, Supreme Court of Canada, Decision, 8 September 2006, **RL-0254**, paras. 34, 39-40; *Orco Bank, N.V. v. Proteinas Del Pacifico, S.A.*, 178 A.D.2d 390, 390 (2d Dept. 1992), **RL-0250**.

[21] Respondent's Further Application, p. 9.

[22] Respondent's Further Application, pp. 9-10.

[23] Respondent's Further Application, p. 10, citing *Global Telecom v. Canada*, **RL-0251**, p. 55, para. 4; *Glamis Gold v. United States*, **RL-0170**, para. 234.

27. The Respondent asserts that all privilege is waived over all communications regarding the subject-matter of [redacted] evidence (*i.e.*, "*legal, regulatory and political framework applicable in the Federal Republic of Germany in 2008, Claimants' applications to the BSH for the Projects, the consenting process from 2008 through 2013 and the Stakeholder Conference from 2013 through 2015, inter alia*"). According to the Respondent, this would encompass the majority of the [redacted] communications contained in the Claimants' Privilege Log (*i.e.*, Log Nos. 2-3, 9-10, 14-17, 22-25, 29-30, 33-35, 38, 42-49, 78-81 and 84-101 on applications to the BSH for the Projects and/or the consenting process from 2008 through 2013; Log Nos. 12-13, 18-21 and 26-28 on the Stakeholder Conference from 2013 through 2015; and Log Nos. 50-77 on legal, regulatory and political framework applicable in Germany in 2008).[24]

28. In relation to the [redacted] communications, the Respondent argues that:

    a. privileged communications cannot be used as "*both a sword and a shield*";[25]

    b. privileged information "*ceases to be privileged once it is intentionally or inadvertently disclosed to third parties, particularly when that privileged information is used as a relevant and material fact in support of a party's claims and made an issue in the claim*";[26]

    c. common law jurisdictions "*with extensive experience in matters regarding privilege do not permit selective disclosure*" on the ground that "*it constitutes an obstacle to the truth-finding process*",[27] and "*piercing the privilege veil is required to determine the validity of a claim or defence of the party asserting the privilege, and the privilege would deprive the adversary of vital information*";[28]

[24] Respondent's Further Application, p. 10.

[25] Respondent's Further Application, p. 11.

[26] Respondent's Further Application, p. 11, citing *Global Telecom v. Canada*, **RL-0251**, p. 55, para. 4; Respondent's Reply, pp. 4-5.

[27] Respondent's Further Application, p. 11, citing *North River v. Columbia Casualty*, **RL-0252**.

[28] Respondent's Reply, p. 5, citing *North River v. Columbia Casualty*, **RL-0252**.

d. "[o]*nce a party affirmatively places the subject matter of its own privileged communication at issue, invasion of the privilege is required to determine the validity of a claim or defence of the party asserting the privilege, and the privilege would deprive the adversary of vital information*".[29]

e. "[t]*he fact that Claimants' document search returned the allegedly privileged documents confirms that the documents are relevant to the case and material to its outcome*", and "*Claimants must not be allowed to rely on one of its (former) lawyers as a fact witness and at the same time argue that legal advice given by the lawyer would still be covered by legal privilege, despite the documents in question being relevant to the case and material to its outcome*".[30]

29. For the aforementioned reasons, the Respondent requests that the Tribunal order the Claimants to produce the communications involving the Claimants' fact witness, [redacted].

30. The Respondent further asserts that the Claimants' privilege objections were unclear, submitting that the "*Claimants seem to have withheld a total of ten documents concerning purely internal communications among Mainstream employees, i.e. Claimants' Privilege Log Nos. 1, 4, 6, 39, 40, 41, 46, 82, 83 and 105*". It argues that "*it is not apparent from the Privilege Log that any outside counsel was involved in the creation of those documents, or that any legal advice was indeed provided*".[31]

31. The Respondent adds that the Claimants' reference to "*existing or reasonably contemplated litigation*" is "*devoid of content*" because "*litigation privilege*" or "*work product privilege*" only protects documents whose main purpose is preparing for litigation involving specific parties and causes of action and not "*communications made for the purpose of any potential litigation that could arise at any time*" as this "*would allow parties to withhold documents that might be damaging to their case under the guise of privilege*", which cannot be the rationale behind litigation privilege, according to the Respondent. The

[29] Respondent's Further Application, p. 11, citing *North River v. Columbia Casualty*, **RL-0252**.
[30] Respondent's Reply, p. 5.
[31] Respondent's Further Application, p. 11.

Respondent claims that a more detailed description of the allegedly privileged communication is needed for the Tribunal to be able to assess the claim to privilege and asks why it is not possible for the Claimants to produce the documents in part and redact the specific sections where legal advice was provided.[32]

32. Accordingly, the Respondent requested that the Claimants provide the documents at Log Nos. 1, 4, 6, 39, 40, 41, 46, 82, 83 and 105, redacting the specific sections where legal advice was provided. The Respondent submits that the "*Claimants refused to produce these documents despite not naming a single attorney involved with the particular document*". The Respondent further suggests that a party "*could easily hide information behind the cover of privilege in this manner*" and that, "[w]*ithout more information, Respondent is unconvinced that these documents are not being maliciously withheld*".[33]

33. On that basis, the Respondent requests that the Tribunal order the Claimants to produce the documents at Log Nos. 1, 4, 6, 39, 40, 41, 46, 82, 83 and 105 and redact, where necessary, the specific sections where legal advice was provided.[34]

(iii) Public Hearing Access

34. Finally, the Respondent's Further Application maintains that a decision regarding public access to the hearing scheduled for 18 to 29 September 2023 remains pending.

35. In this regard, the Respondent refers to its letter of 1 February 2023, requesting public access to the hearing, and to the Claimants' observations of 6 February 2023, objecting to public access. According to the Respondent, the Claimants have not substantiated their objections.[35]

36. In support, the Respondent cites the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, effective from 1 April 2014, and the United Nations Convention

[32] Respondent's Reply, p. 6.
[33] Respondent's Further Application, p. 11.
[34] Respondent's Further Application, p. 12.
[35] Respondent's Further Application, p. 12.

on Transparency in Treaty-based Investor State Arbitration, opened for signature on 17 March 2015 (the "**Mauritius Convention**") in support of "*calls for greater transparency in international investment arbitration*".[36]

B. THE CLAIMANTS

37. Preliminarily, the Claimants note that the Respondent's Further Application of 6 March 2023 "*is not the first 'protest' by the Respondent against one of the Tribunal's procedural orders" and that it "unfortunately, would appear to be a further attempt by the Respondent – a strategy seen across its other conduct in these proceedings – to undermine the efficient conduct of this Arbitration*".[37] The Claimants do not provide any additional detail or analysis in this respect. Instead, they proceed briefly to deal with each of the points raised by the Respondent in turn, as follows.

(i) Objections to PO 6

38. First, as to the Respondent's observation regarding the word "*Draft*" in the PO 6 file name, the Claimants assume "*that the word 'DRAFT' in the file name of PO6 was inadvertent*" and further note that "*it does not appear in the text of PO6, nor anywhere in the version published on ICSID's website*".[38]

39. Secondly, as to the Respondent's concerns regarding the Tribunal's orders at paragraphs 15 and 17.a, the Claimants describe these as "*regrettable*". They note that "[w]*hile there was a short delay in the Claimants' completion of their document production, as noted in the Claimants' letter of 2 February 2023, that short delay caused no prejudice to the Respondent in circumstances where the next step in the Procedural Timetable is the submission of the Claimants' Reply*", and that, as noted in PO6, "*any shortening of the*

[36] Respondent's Reply, p. 7.

[37] Claimants' Response, para. 1.2

[38] Claimants' Response, para. 2.1, referring to https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/26.

window between the completion of document production and the next step in the schedule affects the Claimants as opposed to the Respondent".[39]

40. They argue that "[n]*othing in the Protest amounts to the 'exceptional circumstances' required to entertain a change to the due date of the Reply*", because as to the timing:

a. the Claimants completed document production on 10 February 2023, which meant that "*the entire alleged window for review could have been used by the Respondent*";

b. even if the Respondent could not download the documents in time to begin review on 11 February 2023, by 27 January 2023, the Claimants had already produced a significant volume of documents for the Respondent to begin its review; and

c. as 11 February 2023 was a Saturday, the Claimants' submission "*late in the evening*" the night before (*i.e.*, at 19:33 CET) was unlikely to impact the schedule.[40]

41. Therefore, according to the Claimants, the Respondent "*suffer*[ed] *no prejudice by a short delay in document production, nearly six months before its next deadline, when the next submission is the Reply which, itself, is still months from being submitted*". The Respondent's concerns regarding Russia's invasion of Ukraine had already been considered by the Tribunal and the Respondent "*offers no reason to suggest that the two-week window from 11 February 2023 for its alleged review of documents was a window where the staff which are, supposedly, otherwise unavailable would have been suspending their other tasks in order to review documents*".[41]

[39] Claimants' Response, para. 3.1 (emphasis in original).
[40] Claimants' Response, para. 3.2.
[41] Claimants' Response, para. 3.2(c).

42. The Claimants conclude that there is no reason to extend the due date of the Respondent's Rejoinder, which should be limited to "*responding to the arguments in the Reply*", due 5 May 2023. According to the Claimants, the Respondent "*has suffered no prejudice*".[42]

43. The Claimants request that the Tribunal reject the Respondent's objections to PO 6 regarding the procedural timetable and "*confirm that the Procedural Timetable amended on 13 September 2022 remains applicable to the Arbitration*".[43]

44. As to the Respondent's objections arising out of PO 6, paragraph 16.b.i., the Claimants submit that they "*should be entitled to an extension as a result of the document production process*" because they "*completed their document production obligations on 10 February 2023*" and as of 16 March 2023 "*the Respondent still ha*[d] *not completed its own obligations*" in accordance with the orders made in PO 6 in relation to responses or native files.[44]

45. The Claimants further submit that the Respondent should "*comply with its obligations under PO 4*" regarding "*sensitive*" documents. In this regard, the Claimants submit that:

    a. the "*Respondent has made no attempt to agree terms with the Claimants for the production of documents in order to protect confidentiality*";

    b. as to the 20 withheld documents, the Respondent "*withheld 20 documents from its document production on the grounds of data privacy law and commercial privacy*", without offering reasons why "*counsels*[']*eyes only*" would not be possible;

    c. it is "*not for the Respondent … to make a unilateral determination that any 'right to self-determination' 'outweighs Claimants' interest in the production of these documents"*";

[42] Claimants' Response, para. 3.2(d).
[43] Claimants' Response, para.10.1(a).
[44] Claimants' Response, para. 3.3.

d. the Claimants "*have a legitimate interest in reviewing these documents and are willing to agree to reasonable measures which respect confidentiality*";

e. "*the point of confidentiality terms is to agree terms sufficient to avoid a violation of confidentiality*"; and

f. "[n]*one of the Respondent's objections to the Claimants' document production requests were conducted on a 'data privacy' basis*" and therefore the "*Respondent should not be permitted to raise a new objection at this stage*".[45]

46. As to the Respondent's assertions that it has not withheld responsive documents on the basis of political and institutional sensitivity, the Claimants reiterate that they would find that to be surprising because the "*Respondent raised strongly-worded objections based on political and institutional sensitivity in respect of every one of the Claimants' requests*".[46]

47. Ultimately, the Claimants observe that neither they nor the Tribunal could assess such sensitivity without a summary of the Respondent's searches, but the Claimants do not repeat their request for the Respondent to provide a political and institutional sensitivity log and instead reserve their rights to do so after the Respondent provided a summary of its searches.[47]

48. Similarly, the Claimants do not repeat their request for a further privilege log, but again reserve their rights to do so after the Respondent provides a summary of its searches.[48]

49. In summary, the Claimants request that the Tribunal order the Respondent to comply with its obligations set out in PO 4 and PO 6; namely, that the Respondent should provide the Claimants with: (i) a brief summary of the scope and nature of its document search; and

[45] Claimants' Response, paras. 5.1-5.3.
[46] Claimants' Response, para. 6.1.
[47] Claimants' Response, paras. 6.2-6.3.
[48] Claimants' Response, para. 7.2.

(ii) the proposed confidentiality terms regarding any responsive documents that are subject to a specific commercial or technical sensitivity.

(ii) Objections to the Claimants' Privilege Log

50. The Claimants further assert that they correctly withheld privileged documents from production. The responded to the Respondent's waiver argument by suggesting that it arises "*simply by virtue of* [redacted] *participation in these proceedings as a witness*".[49] In this regard, the Claimants submit that:

a. the IBA Rules and international arbitral practice (as submitted by the Respondent) do not "*support the notion of this blanket waiver*";

b. the Respondent offered "*no argument as to the rules of privilege which should apply to the Tribunal's determination*";

c. the Respondent "*briefly references '[c]ommon law jurisdictions while relying on a United States case*", but there is "*no reason for the US rules of privilege to apply to this case, where the privileged communications were issued between a German lawyer and German and Irish companies*";

d. the Claimants' "*waiver of privilege in relation to communications involving* [redacted] *was limited to the specific pieces of advice mentioned in* [redacted] *First Witness Statement*" and "[t]*hat every piece of advice* [redacted] *gave the Claimants on broader topics would be waived cannot be correct under any applicable rules of privilege*";

e. by way of two illustrative examples, documents relating to (i) specific drafts of the application documents in relation to the Horizont Projects and (ii) due diligence for the Horizont Projects were withheld and the "*nature of those specific drafts of the application documents*" or the due diligence are "*not even mentioned*" in [redacted] First Witness Statement; and

[49] Claimants' Response, para. 8.1.

f. "[e]*ven where there is a conceptual overlap, the Respondent's blanket approach is too wide for a real waiver to have occurred*" and the Respondent "*offers no argument to support why preliminary drafts of documents eventually sent to the BSH should be privileged*".[50]

51. As to the remaining objections to the Claimants' Privilege Log, the Claimants submit that the Respondent's allegation that "*it is not apparent from the Privilege Log that any outside counsel was involved*" is unsupported by "*submissions as to the rules of privilege which it applies when it argues that outside counsel would require to be copied*". The Claimants refer to the Privilege Log reasons stated as: (i) the documents were privileged because they relate to correspondence forwarding privileged legal advice with an expectation that privilege would be maintained; or (ii) the documents were privileged because they relate to correspondence existing or reasonably contemplated litigation.[51]

52. On those bases, the Claimants maintain their position that these documents are privileged. Therefore, the Claimants request that the Tribunal confirm that the Claimants "*are not required to disclose the documents set out in their privilege log*".[52]

(iii) Public Hearing Access

53. As to the question of whether or not the hearing would be held in public, the Claimants assert that this matter is not outstanding as a consequence of the Claimants' letter of 6 February 2023 objecting to public access pursuant to (2006) ICSID Arbitration Rule 32(2).[53]

[50] Claimants' Response, paras. 8.2-8.5.
[51] Claimants' Response, para. 8.6.
[52] Claimants' Response, para. 10.1(c).
[53] Claimants' Response, para. 9.1.

54. According to the Claimants, their objection brings the matter to a close because the hearing may only be in public with the agreement of both parties. They note further that they "*were not required to substantiate their position*" and "*the Tribunal's decision is not pending*".[54]

55. The Claimants request that the Tribunal confirm that, "*as a result of the Claimants' veto, there will be no public access to the hearing in this Arbitration*".[55]

III. THE TRIBUNAL'S ANALYSIS

56. The Tribunal has carefully considered the submissions of the Parties in full and sets out its reasoning and decisions below.

57. The Respondent's Further Application raises objections concerning: (i) the Tribunal's orders in PO 6 at paragraphs 15, 16.b.ii and 17.a; (ii) the Claimants' privilege log; and (iii) public access to the hearing. Each will be addressed in turn.

(i) The Tribunal's Orders in PO 6

58. First, regarding the Respondent's first objection to the word "*Draft*" in the electronic file name of PO 6, the version circulated to the Parties by email on 6 March 2023 was the full and final version.

59. It is identical to the document PO 6 published on ICSID's website.[56] .

60. Accordingly, the Tribunal makes no further directions or orders in that regard.

61. Secondly, as to PO 6, paragraphs 15 and 17.a, the Respondent objects to the Tribunal's decision not to amend the procedural timetable following the Claimants' late document production on two separate grounds: (i) that the decision does not "*adequately sanction*" the Claimants' failure to comply; and (ii) that the decision does not take into account the delay impact on the Respondent's internal scheduling.

[54] Claimants' Response, para. 9.2.
[55] Claimants' Response, para. 10.1(d).
[56] ICSID website page, available at: https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/26.

62. Paragraphs 15 and 17.a of PO 6 provide as follows:

> *15. As to the Respondent's Application, having carefully considered the Parties' submissions, the Tribunal makes no orders against the Claimants on the basis that documents production was finally completed by 10 February 2023. However, the Tribunal notes that:*
>
> *a. any extension to the due dates set out in Annex C to PO 1 (as amended) should be (and should have been) subject to an application to and order from the Tribunal before the relevant date;*
>
> *b. given the Claimants' failure to meet the due date for document production, and their failure to seek or obtain any extension of time from the Tribunal, the Tribunal considers it appropriate to ensure that their delay does not adversely impact the Respondent or the procedural schedule and, notes in that regard that:*
>
> *i. as the next scheduled submission is due from the Claimants, any shortening of the window between the completion of document production and the next step in the schedule affects the Claimants as opposed to the Respondent; and*
>
> *ii. exceptional circumstances would be required to entertain a change to the due date of the Claimants' Reply, currently scheduled for 5 May 2023.*
>
> …
>
> *17. As to both Applications, the Tribunal:*
>
> *a. confirms that at this time it does not make any further orders or adjustments to the schedule in PO 1 (as amended) … .*

63. As to the Respondent's allegation that PO 6 does not "*adequately sanction*" the Claimants, that was not the purpose of the orders. The Tribunal expressly directed at PO 6, paragraph 17.b that "*any costs orders concerning document production will be dealt with in the ordinary course of this arbitration*". Any sanctioning that the Respondent considers should arise out of the Claimants' conduct during the proceeding, including their failure to comply

with the procedural schedule, would be a matter for costs at the appropriate time, as directed.

64. In any event, a penalty of reducing time permitted for one Party to submit its case is not, in the Tribunal's view, appropriate in these circumstances. Indeed, the Tribunal does not immediately envisage any situation where that would be appropriate, given the need for procedural fairness and rules of natural justice and equality as between the Parties.

65. The purpose of PO 6 was to deal with document production related issues raised by the Parties mid-way through the proceedings. These are largely matters of case management and determined in accordance with guiding principles of fairness and equal treatment to the Parties, as well as efficiency and cost effectiveness.

66. As to the Respondent's allegation that PO 6 fails properly to account for the Respondent's internal scheduling for the purposes of document review, the Tribunal has some sympathy for this. However, the Respondent did not raise the issue that it had an established "*time-slot reserved for a comprehensive, all-encompassing internal ministerial document review*" that was "*scheduled for 11 February 2023 and following two weeks*" in the Respondent's original Application, or at any time prior to the issuance of PO 6. Therefore, it is difficult for the Tribunal to reopen the matter based on new arguments that could and should have been made with the original Application.

67. In any event, assuming it had reserved the timeslot as now indicated, the Respondent has failed to address the valid points on timing made by the Claimants as summarised at paragraph 37 above. As the Claimants had completed document production on 10 February 2023, it would appear that "*the entire alleged window for review could have been used by the Respondent*". Moreover, even if there were problems with that tight timing, the Respondent has not adequately explained why it could not have commenced its review of the substantial amount of documents produced by 27 January 2023, and the subsequently produced documents thereafter.

68. Moreover, the Respondent has not sought to explain how any of the requested relief scenarios sought at page 4 of the Further Application would assist. Receiving the Claimants' Reply at an earlier date would neither create nor expand the available window for the Respondent's review of the Claimants' documents. Nor has the Respondent explained how an additional two-week extension of time for its Rejoinder from 3 August 2023 to 18 August 2023 would provide an additional two-week review window, particularly given that the additional two weeks fall in the summer holiday period.

69. In the circumstances, it is difficult for the Tribunal to identify the exceptional circumstances required to change the due date of the Claimants' Reply, or indeed sufficient circumstances to change the due date of the Respondent's Rejoinder in response to that Reply.

70. Thirdly, as to PO 6, paragraph 16.b.ii, the Respondent objects to the Tribunal's direction that the Respondent provide the Claimants with a "*brief summary of the scope and nature of its document search*", on the basis that it has already done so.

71. PO 6, paragraph 16.b.ii, provides as follows:

> *16. As to the Claimant's Application, having carefully considered the Parties' submissions, the Tribunal:*
>
> …
>
> *b. directs the Respondent, to the extent it has not already done so, to provide the Claimants with:*
>
> …
>
> *ii. the proposed confidentiality terms regarding any responsive documents that are subject to a specific commercial or technical sensitivity … .*

72. In its letter of 7 February 2023, the Respondent did provide a statement regarding its searches, which included the following:

a. the Respondent conducted "*reasonable and proportionate searches*" for responsive documents as required by PO 4, paragraph 28;

b. for each request, the Respondent "*underwent great efforts to contact various different ministerial units and public agencies to request the handover of documents from those various custodians*";

c. "*every ministerial unit and public agency that could reasonably be expected to be in possession of documents responsive to any of Claimants' requests was contacted to conduct searches*";

d. "[a] *large number of custodians reviewed an immense volume of documents in an extremely narrow time window*";

e. "[w]*here the respective unit or agency identified responsive documents, said documents were transmitted to the responsible unit within the Federal Ministry of Economic Affairs and Climate Action and consequently, after being structured and coordinated by said unit, to Counsel for Respondent*";

f. it conducted a "*thorough search*", which "*involved a large number of possible internal custodians in its document search, and confirmed full compliance with its disclosure obligations under the PO 4*"; and

g. the "*far-reaching scope and large number of possible custodians did not prevent Respondent from conducting a thorough search and comply with its disclosure obligations on time*".

73. Further, in its letter to the Claimants on 2 March 2023, the Respondent stated that it:

a. contacted the "*respective ministerial units and public agencies that could potentially be a custodian for the different requests who then searched for responsive documents in their possession in accordance with the wording and goal of the requests*"; and

b. documents were "*then passed on for review to ensure all avenues of finding responsive documents had been exhausted*".

74. These statements confirm that: (i) the Respondent contacted internal agencies; (ii) those agencies "*searched for responsive documents in their possession in accordance with the wording and goal of the requests*"; and (iii) responsive documents were passed on for review.

75. None of these statements provides any information regarding:

a. the identity of the ministerial units and public agencies that were contacted to conduct document searches;

b. the identity of individual custodians contacted to conduct document searches;

c. the precise instructions as to the "*wording and goal of the requests*"; or

d. in the case of documents maintained in electronic form, identify any search terms, individuals or other means adopted to search for such Documents in an efficient and economical manner.

76. The Tribunal considers that the aforementioned information is appropriate for a brief summary of the scope and nature of a party's document search. The Tribunal had considered this to be self-evident in light of its orders following the existing statements in the Respondent's letters of 7 February 2023 and 2 March 2023. The language in paragraph 75.d broadly reflects the electronic search guidance at Article 3 of the IBA Rules.

77. However, it appears not to have been suitably clear and the Tribunal clarifies in this PO 7 that the statement is to accord with the requirements in paragraph 75 above.

78. As to whether or not the Respondent validly withheld documents from production on the basis of data privacy law and commercial confidentiality, the Tribunal accepts the Respondent's representation that the "*20 documents from its document production on the*

grounds of data privacy law and commercial confidentiality" were "*withheld because of data privacy reasons to protect the personal data of third parties*", in accordance with the German Constitution and that those concerns could not be overcome by redaction or "*counsel eyes only*" designation

79. Therefore, the Tribunal clarifies that in light of that representation, the 20 so-identified documents withheld by the Respondent due to data privacy do not have to be produced to the Claimants.

80. As to both the 20 documents withheld on the basis of data privacy and any additional documents withheld on the grounds of political or institutional sensitivity, the Claimants' reservation of their position is noted.

(ii) The Claimants' Privilege Log and Non-Disclosure of Privileged Documents

81. The Claimants' non-disclosure of documents on the basis of asserted legal privilege arises out of its Privilege Log. The Parties did not provide the Claimant's Privilege Log to the Tribunal.

82. The Respondent asserts that all privilege is waived over all communications regarding the subject-matter of [redacted] evidence (*i.e.*, "*legal, regulatory and political framework applicable in the Federal Republic of Germany in 2008, Claimants' applications to the BSH for the Projects, the consenting process from 2008 through 2013 and the Stakeholder Conference from 2013 through 2015, inter alia*").

83. The Claimants have accepted that there is a "*waiver of privilege in relation to communications involving* [redacted]" but that it is "*limited to the specific pieces of advice mentioned in* [redacted] *First Witness Statement*". The Claimants do not accept that the waiver applies to "*every piece of advice* [redacted] *gave the Claimants on broader topics*" as this "*cannot be correct under any applicable rules of privilege*".

84. The first question for the Tribunal is the law applicable to waiver.

85. The IBA Rules on the Taking of Evidence in International Arbitration, which apply as a guide in these proceedings pursuant to PO 1, provide at Article 9(2)(a) that the Tribunal may exclude evidence or production of any document by reason of legal impediment or privilege "*under the legal or ethical rules determined by the Arbitral Tribunal to be applicable*".

86. [redacted] is a lawyer qualified under German law, having passed the first legal *Staatsexamen* in 1998 at the University of Hamburg and the second legal *Staatsexamen* in 2000 at the Higher Regional Court of Celle.[57] There is no evidence that she is qualified in or subject to legal rules of any other national jurisdiction.

87. [redacted] confirms in her evidence that [redacted] "*became formally instructed by Mainstream in June 2008, while* [redacted] *was still a partner at* [redacted]" and subsequently "*retained the client relationship with Mainstream*" after the firm's merger.[58] [redacted] states further that [redacted] was "*first instructed on behalf of Mainstream by* [redacted] *... from 2008 until the end of 2014 when* [redacted] *left Mainstream*".[59]

88. The Tribunal considers that the scope and extent of legal advice privilege over [redacted] communications with Mainstream representatives during the period from 2008 to 2014 are to be determined under and in accordance with professional legal and ethical rules applicable to German-qualified and practicing lawyers and EU practising lawyers, if different.

89. The second question is the scope of waiver pursuant to the applicable law.

90. Both Parties have proceeded on the basis that legal advice privilege does apply to communications between [redacted] and Mainstream. In evidence in the arbitration proceedings [redacted] has relied on and indeed produced documents in support of some, but not all, of those communications. The question to be determined is the scope of such

[57] [redacted] First WS, para. 6.
[58] [redacted] First WS, para. 16.
[59] [redacted] First WS, para. 17.

waiver, *i.e.*, does it cover all communications between [redacted] and Mainstream in the relevant period, or only those communications relating to events referred to in [redacted] evidence. If the latter, how should the Tribunal proceed to ascertain whether or not the documents in the Privilege Log are properly outside the scope of that evidence. This inquiry raises questions of law and fact.

91. The Tribunal would expect waiver to arise where evidence is included which: (i) makes reference to the contents of legal advice, (ii) is relevant to an issue which the Tribunal has to determine, and (iii) the party relying on that evidence has put forward a positive case/argument in reliance on the otherwise privileged material. However, this is a preliminary view and subject to further submissions on German law, if different.

92. The third question is whether or not privilege was in fact waived over some or all of the non-disclosed documents in the Privilege Log.

93. In this regard, the non-disclosed Privileged Documents would need at least to relate to the legal advice in the [redacted] witness statement, which is relevant to the issues in dispute and part of the Claimant's positive case.

94. Without having seen the Privilege Log (or perhaps more importantly the underlying documents in question), it is difficult for the Tribunal to know with any certainty which of the individual documents referred to in the Claimants' Privilege Log relate to the "*specific pieces of advice mentioned in* [redacted] *First Witness Statement*" and which do not. Moreover, the Tribunal (and the Respondent) have no way of identifying if documents referred to in the Claimant's Privilege Log relate to specific pieces of advice mentioned in subsequent witness statements.

95. Accordingly, the Tribunal considers that it is prudent to arrange for these documents to be subject to review by a neutral third party on a confidential basis. At the same time, the documents giving rise to the remaining objections in the Claimants' Privilege Log could also be reviewed.

96. Therefore, the Tribunal proposes to appoint a third-party neutral reviewer of the Claimants' Privilege Log for review as to the existence of privilege and/or waiver in respect of:

a. [redacted] communications in Log Nos. 2-3, 9-10, 14-17, 22-25, 29-30, 33-35, 38, 42-49, 78-81 and 84-101 on applications to the BSH for the Projects and/or the consenting process from 2008 through 2013;

b. [redacted] communications in Log Nos. 12-13, 18-21 and 26-28 on the Stakeholder Conference from 2013 through 2015;

c. [redacted] communications in Log Nos. 50-77 on legal, regulatory and political framework applicable in Germany in 2008; and

d. documents at Log Nos. 1, 4, 6, 39, 40, 41, 46, 82, 83 and 105.

97. The Tribunal proposes a German-qualified third-party neutral, although if there are issues as to the scope of applicable privilege as a matter of law, those issues are a matter for the Tribunal to be determined in advance of the third-party review.

(iii) Public Hearing Access

98. As to the question of whether or not the hearing would be held in public, the Claimants' 6 February 2023 objection to public access pursuant to ICSID Arbitration Rule 32(2) precludes the Tribunal from directing otherwise.

99. The Tribunal does note that, having accepted from the outset that there is a public interest benefit in transparency in the proceedings, and having permitted publication of POs, the Claimants' insistence on a non-public hearing appears to be somewhat inconsistent.

100. In light of the largely accepted interests of transparency in investor-State proceedings and the reasons provided by the Respondent – which have not been rebutted, the Tribunal will require the Parties to revisit this position at appropriate junctures.

IV. THE TRIBUNAL'S DECISION AND ORDER

101. Based on the foregoing, the Tribunal:

i. confirms that at this time it does not make any further orders or adjustments to the schedule;

ii. considers that "a brief summary" of the scope and nature of a party's document search is expected to accord with the requirements in paragraph 75 above;

iii. considers that the 20 so-identified documents withheld by the Respondent due to data privacy do not have to be produced to the Claimants;

iv. invites the Parties to comment on the appointment of a third-party neutral reviewer to review privilege in respect of the documents in the Claimants' Privilege Log by **2 June 2023**;

v. invites the Parties to provide any additional submissions as to the law applicable to privilege and waiver of the [redacted] communications and the scope of waiver also by **2 June 2023**;

vi. subsequently will decide on whether to appoint a third-party neutral reviewer and, if it does, will propose a specific reviewer to the Parties as well as draft terms of reference and will invite the Parties to comment on the reviewer and the terms of reference within a further five days thereafter;

vii. taking the Parties' comments into consideration, the Tribunal will appoint an reviewer and set out the terms of reference;

viii. the Parties will provide the reviewer all required documents, as detailed in the terms of reference;

ix. by the deadline set by the Tribunal, the reviewer will produce a report to the Tribunal, copying the Parties and the Secretary, setting out, for each of the privilege

and confidentiality claims, the reviewer's reasoned recommendation as to whether or not the document, in whole or in part, attracts the privilege that has been claimed; and

x. based on the reviewer's recommendations and the underlying reasoning, the Tribunal will issue a ruling on whether the documents at issue have to be produced.

On behalf of the Tribunal,

[signed]

Ms. Wendy Miles KC
President of the Tribunal
Date: 30 May 2023