

IN AN ARBITRATION UNDER THE
RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS OF THE

**International Centre for
Settlement of Investment Disputes**

Washington, D.C.

between

Azienda Elettrica Ticinese
(Claimant)

and

The Federal Republic of Germany
(Respondent)

ICSID Case No. ARB/23/47

CLAIMANT'S REJOINDER ON JURISDICTION

17 July 2026

Tribunal:

Sir Christopher Greenwood GBE CMG KC (President)

Mr John Beechey CBE

Professor Campbell McLachlan KC

Luther.

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REJOINDER ON JURISDICTION

A. INTRODUCTION: RESPONDENT'S UNPRECEDENTED AND UNSUBSTANTIATED PRELIMINARY OBJECTIONS

- 1 Claimant hereby submits its Rejoinder on Jurisdiction, addressing both preliminary objections contained in Germany's Rejoinder on the Merits and Reply on Jurisdiction ("**Rejoinder**") – the first pertaining to jurisdiction, the second pertaining to the admissibility of Claimant's claims.
- 2 **Respondent's First Objection** remains what it has always been: an attempt to transform a dispute between AET, a distinct Swiss legal person, and Germany into an alleged State-to-State dispute between Germany and Switzerland. Respondent hopes to thereby achieve the dismissal of a politically inconvenient dispute.
- 3 That attempt fails. As established by Claimant throughout the written phase of this arbitration, AET is a Swiss investor within the meaning of Article 26 of the Energy Charter Treaty ("**ECT**"), and a "*national of another Contracting State*" within the meaning of Article 25(1) of the ICSID Convention. Respondent bears the burden of proving that AET falls within the narrow exception recognised by the *Broches* test. It failed to do so in its Counter-Memorial, and it fails again in its Rejoinder.
- 4 The Parties agree in general: State-owned entities ("**SOE**") fall within ICSID jurisdiction, unless, under the *Broches* test, they act as an agent of the State or discharge an essentially governmental function in performing the specific act in question. Respondent bases its objection solely on the first alternative, i.e. alleged State agency based on effective control under Article 8 of the ILC Articles. From the beginning, it made clear that it does not advance the separate argument that AET's investment into Lünen was itself an exercise of delegated governmental authority under Article 5 of the ILC Articles.¹

¹ Procedural Order No. 5, Schedule B: Respondent's Document Production Requests, p. 27; Counter-Memorial, section III.A.3.; Rejoinder, para. 153 (emphasis added); see also paras 152-153, 161.

- 5 Importantly, under Article 8, effective control is not established *per se* for State enterprises. Ownership, public-law status, political supervision, public-interest objectives, State guarantees, parliamentary debate, or regulatory changes after the investment decision are irrelevant. Instead, effective control requires proof that the State instructed, directed, or controlled the specific act in question. Respondent attempts to dilute that legal standard and expand it beyond the requirements of the *Broches* test. Its approach turns the *Broches* test on its head and would make jurisdiction over State enterprises the exception rather than the rule.
- 6 On the factual side, Respondent points to several general alleged features of AET and treats them as if they were equivalent to control over AET's investment decision. But Germany does not, and could not, identify the legally decisive fact – any State instruction or direction requiring Claimant to enter the Lünen investment, or any act of control over Claimant's decision to do so.
- 7 The Rejoinder also continues the chronological contradiction at the heart of Respondent's case: Respondent asks the Tribunal to treat a later political process as proof of earlier direction or control over the process and decision to invest in 2006 to 2008 ². But the 2010 parliamentary approval to hold participation in TKL cannot retroactively become an instruction to invest in TKL. Nor can a debate over Swiss law about whether such approval under Article 5(4) LAET should have been obtained or not transform Claimant's already completed commercial investment decision into an act controlled by the State.
- 8 In rebutting Respondent's assertions, Claimant continues to rely on the analysis of Professor Henry Peter, now supplemented by a second expert report on Swiss law ([Exhibit CER-0007](#), the "**Second Peter Report**"). Professor Peter builds upon his findings from his first report and, in particular, responds to and rebuts Respondent's expert, Professor Peter V. Kunz.
- 9 **Respondent's Second Objection** is as unsubstantiated and lacking in a solid legal basis as its First Objection:
- 10 The newly introduced admissibility objection rests on the allegation that AET had breached Swiss law by not following its obligation to divest. Germany also here relies

² See [Exhibit CER-0001: First Secretariat Report](#), para. 3.7.

on Professor Kunz's assessment, but cannot point to any Swiss judicial or other decision – or even any relevant proceedings – that had found or dealt with such alleged violation. Professor Peter, by contrast, confirms that no violation of Swiss law has occurred. The Second Objection also lacks any basis in international law. Procedurally, it is both belated and outside of this Tribunal's competence, which does not extend to decisions over the relevant questions of Swiss law under either the ICSID Convention or the ECT.

B. RESPONDENT'S PRELIMINARY OBJECTIONS DO NOT WITHSTAND SCRUTINY

11 In the following, Claimant will show in detail that Respondent's preliminary objections are both unfounded. **Section I** addresses Respondent's allegation that Claimant's investment decision was effectively controlled by Switzerland. **Section II** addresses Respondent's belated attempt to invoke Claimant's alleged failure to follow its obligation to divest under Swiss law.

I. Respondent's First Objection is unfounded in law and in fact

12 Claimant will show in the following that there is simply no jurisdictional problem in this case, since the entitlement for State enterprises to act as claimants in ICSID proceedings is well-established (1.).

13 The Parties agree that SOEs are in principle entitled to appear before ICSID tribunals. There is only a limited exception to this rule under the *Broches* test, on which both Parties also agree. Respondent, however, attempts to convert AET's public ownership and public-law framework into proof of State agency, which is not the yardstick. Respondent does not respond to the relevant enquiry under the *Broches* test, namely whether, in relation to the specific conduct at issue, the entity acted as an agent of the State or discharged an essentially governmental function (2.).

14 Respondent frames its objection solely as one of State agency and effective control over AET's decision to invest in the Lünen Plant. But, in doing so, it seeks to dilute the demanding standard international law requires (3.). Furthermore, Respondent misrepresents ICSID authorities that applied the *Broches* test in the past (4.). The record shows that Claimant acted autonomously and independently from the State when it took its decision to invest in the Lünen Plant, absent any instructions or directions from Switzerland (5.).

15 Respondent's First Objection must therefore be dismissed.

1. There is no jurisdictional problem in this case

- 16 This is an investor-State dispute. As Claimant showed in its Memorial and Reply, AET falls squarely within the definition of an “*Investor*” under Article 1(7) of the ECT and qualifies as a “*national of another Contracting State*” under Article 25(2)(b) of the ICSID Convention.³ Its establishment and ownership by the Canton of Ticino do not deprive it of that status.⁴
- 17 Respondent's First Objection therefore seeks to manufacture a jurisdictional problem where the treaty framework foresees none. It seeks to transform a straightforward investor-State dispute into an alleged State-State dispute by treating public ownership and alleged cantonal oversight as if they were exclusionary criteria. They are not.
- 18 This is not an unusual situation. To the contrary, the qualification of SOEs as Investors under the ICSID Convention and the ECT is well established.⁵ Investment tribunals have consistently treated SOEs as protected investors, including under the ECT.⁶
- 19 As the tribunal in *Stadtwerke München et al v. Spain*, one of the relevant ECT ICSID cases, observed:

While it is common ground between the Parties that SWM is a company controlled and fully owned by the Council of the City of Munich, this does not result in assimilating SWM to the Republic of Germany. All this entails is that SWM is a State-owned entity because the sole shareholder is the State. The Tribunal observes that the ECT does not provide that companies owned by States are to be treated differently from companies owned by private individuals and entities. SWM falls squarely within the definition of “Investor ...with respect to Contracting Party” since it was organized in accordance with the law of a Contracting Party, that is, in accordance with the law of Germany. As a G.m.b.H., SWM is clearly a “company” as that term is understood in Germany. Even if that were not the case, the fact that SWM is an organization is sufficient to bring it within the ECT’s definition of an “Investor.”⁷

³ Memorial, paras 287-289, 294; Reply, paras 333-344.

⁴ Memorial, paras 288-289; Reply, para. 333.

⁵ See Reply, paras 338-344.

⁶ See Reply, paras 332 (footnote 321), 337-344.

⁷ [Exhibit CLA-0051: Stadtwerke München GmbH and others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award, 2 December 2019](#), para. 134.

20 Further, as the Tribunal's President and Respondent's Counsel will recall, in *Landesbank Baden-Württemberg v. Spain*, the tribunal rejected the equivalent attempt to equate banks held by the German federal states (the "*Länder*") with Germany itself.⁸ In that case, the claimants were German public sector entities ("**PSEs**"; "*Anstalten des öffentlichen Rechts*"),⁹ just as AET is under Swiss law in the present proceedings. The tribunal confirmed that those entities were "*legal entities possessing juridical personality separate from that of the Federal Republic of Germany*".¹⁰ This alone was sufficient for that tribunal to conclude that "[t]hey therefore qualify as Investors of a Contracting Party, rather than being the Contracting Party itself."¹¹

21 As Claimant has already set out in prior submissions, allowing SOEs to act as claimants in ICSID arbitration is settled practice.¹² Notably, Respondent does not point to a single decision accepting a State-agency objection against a State-owned claimant. Still, with its First Objection, Respondent seeks to turn that settled ICSID practice on its head.

2. The Parties agree that ICSID arbitration is open to State-owned but commercially-managed Investors under the *Broches* test

22 There is no material dispute between the Parties that the applicable framework is the test commonly referred to as the *Broches* test. Respondent relies on that test in support of its objection, while Claimant agrees that the *Broches* test is the relevant point of

⁸ [Exhibit CLA-0209: Landesbank Baden-Württemberg et al v. Kingdom of Spain, ICSID Case No. ARB/15/45, Decision on the "intra-EU" jurisdictional objection, 25 February 2019](#), paras 97-99.

⁹ [Exhibit CLA-0209: Landesbank Baden-Württemberg et al v. Kingdom of Spain, ICSID Case No. ARB/15/45, Decision on the "intra-EU" jurisdictional objection, 25 February 2019](#), para. 1.

¹⁰ [Exhibit CLA-0209: Landesbank Baden-Württemberg et al v. Kingdom of Spain, ICSID Case No. ARB/15/45, Decision on the "intra-EU" jurisdictional objection, 25 February 2019](#), para. 98.

¹¹ [Exhibit CLA-0209: Landesbank Baden-Württemberg et al v. Kingdom of Spain, ICSID Case No. ARB/15/45, Decision on the "intra-EU" jurisdictional objection, 25 February 2019](#), para. 98.

¹² Reply, para. 332 with numerous further references.

departure for assessing whether a SOE qualifies as a “*national of another Contracting State*” under Article 25(1) of the ICSID Convention.¹³

23 The significance of that common ground should not be obscured. The *Broches* test does not establish a presumption against jurisdiction over SOEs. It is the other way round: jurisdiction exists unless Respondent proves that one of the two *Broches* exceptions is triggered. The test also does not ask whether an entity's shareholder is a State or whether its activities serve public interests. Instead, it asks whether, in relation to the relevant conduct, an entity was acting as an agent of the State or discharging an essentially governmental function.¹⁴

24 The starting point is therefore that an entity such as AET may bring an ICSID claim, unless Respondent proves that the narrow *Broches* exception applies.¹⁵ As shown below, Respondent's latest submission does not do so, and it could not have done so.

3. Respondent has narrowed its objection to alleged State agency but tries to dilute the meaning of “effective control”

25 With its Rejoinder, Respondent expressly stated that it would not allege that AET was discharging governmental functions, and would instead confine its case to the allegation that AET acted as an agent of the State in relation to the investment decision:

“In the Counter-Memorial, Respondent set out in detail that this first limb of the Broches test resembles Article 8 ILC Articles (and that the second limb, on which Respondent does not rely, resembles Article 5 ILC Articles).”¹⁶

26 Respondent frames the relevant inquiry by reference to customary international law as codified in Article 8 of the ILC Articles.¹⁷ Although the Rejoinder correctly acknowledges

¹³ Rejoinder, para. 152.

¹⁴ See Reply, section C.II.2.

¹⁵ See Reply, paras 345-346.

¹⁶ Rejoinder, para. 153 (emphasis added); see also para. 161.

¹⁷ Counter-Memorial, paras 353-357.

that Respondent must demonstrate control in relation to the precise conduct at issue,¹⁸ it seeks to avoid the high threshold the test under Article 8 poses:

- In the *Nicaragua* case, the ICJ required proof that the State had effective control over the specific operations in dispute. General assistance, support, financing, organisation, or influence did not suffice.¹⁹
- Similarly, in the *Bosnian Genocide* case, the ICJ reaffirmed that Article 8 attribution requires instructions, direction, or control over the specific conduct in question – and not merely “*generally in respect to the overall actions taken*”²⁰. Even extensive political, military, and financial links were insufficient absent proof of effective control over the specific acts.²¹
- Investment tribunals have adopted the same standard in equally strict terms, leaving no room for Respondent’s low bar approach. For example, in *Jan de Nul v. Egypt*, the tribunal held:

“International jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake; this is known as the ‘effective control’ test.”²²

¹⁸ Rejoinder, paras 154-155.

¹⁹ [Exhibit RL-0014: Military and Paramilitary Activities in and against Nicaragua \(Nicaragua v. United States of America\)](#), International Court of Justice, Judgment – Merits, 27 June 1986, p. 14, at pp. 64-65.

²⁰ [Exhibit RL-0015: Application of the Convention on the Prevention and Punishment of the Crime of Genocide \(Bosnia and Herzegovina v. Serbia and Montenegro\)](#), International Court of Justice, Judgment, 26 February 2007, I.C.J. Reports 2007, p. 43, at pp. 208, 210.

²¹ See [Exhibit RL-0015: Application of the Convention on the Prevention and Punishment of the Crime of Genocide \(Bosnia and Herzegovina v. Serbia and Montenegro\)](#), International Court of Justice, Judgment, 26 February 2007, I.C.J. Reports 2007, p. 42, at pp. 214, 216.

²² [Exhibit CLA-0210: Jan de Nul et al v. Arab Republic of Egypt](#), ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 173 (emphasis added); see also [Exhibit CLA-0211: Georg Gavrilovic v. Republic of Croatia](#), ICSID Case No. ARB/12/39, Award, 26 July 2018, para. 828, adopting the same formulation.

On this basis, the tribunal rejected attribution because there was no evidence of State instructions in relation to the specific acts and omissions complained of.²³

- The decision in *Masdar v. Spain*, invoked by Respondent²⁴ is consistent with these findings. The tribunal did not treat State ownership or public ownership interests as sufficient to deny investor status. It had “*little hesitation in dismissing*” the objection to its jurisdiction²⁵ because the respondent had not shown that the municipality of Abu Dhabi, as the majority shareholder of Masdar, exercised control over the claimant’s investment decision.²⁶
- The same approach follows from the *Broches* test. Claimant showed that the relevant question is not whether AET is publicly owned, whether energy policy is important to Ticino, or whether AET operates in a regulated sector. The question is whether the State exercised control over the specific act under review by way of specifically directing or instructing the entity.²⁷

27 Respondent’s submissions blur the standard. Germany purports to rely on Article 8 but repeatedly invokes factors more relevant, if at all, to Article 5. As further illustrated below (see Sections B.I.5.(b)-(e), in particular paras 47-55). Respondent has not identified any State instruction to invest or any direction to AET’s Board. It asks the Tribunal to infer effective control from institutional features and political context. Respondent therefore already fails to meet the legal standard it invokes.

²³ [Exhibit CLA-0210: Jan de Nul et al v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008](#), para. 173.

²⁴ Counter-Memorial, para. 356.

²⁵ [Exhibit CLA-0068: Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, 16 May 2018](#), para. 166.

²⁶ [Exhibit CLA-0068: Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, 16 May 2018](#), paras 168-172.

²⁷ Reply, paras 363-368.

4. Respondent fails to distinguish leading ICSID authorities that apply the *Broches* test

- 28 In its Rejoinder, Respondent also seeks to downplay the relevance of the leading ICSID authorities that correctly apply the *Broches* test. It does so by attempting to distinguish those decisions on the basis of narrow factual differences, while ignoring the broader principles that those tribunals in fact applied.
- 29 Respondent first attempts to minimise the significance of the reasoning applied in *Cyprus Popular Bank v. Greece*. Claimant, it alleges, would overstate that decision because it would not add anything material specifically on the issue of shareholder authorisation processes over the decision to invest, but rather shareholder approvals over cooling-off letters.²⁸ That misses the point.
- 30 In the *Cyprus Popular Bank* case, the Republic of Cyprus was the controlling shareholder of the company Laiki.²⁹ The act under review was the submission of a notice of dispute, which had been approved through Laiki's corporate bodies and was also submitted to the controlling shareholder for approval.³⁰ When applying the *Broches* test, the tribunal set out the threshold of its inquiry in general terms:

"In private corporations with a controlling shareholder, it is frequent that important decisions are approved not only by the internal corporate organs, but that additionally the consent of the controlling shareholder is obtained, in accordance with its constitutional or other applicable requirements. This is what happened in this case. [...]"

The fact that Laiki's management sought ratification from its controlling shareholder, does not affect its character by reference to the Broches test: Laiki did not assume essential government functions, nor was it converted into an agent of the Cypriot State merely because of the approval processes that were required to be followed. The purpose of the Notice of Dispute was for Laiki to bring proceedings to obtain compensation for the damage allegedly suffered in Greece – compensation that would flow to all its shareholders,

²⁸ Rejoinder, paras 158-159.

²⁹ [Exhibit CLA-0152: Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic, ICSID Case No. ARB/14/16, Decision on Jurisdiction and Liability, 8 January 2019](#), para. 386.

³⁰ [Exhibit CLA-0152: Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic, ICSID Case No. ARB/14/16, Decision on Jurisdiction and Liability, 8 January 2019](#), paras 386-388.

public and private. In so acting, Laiki was not acting as an agent for and on behalf of the Cypriot Republic – it was acting in its own interest.”³¹

- 31 The takeaway from *Cyprus Popular Bank* is therefore not that it would create a special rule only for a certain type of shareholder approval mechanisms, or that the relevant activity in every case must be identical. Instead, that tribunal applied the *Broches* test to a specific act of a State-controlled entity and held that the involvement or approval of a controlling shareholder did not establish State agency in relation to that act.³²
- 32 Respondent next seeks to distinguish *BUCG v. Yemen*. It asserts that Yemen’s case “does not appear to have gone beyond the fact that State representatives sat in the claimant’s board and that in China, such representatives would act in the interest of the State”.³³ Respondent then says that this case would be different because its present objection would concern “the claimant’s nature and the undisputed fact that the decision to invest was made by parliament”.³⁴
- 33 Respondent’s attempt to distinguish *BUCG* rests, first, on a false premise. Claimant has expressly disputed Respondent’s allegation that Ticino Parliament in 2010 made the decision to invest in the Lünen plant which had already taken place years earlier. The decision was first taken by Claimant’s organs. The later parliamentary process did not retroactively displace AET’s autonomous decision-making.³⁵
- 34 In any event, *BUCG* is not distinguishable in the manner Respondent suggests. *BUCG* was a publicly funded and wholly State-owned enterprise established by the Chinese government.³⁶ The allegations advanced by Yemen were not confined to the bare presence of State representatives on the board. Yemen relied on the claimant’s status as a Chinese SOE, the role of State representatives, the overall direction of a board

³¹ [Exhibit CLA-0152: Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic, ICSID Case No. ARB/14/16, Decision on Jurisdiction and Liability, 8 January 2019](#), paras 387-388.

³² See Reply, paras 357-358.

³³ Rejoinder, para. 160.

³⁴ Rejoinder, para. 160 (emphasis added).

³⁵ Reply, paras 401-402; [Exhibit CER-0006: First Expert Report by Prof Henry Peter](#), paras 63, 92.

³⁶ [Exhibit CLA-0153: Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017](#), para. 32.

said to represent State interests, and alleged State supervision and inspection³⁷ more substantial than anything shown here. Yet, the *BUCG* tribunal dismissed the State agency objection. It focused on the claimant's role in the relevant project and found that *BUCG* acted as a commercial contractor rather than as an agent of the State.³⁸

35 *BUCG* therefore supports Claimant's position: It confirms that general structural criteria and even broad supervisory features do not suffice if the entity acts as a commercial participant in the specific instance.³⁹

36 Respondent's comments on *BUCG* also contradict its position on the legal standard. Respondent on the one hand maintains that it relies exclusively on control over the specific investment decision (Article 8 ILC Articles), not on the issue whether Claimant's actions were essentially commercial in nature (Article 5 ILC Articles).⁴⁰ On the other hand, when seeking to distinguish *BUCG*, Respondent claims that its objection would be "*about the claimant's nature*",⁴¹ i.e. about general aspects of Claimant, which are irrelevant for establishing effective control under Article 8 ILC Articles.

37 Lastly, Respondent attempts to sideline *CSOB v. Slovakia*. In this context, it argues that Slovakia's case in *CSOB* appears to have focused on discharging governmental functions, and not on State agency aspects.⁴²

38 That is plainly incorrect. The tribunal expressly addressed both limbs of the *Broches* test. Slovakia argued that *CSOB* had served as an "*agent or representative of the State*" and that the dispute arose out of functions *CSOB* performed in that capacity:

³⁷ Reply, para. 359; [Exhibit CLA-0153: Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017](#), paras 29, 37-41.

³⁸ Reply, para. 359; [Exhibit CLA-0153: Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017](#), paras 39-44.

³⁹ Reply, paras 359-360; [Exhibit CLA-0153: Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017](#), paras 39-44.

⁴⁰ Rejoinder, paras 154-156, 162.

⁴¹ Rejoinder, para. 160.

⁴² Rejoinder, para. 161.

*"[Respondent] contends further that CSOB is a government agency which has been discharging essentially governmental functions throughout its existence and, more specifically, with regard to all events pertinent to this dispute. In this regard, Respondent seeks to show that since its inception CSOB has served as agent or representative of the State to the international banking and trading community, that its subsequent reorganization has not changed its status, and that, moreover, the instant dispute arises out of the functions CSOB performed in that capacity."*⁴³

39 The tribunal considered both assertions jointly and concluded that

*"Respondent has failed to sustain its contention that the Centre lacks jurisdiction and the Tribunal competence to hear this case on the ground that Claimant was acting as an agent of the State or discharging essentially governmental activities as far as this dispute is concerned."*⁴⁴

40 The relevance of CSOB therefore does not depend on whether Respondent frames its objection under Article 8 rather than Article 5 of the ILC Articles. The tribunal in CSOB considered an allegation of the *Broches* test as a whole, including the State agency criterion, and rejected it by focusing on the commercial nature of the relevant specific activities.⁴⁵

41 The broader lesson from CSOB, *BUCG*, and *Cyprus Popular Bank* is therefore clear: State ownership, political shareholder approval mechanisms, State-appointed representatives, public-law supervision, or a public-interest context do not suffice to deny standing to a SOE.⁴⁶ The threshold developed by Mr Broches and followed by numerous ICSID tribunals is high. Respondent's approach would turn this situation upside town. If accepted, it would essentially risk converting SOEs with ordinary shareholder oversight or public-law approval mechanisms into State organs for purposes of ICSID jurisdiction.

⁴³ [Exhibit CLA-0151: Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999](#), para. 19.

⁴⁴ [Exhibit CLA-0151: Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999](#), para. 27.

⁴⁵ See Reply, paras 353-356.

⁴⁶ Reply, paras 351-368.

5. Switzerland did not exercise effective control over Claimant's investment decision

42 In any event, and as already noted, Respondent has failed to show any control by Switzerland over Claimant's investment decision and process in 2006 to 2008. Respondent mischaracterises contested facts as undisputed (a) and continues to fall short of its burden of proof (b). Claimant, by contrast, has shown that its investment decision was taken autonomously and commercially, not under State control (c). Neither the later parliamentary process (d) nor the negotiated contractual exit right (e) can retroactively create effective control where none existed.

(a) Respondent mischaracterises contested facts as undisputed

43 Respondent's application of the effective control standard rests on a false premise. In the Rejoinder, Respondent repeatedly labels as "undisputed" facts that are plainly disputed on the record.

44 Most notably, Respondent asserts that it would be undisputed that the decision to invest was made by parliament.⁴⁷ That is false, and Respondent knows that. Claimant's case has always been the opposite:

"The decision to invest was neither taken by the State nor did the Grand Council order AET to invest."⁴⁸

45 By labelling the point as "undisputed," Respondent seeks to avoid the very issue it must prove, namely that Switzerland instructed or directed Claimant in relation to the decision to invest. Claimant has expressly denied that proposition and showed that the parliamentary process came years after AET's own organs had already taken the relevant investment decisions, and after funds had been invested.⁴⁹ Moreover, as

⁴⁷ Rejoinder, para. 160.

⁴⁸ Reply, para. 401; see also e.g. Reply, para. 402, which reinforces Claimant's position with reference to the [Exhibit CER-0006: First Expert Report by Prof Henry Peter](#): "Professor Peter begins his analysis by explaining that the parliamentary approval procedure is completely distinct from, and has no impact on the validity of, the independent conduct of AET's decision-making bodies."

⁴⁹ Reply, paras 401-404; [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), paras 49-52; see also Memorial, paras 145-146.

explained by Professor Peter, the Grand Council's involvement concerned whether AET should continue to hold its TKL participation, not whether Parliament itself should make the investment decision. Parliament's approval necessarily presupposed that AET's Board decisions had already been validly taken.⁵⁰

46 Having failed to establish that the Grand Council made the investment decision, Respondent still has to prove that the State otherwise exercised effective control over AET's decision to invest in the Lünen Plant.

(b) Respondent continuously fails to meet its burden of proof

47 Respondent has produced no evidence that the Canton ordered AET to invest in Lünen. It has not identified any binding instruction, any directive, any compulsory decision, or any Cantonal act controlling AET's commercial judgment.

48 Instead, Respondent relies on a set of general circumstances: AET's public-law nature, the Canton's ownership, the statutory framework, alleged public-policy motives, the State guarantee, profit remittance, parliamentary debates, and subsequent coal-exit motions.⁵¹ As explained above, this is the wrong inquiry under the *Broches* test.⁵² Having consciously decided not to present a case based on AET discharging governmental functions under Article 5 of the ILC Articles, Respondent cannot rely on those general features as evidence of effective control. This evidence is not suitable to establish effective control which requires evidence of control over specific actions (see above, Section B.I.3, para. 26). Respondent has narrowed its objection to alleged State agency and must satisfy that standard.

49 The same defect affects Respondent's reliance on Professor Kunz expert report.

50 Respondent invokes Professor Kunz's views on a number of general points, e.g. AET's structure, purpose, State guarantees, and alleged general cantonal influence.⁵³

⁵⁰ [Exhibit CER-0006: First Expert Report by Prof Henry Peter](#), paras 92, 101-103; [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), paras 45, 47-52, 60-61.

⁵¹ Rejoinder, paras 170, 174; Counter-Memorial, paras 365-376.

⁵² See sections B.I.3. and B.I.4. above.

⁵³ Rejoinder, para. 174.

Professor Peter directly addresses those propositions and shows why they do not establish State control. In particular, he explains (i) that AET is a separate legal entity with its own organs, assets, liabilities, management, signatory powers and auditors;⁵⁴ (ii) that the Canton's supervisory powers do not include a general competence to issue binding instructions to AET's Board;⁵⁵ and (iii) that political oversight or public-interest alignment is not the same as legal control over a specific commercial transaction⁵⁶. These features do not make Claimant "*the State*", as implied by Professor Kunz.⁵⁷ Professor Peter firmly rebuts this assertion in his Second Report:

*"I fear that these statements of Prof. Kunz could be misleading, in particular when he states that "PSEs are the state" (§68 in fine), which would here mean that "AET is the Canton Ticino". With all due respect, I strongly disagree. AET is without any possible doubt an entity which is separate – i.e. distinct from – the Canton Ticino, and has been deliberately set up as such in 1958/1959, for a series of reasons including what is said hereabove at Section B lit. b), c) and d)."*⁵⁸

51 Even taken at their highest, the features invoked by Respondent concern AET's general institutional setting. As set out before, a SOE may pursue public-interest objectives while still acting commercially as an investor.⁵⁹ The *Broches* test exists precisely because State ownership and public-interest objectives can coexist with commercial operations. Such policy objectives do not establish that the State instructed or directed AET to invest in Lünen.

⁵⁴ [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), paras 8-10, 24-29; [Exhibit CER-0006: First Expert Report by Prof Henry Peter](#), paras 47-54.

⁵⁵ [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), para. 19; [Exhibit CER-0006: First Expert Report by Prof Henry Peter](#), paras 64-71.

⁵⁶ [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), para. 67, see also paras 39-40.

⁵⁷ See [Exhibit RER: Prof Peter V. Kunz, Expert Report](#), para. 68: "*Regarding SOEs, the most intense proximity to the state is found with the PSEs, which – as part of the decentralised administration – downright represent the state: PSEs are the state.*"

⁵⁸ [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), para. 25.

⁵⁹ Reply, para. 360; see also [Exhibit CLA-0159: S. Konrad, 'Protection of Investments Owned by States' in M. Bungenberg et al \(eds\), International Investment Law \(2015 C.H.Beck et al.\)](#), para. 27 [Exhibit CLA-0161: C. Kovács, Attribution in International Investment Law, International Arbitration Law Library, Volume 45](#), pp. 267-288, pp. 270-271.

- 52 Also Respondent's repeated references to AET's finances, profit distribution, and alleged State guarantee for debts⁶⁰ are beside the point. Such features may describe AET's relationship with the Canton as owner. However, they do not show that Switzerland would have controlled AET's investment decision.
- 53 Respondent also invokes the subsequent referendum in Ticino and the later coal exit debate in the Canton.⁶¹ Those developments are, once more, irrelevant to the original investment decision. Subsequent political or regulatory developments cannot retroactively create State control over an independently taken business decision. Were it otherwise, any private company later affected by regulation could suddenly be treated as State-controlled.
- 54 Furthermore, the chronology alone defeats Respondent's case. AET's competent organs had already taken the relevant investment decisions a long time before the matter was submitted to the Ticino Parliament.⁶² As Professor Peter confirms, the later political process presupposed the validity of AET's prior Board decisions and concerned the question whether AET should continue to hold a participation that it had already entered into.⁶³
- 55 As shown, Respondent and Professor Kunz repeatedly move from general aspects of AET's legal nature to conclusions about control over AET's specific investment decision. That is precisely the move the *Broches* test and effective control do not permit.

(c) Claimant showed that the investment decision was not controlled by the Canton, but was an autonomous and commercial decision

- 56 Respondent's renewed attempt to equate AET with the State ignores the evidence on AET's governance and the actual decision-making process that led to the Lünen investment. Claimant and its expert Professor Peter have shown that AET acted through its own organs, within its statutory mandate to produce and trade energy, and

⁶⁰ Rejoinder, paras 170, 174; Counter-Memorial, para. 376.

⁶¹ Rejoinder, para. 170.

⁶² [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), para. 49.

⁶³ [Exhibit CER-0006: First Expert Report by Prof Henry Peter](#), para. 101.

as part of its ordinary commercial activity as an electricity company.⁶⁴ Claimant assessed the investment decision followed its own commercial processes, including feasibility, risk allocation, business planning, and the role of the project in AET's supply portfolio. This shows that there was no control by the State.⁶⁵ In fact, the State is not even entitled to give binding instructions to Claimant.⁶⁶ Claimant did so, albeit it does not bear the burden of proof. It is Respondent that must prove effective control, and not Claimant that none exist.

57 In its Rejoinder, Respondent does not rebut that evidence. It does not submit evidence of instructions, directions, or control measures – because that evidence does not exist. It simply re-labels AET's public ownership, statutory mandate, and parliamentary process as “control.” That is insufficient.

58 Respondent's reliance on public-service elements and the broader energy-policy context does not alter the character of the investment act. Energy undertakings often operate in sectors affected by public policy, security of supply, environmental considerations, and public-service mandates. That does not transform their commercial investment decisions into acts of the State.

59 Professor Kunz takes a different view, concluding that the investment in TKL had to be made under the control of the Canton because the project served Ticino's security of supply and required democratic approval.⁶⁷ But public-interest alignment is not proof of State agency. As Professor Peter explains:

“The fact that the end effect of what AET has been set up for is in the interest of the Canton Ticino does not mean that the decisions taken by the AET BoD and the AET Executive Board are not independent business decisions.”⁶⁸

60 Professor Kunz further asserts that AET was under State control due to its internal organisation, the general possibility to exert influence, the fact that it is owned by the

⁶⁴ See Reply, section C.III.

⁶⁵ See Reply, section C.III.4.

⁶⁶ [Exhibit CER-0006: First Expert Report by Prof Henry Peter](#), para. 69.

⁶⁷ [Exhibit RER: Prof Peter V. Kunz, Expert Report](#), para. 143.

⁶⁸ [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), para. 51.

State, and politically supervised.⁶⁹ However, as explained, all these criteria are irrelevant for the notion of effective control under international law and, for that matter, the *Broches* test, as they do not relate to the specific act of making the decision to invest in the Lünen Plant.

61 If this approach were sufficient to fulfil the criteria of the *Broches* test, then no SOE would ever be permitted to have standing before an ICSID tribunal. That is inconsistent with the general acceptance of the *Broches* test, which presupposes that SOEs may act commercially and remain “nationals” for purposes of ICSID jurisdiction.

(d) Contrary to Respondent's view, the Canton's political approval does not establish State control over Claimant's investment decision

62 Respondent's next attempt to prove State agency rests on the Canton's political approval process. Relying on Professor Kunz, Respondent argues that Article 5(4) LAET made parliamentary approval legally mandatory and that this alleged requirement proves State control over AET's investment decision.⁷⁰ That argument fails both as a matter of Swiss law and as a matter of the *Broches* test.

63 Professor Peter's Second Report confirms his earlier conclusion that no obligation existed under Article 5(4) LAET to obtain Parliament's approval for the investment in Lünen.⁷¹ Both the nature and magnitude of the investment did not exceed AET's ordinary administration and normal energy trading, the investment was consistent with AET's statutory purpose, was below the relevant relative threshold used in practice, and did not require State funding or a specific State guarantee.⁷²

⁶⁹ [Exhibit RER: Prof Peter V. Kunz, Expert Report](#), para. 110.

⁷⁰ Rejoinder, section III.A.2.b.

⁷¹ [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), paras 59-60; [Exhibit CER-0006: First Expert Report by Prof Henry Peter](#), para. 104.

⁷² [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), section D.3; [Exhibit CER-0006: First Expert Report by Prof Henry Peter](#), section 2.3, see in particular paras 86-92.

64 AET nevertheless sought Parliament's position as a matter of political opportunity because the investment concerned sensitive issues⁷³:

*"AET decided to submit such investment to the Ticino Parliament for reasons of opportunity and of a political nature because the investment was touching upon sensitive environmental related issues, not because this was an obligation under the LAET."*⁷⁴

65 That did not alter the legal position: AET's prior Board decisions had already been validly taken and remained in force, irrespective of the Grand Council's decree.⁷⁵

66 Respondent now disputes the threshold for obtaining approval and, in addition, puts forward that Professor Peter would ignore the "qualitative aspects" of the investment.⁷⁶ Confronted with these allegations, Professor Peter notes that Respondent clearly misrepresents his analysis conducted with regard to both quantity and quality of the investment:

*"Both with regard to the magnitude and to the nature of AET's decision to invest in the Lünen Plant, the decision was taken within AET's "ordinary administration and normal energy trading, and in particular those relating to new plants, equity participations, major renovations, or also commercial commitments" (see my First LO, §55 and §§62-63)."*⁷⁷

67 Further, Respondent's argument again confuses political oversight with effective control under international law. Ordinary political oversight, transparency, and parliamentary accountability are typical features of SOEs. They do not establish that the SOE acts as an agent of the State, still less that the State exercised instructions, direction, or control over the specific conduct at hand. The fact that public approval

⁷³ [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), para. 68, see also section D.3; [Exhibit CER-0006: First Expert Report by Prof Henry Peter](#), paras 96, 98, 100.

⁷⁴ [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), para. 60.

⁷⁵ [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), paras 45, 60; [Exhibit CER-0006: First Expert Report by Prof Henry Peter](#), para. 106.

⁷⁶ [Exhibit RER: Prof Peter V. Kunz, Expert Report](#), paras 140-141.

⁷⁷ [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), para. 68 (footnotes omitted, emphasis added).

may be required (*quod non*), does not transform the SOE's own commercial decision into State-directed conduct. Claimant has already explained this in detail in its Reply.⁷⁸

68 Moreover, Professor Peter explained that, even where a decision is subject to parliamentary approval under Article 5(4) LAET, the relevant decision must first be taken by AET's Board of Directors. The initiative for any decision, including an investment decision, lies exclusively with AET and its bodies.⁷⁹ That is incompatible with Respondent's assertion that the Canton or the Grand Council "made" the investment decision by approving the project years after AET took the investment decision via decree:

*"The decision to invest in the Lünen Plant was in fact a business decision which was autonomously taken by AET as early as 29 March 2006. Since then it was valid and binding on AET. On 9 August 2006, AET signed the Partnership Agreement and the Consortium Agreement with the 25 other project partners. The construction of the Plant started in 2008 and further contracts amongst the partners were signed on that occasion. It is only in 2010, four years after AET had taken the decision to invest, that the Ticino Parliament was invited to express its views as to whether or not the Lünen Plant investment should be maintained, or divested."*⁸⁰

69 The parliamentary process did not replace AET's decision-making. At most, Parliament was asked to take a position on whether AET should be authorised to continue to hold the participation in TKL, after AET's own Board decisions had already been taken. That is not evidence that Parliament made, directed, or controlled the original investment decision.⁸¹

70 In any event, the disagreement between the Swiss-law experts underscores the weakness of Respondent's objection. At most, Respondent has identified an interpretative dispute about the scope and effect of Article 5(4) LAET under Swiss law. That is not enough to meet Respondent's heavy jurisdictional burden of showing that the State instructed, directed, or controlled AET's decision to invest in Lünen.

⁷⁸ Reply, section C.III.1., see in particular paras 382-404.

⁷⁹ [Exhibit CER-0006: First Expert Report by Prof Henry Peter](#), para. 63.

⁸⁰ [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), para. 49 (footnotes omitted, emphasis added).

⁸¹ [Exhibit CER-0006: First Expert Report by Prof Henry Peter](#), para. 101.

71 The Canton's political approval therefore does not establish State agency.

***(e) Claimant's negotiated temporary exit right in the Consortium Agreement
does not evidence effective control over the investment decision***

72 Lastly, Respondent relies on Claimant's negotiated temporary exit right in the Consortium Agreement to allege effective control over the decision to invest.

73 According to Respondent, Claimant made its equity contributions prior to obtaining parliamentary approval, because AET allegedly risked exclusion from the project if it delayed its payment. Respondent therefore portrays AET's special exit right as a mechanism that "*ensured that AET could comply with Article 5(4) AET Law*" and, ultimately, as evidence that the Grand Council controlled the investment decision.⁸²

74 Respondent's argument reverses the logic of the clause. An exit right does not show who made the initial decision to invest. As Professor Peter explains, the contractual exit mechanism confirmed that AET's decisions had already been validly taken by AET's Board of Directors, while preserving a "way out" should the Ticino Parliament later take a political position against continuing the participation.⁸³ In short, one can only exit an investment one has already entered. The clause therefore concerned possible later divestment, not State control over the original decision to invest.

75 Once properly understood as a divestment mechanism rather than an investment instruction, the clause supports Claimant's case, not Respondent's. The provision does not evidence State control, but rather demonstrates Claimant's commercial autonomy. AET negotiated contractual flexibility to protect its position in a multi-party project while political discussions in Ticino were ongoing. That is the conduct of a prudent commercial investor managing risk, not of a State agent acting under instructions.

⁸² Rejoinder, paras 177-183.

⁸³ [Exhibit CER-0006: First Expert Report by Prof Henry Peter](#), paras 102-103.

76 The documents cited by Respondent confirm precisely that limited function. For example, the Consortium Agreement simply provides that AET may sell its shares if it is required to do so by the Ticino Parliament.⁸⁴

77 At most, the exit clause addressed what would happen if AET later lacked the political authorisation to remain invested. It did not dictate whether AET should invest in the first place, how much AET should invest, whether AET should participate in the consortium, or what commercial terms AET should negotiate. As Respondent accepted, the *Broches* test must be met in relation to a specific act, in the case at hand that is the decision to invest in Lünen. A contingency option for possible later divestment is not an instruction to invest. Nor is it proof that parliament made the investment decision.

78 Respondent's theory is also internally inconsistent. If the Grand Council had made or controlled the investment decision, there would have been no need for Claimant to negotiate an exit mechanism as a contingency. The clause instead shows that AET managed the timing and political sensitivity of the project through its own contractual arrangements.⁸⁵ Respondent identifies no evidence that the Canton instructed AET to proceed, directed it to negotiate the clause, or dictated its terms.

79 Respondent's selective reliance on individual documents therefore cannot carry its burden. It points to references to "authorisations," "consent," and possible sale rights, but none of those references demonstrates an instruction, direction, or act of control by the Canton over AET's decision to invest.

6. Conclusion on Respondent's First Objection

80 Respondent's First Objection fails both legally and factually.

81 Respondent invokes Article 8 of the ILC Articles, asking the Tribunal to apply the criterion of effective control. Effective control requires instructions, direction or control over the specific conduct at issue. It is not satisfied by general factors such as

⁸⁴ See [Exhibit C-0081-DE](#) / [Exhibit C-0081-EN: TKL 2008 Consortium Agreement, 8 May 2008 \(excerpts\)](#)

⁸⁵ [Exhibit CER-0006: First Expert Report by Prof Henry Peter](#), paras 22-23, 102; see also [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), section D.1.

ownership, supervision, institutional status, public-law features or policy alignment. Nothing Respondent put forward is even remotely capable of satisfying this high threshold. Instead, Respondent's approach impermissibly lowers the standard and collapses the distinction between a State-owned investor and a State-controlled act that the *Broches* test preserves. With Respondent, the *Broches* test would be overturned.

82 Factually, Respondent has not shown that Switzerland exercised effective control over the investment decision. The evidence shows the opposite. Claimant is a separate legal entity, not an organ or agent of the State. It acted through its own bodies, made a commercial investment decision, negotiated commercial protections, and sought political approval regarding the continued holding of shares due to the politically sensitive nature of the project. Professor Peter's Expert Reports confirm these conclusions under Swiss law.

83 This remains an investor-State dispute, not a State-State dispute. Respondent's First Objection should therefore be dismissed.

II. Respondent's new admissibility objection must be dismissed as belated, outside this Tribunal's jurisdiction, and unsubstantiated

84 Respondent's additional admissibility objection, newly introduced with its Rejoinder, rests on the allegation that "*AET breached Swiss law through its conduct until the end of 2017*"⁸⁶. This violation, Germany argues, resulted from AET not following its obligation to divest under the laws of Switzerland and more precisely of the Canton of Ticino.

85 The objection must be dismissed for several reasons: It is belated (1). It is legally irrelevant from an international law perspective and, additionally, raises matters of Swiss law outside this Tribunal's jurisdiction (2). Ultimately, however, it is also without merit under Swiss law. Professor Peter confirms this in his Second Expert Report (3).

⁸⁶ Rejoinder, para. 186.

1. This is a new objection, introduced late

- 86 The objection is belated. Germany sought to introduce it in mid-2026, more than two and a half years after this arbitration was registered by ICSID in October 2023.
- 87 Under Arbitration Rule 43(2), a “*party shall notify the Tribunal and the other party of its intent to file a preliminary objection as soon as possible.*” Germany appears to acknowledge the belated nature of its objection. Yet, it only seeks to justify the objection’s late raising by suggesting it was prompted by the “*documents that Claimant had to produce in document-production*”⁸⁷.
- 88 Not only does this statement by Germany lack substantiation. Germany’s statement also lacks a foundation in the record of this case.
- 89 Germany had been fully aware – presumably from the start of this arbitration but in any event already when filing its Counter-Memorial in March 2025 – that, under Swiss law, AET was supposed to divest its shares in the Lünen Plant by 2035. Indeed, Germany developed its factual argument in that respect over 15 paragraphs in March 2025.⁸⁸ It also made legal arguments at the time regarding what is now supposed to form the basis of its additional preliminary objection.⁸⁹
- 90 Consequently, Germany would have been in a position to formulate its additional preliminary objection already at the time it filed its other preliminary objection – and in line with the agreed-up procedural timetable – in March 2025. The objection in no way depends on how many internal exchanges or memoranda exist with respect to AET’s obligation to sell within Claimant’s organisation, as Germany suggests.⁹⁰
- 91 What document production added is not knowledge of any new fact, but the asserted absence of documents from which Respondent now asks the Tribunal to draw inferences. Accepting this, however, would lead to a reversal of the burden of proof. It is Respondent that now asserts a violation of Swiss law. It is therefore Respondent that must establish (i) the content of the obligation under Swiss law, (ii) the facts constituting

⁸⁷ Rejoinder, para. 185.

⁸⁸ Counter-Memorial, paras 104-118.

⁸⁹ See Counter-Memorial, paras 554 (on FET) and 620 (on quantum).

⁹⁰ Rejoinder, paras 185, 204-205.

its breach, and (iii) a rule of international law attaching the consequence of inadmissibility to such a breach.

92 In addition to its failure to justify its late raising of the objection, Germany also failed to notify the Tribunal and Claimant of its intention to raise this objection “*as soon as possible*”, as required by Arbitration Rule 43(2). At the very least, this would have required a communication by Germany after its alleged discovery of an (additional) basis for this objection during document production. The first time the objection makes an appearance in the record of this arbitration was with Germany’s latest submission. It therefore must be dismissed already for reasons of proper procedure.

2. Germany’s reliance on good faith is a desperate grasping at straws, and its Swiss law arguments are outside this Tribunal’s jurisdiction

93 If the Arbitral Tribunal were nevertheless minded to entertain the objection on substance, its foundation in international law is even less substantiated than Germany’s attempt to justify its late raising.

94 Germany’s submission strings together buzzwords like “*abuse of process*”, “*fraud*”, “*corruption*” as well as the “*clean hands*” doctrine and “*estoppel*”, without identifying a coherent legal standard. At best, Germany presents a patchwork of loosely related jurisprudence.⁹¹ But Germany does not establish a clear legal threshold it wishes this Tribunal to apply. Indeed, as Germany itself notes, “*a fact-pattern such as the present [...] has not been addressed in treaty jurisprudence yet*”⁹².

95 Germany misses a critical point: The main reason why arguments such as Germany’s have so far not been addressed in ICSID jurisprudence may very well be that they concern matters of home-state law. This Tribunal cannot – and, for good reasons, should not – rule upon those:

- As Article 42(1) of the ICSID Convention establishes in relevant parts, absent other agreements, “*the Tribunal shall apply the law of the*

⁹¹ Rejoinder, paras 189-197.

⁹² Rejoinder, para. 198.

Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”

- Article 26(6) of the ECT does not establish a different rule for present purposes, as it sets out that an ECT “tribunal [...] shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.”

96 As a consequence of the above provisions, an ICSID tribunal’s jurisdiction under the ECT is limited to address matters of international law and potentially the law of the host-state of the investment. And this Tribunal’s jurisdiction in particular therefore does not encompass the making of findings under Swiss law, in particular the law of the Canton Ticino.⁹³

97 In that vein, also all cases that Germany refers to either relate to compliance with the host-state’s law in the making of the investment, or observance of the international law principle of good faith with respect to abusive treaty (re-)structuring of investments. Accepting Germany’s approach for the present case, however, would make the exercise of jurisdiction by ICSID tribunals generally contingent on contested home-state domestic law debates, which ICSID tribunals – just as the present one – have no authority to decide.

98 In particular:

- The *Inceysa* and *Krederi* cases pertain to the so-called legality doctrine, which – whether anchored in an “in accordance with law” clause or in transnational public policy – addresses investments procured through violations of the host State’s law or through fraud or corruption in the making of the investment. *Inceysa* concerned fraud committed towards the host State in the tender through

⁹³ For completeness, Claimant notes that host-state law and hence Swiss law may exceptionally be applicable under the ECT’s definition of Investor under Article 1(7). This, however, does not have relevance in the present context.

which the investment was made; *Krederi* concerned alleged corruption in the acquisition of the investment.⁹⁴

Two cumulative features of that doctrine are absent in the present case.

- The law allegedly violated is not Respondent's law. The rationale of the legality doctrine is that a host State cannot be taken to have extended treaty protection to investments procured in violation of its own legal order. That rationale has no purchase where the law in question is a statute of the investor's home canton.
- The legality requirement typically concerns the *making* of the investment, not its subsequent performance or retention. Respondent's own authority is explicit on the point: In *Quiborax v. Bolivia*, the tribunal held that the legality requirement of the applicable BIT in these cases applied to the legality of the investment at the time it is made.⁹⁵ No such illegality exists in the present case. As the Tribunal is aware, the ECT does not even contain a written legality requirement. Moreover, AET made its investment in the period from 2006 to 2008 when the divestment obligation of a participation in coal-fired power plants did not yet exist. It was only introduced with the 2011 LAET, which entered into force on 1 August 2011 – three years later. On Respondent's own chronology, no doctrine of illegality can touch the making of this investment, and Respondent does not allege otherwise.
- The cases of *Phoenix Action*, *Churchill Mining* and *WM Mining* relate to the doctrine of abuse of process or rights. This abuse-of-process and abuse-of-rights jurisprudence sanctions conduct directed at the treaty protection or the arbitral process itself: Respondent's own quotation from *WM Mining* lists the recognised categories:

⁹⁴ [Exhibit RL-0127: *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006](#), paras 234, 237; [Exhibit RL-0128: *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018](#), para. 385.

⁹⁵ [Exhibit RL-0143: *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012](#), para. 266.

“conduct such as corporate restructuring aimed at securing jurisdiction under an investment treaty, the multiplication of arbitral proceedings to maximize chances of success, or the use of a treaty to gain advantages that are inconsistent with the purpose of international arbitration, may be considered abusive.”⁹⁶

The present case does not fall under any of those, and Respondent does not contend otherwise. AET lawfully made its investment in 2008, held it, and brought a claim in respect of a 2020 measure of the host State. There is no allegation that AET structured, timed or manufactured anything in order to obtain treaty protection. Continuing to hold one's own lawful investment is not an abuse of any right, let alone of the arbitral process. Moreover, not even Respondent alleges that there is any indication that Claimant maintained its investment in the period from 2011 to 2019 in order to obtain treaty protection against an - at the time - unexpected coal ban in Germany.

- As far as Respondent refers to the *Siag* case and estoppel, Respondent leaves the Tribunal and Claimant in the dark as to their relevance. It is clear, however, that there is no room for an estoppel argument in the present case. The *Siag* case involved the question which representations the claimants had made about their nationality and what those representations' effects would be. This is in line with the traditional notion of estoppel under international law, as summarised by Judge Spender in the *Temple of Preah Vihear* case:

“the principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result the other State has been prejudiced or the State making it has secured some benefit or advantage for itself.”⁹⁷

⁹⁶ Rejoinder, para. 193, quoting [Exhibit RL-0126: WM Mining Company, LLC v. Mongolia, ICSID Case No. ARB/21/8, Award, 29 August 2024](#), para. 122.

⁹⁷ [Exhibit CLA-0212: Temple of Preah Vihear \(Cambodia v. Thailand\)](#), International Court of Justice, Judgment of 15 June 1962 – Merits, Dissenting Opinion of Judge Spender, I.C.J. Reports 1962, p. 101 at pp. 143-144; see also [Exhibit CLA-0213: Chagos Marine Protected Area Arbitration \(Mauritius v. United Kingdom\)](#), PCA Case No. 2011-03, Award, 18 March 2015, para. 435.

Respondent does not – because it cannot – identify any representation by AET to Germany concerning the 2011 LAET or its implementation, any reliance by Germany on such a representation, or any detriment to Germany resulting from AET not following the representation it did not make. On the contrary: Respondent's own case is that it learned of the 2011 LAET only in the course of this arbitration and that Claimant had “concealed” it.⁹⁸ A party that claims to have been unaware of a matter cannot have relied upon it.

- Finally, Germany's reference to the *Sanum* case and good faith in general is equally obscure at best. Respondent designates “the principle of good faith” as one possible legal standard. But, as the International Court of Justice has held, the principle of good faith “*is not in itself a source of obligation where none would otherwise exist*”.⁹⁹ Good faith informs the interpretation and performance of existing obligations. It does not itself create a self-standing cause of dismissal. Respondent's own authorities confirm this: every case it cites applies good faith through a recognised, well-defined doctrine – abuse of process (*Phoenix, Churchill Mining, WM Mining*), illegality or fraud in the making of the investment (*Inceysa*), corruption (*Krederi*), or estoppel (*Siag*).

⁹⁹ If anything, and assuming Respondent's assertions were correct (which they are not), the matter of Claimant's obligation to divest under Swiss law could – as a matter of fact – pertain, at most, to the merits or quantum stage of this arbitration. This is also evidenced by Germany's earlier references to the relevant aspects in its Counter-Memorial solely with respect to FET and quantum.¹⁰⁰

⁹⁸ Counter-Memorial, para. 620; Rejoinder, para. 49.

⁹⁹ [Exhibit CLA-0214: Border and Transborder Armed Actions \(Nicaragua v. Honduras\), International Court of Justice, Judgment of 20 December 1988 – Jurisdiction of the Court and Admissibility of the Application, I.C.J. Reports 1988](#), p. 69, at p. 105.

¹⁰⁰ See above, para. 89. See also Counter-Memorial, paras 554 (on FET) and 620 (on quantum).

3. The newly introduced admissibility objection is without merit

- 100 In any event, and while this Tribunal cannot properly engage with the matters that Germany raised on the basis of Swiss law, Germany's allegations are unfounded.
- 101 Already with its Reply, Claimant showed that it complied with its divestment obligation, including through Project Mozart¹⁰¹, and illustrated the background.¹⁰²
- 102 There exists no Swiss judicial or governmental authority decision finding of AET being in breach of Cantonal law, despite full knowledge of the situation by the Grand Council and numerous opportunities to assess such supposed breach.
- 103 To dispel any doubts in that respect, Claimant also asked its Swiss law expert Professor Peter to assess the matter. As Professor Peter concludes:

*"Neither AET nor the Ticino Government is – or has been at any time – in breach of its respective obligations regarding AET's Lünen Plant investment. As regards AET, if a breach had existed, it would have been for the competent bodies of the Canton, in particular the Ticino Government and Ticino Parliament to say so. None of them have ever alleged or stated so. AET has in fact always complied with its obligations deriving from the LAET and of any other governing rule. As regards the Ticino Government, materials show that it has actively exercised its supervisory role and has carefully followed the complex issues connected with the possible divestment of AET's participation in the Lünen Plant."*¹⁰³

- 104 By contrast, while Claimant has done all it could to comply with its divestment obligation and to illustrate this for the benefit of the present Tribunal, Germany fails to point to any opportunity AET would have missed to sell its Lünen participation. Germany bears the full burden to substantiate its defence, and has failed to do so – generally but importantly, also for admissibility purposes.

4. Conclusion on Respondent's Second Objection

- 105 As a result, this Tribunal must dismiss Respondent's Second Preliminary Objection already as belated, alternatively outside of its jurisdiction. If the Tribunal were

¹⁰¹ Reply, para. 116.

¹⁰² Reply, paras 104-119.

¹⁰³ [Exhibit CER-0007: Second Expert Report by Prof Henry Peter](#), para. 87.

nevertheless inclined to entertain the objection, it is both unfounded as a matter of international law and a matter of Swiss law.

C. PRAYERS FOR RELIEF

106 Specifically with respect to Respondent's preliminary objections, Claimant respectfully requests this Tribunal to

(1) DISMISS Respondent's preliminary objections in their entirety; and

(2) ORDER Respondent to compensate Claimant for its costs of arbitration arising from or associated with its preliminary objections in an amount to be specified later together with interest thereon at the rate specified in paragraph 916 (B) of Claimant's Reply and, as between the parties, alone to bear all costs arising from or associated with its preliminary objections, including compensation, fees and costs of the Tribunal and ICSID.

107 For the avoidance of doubt, the above requests are without prejudice to Claimant's prayer for relief as set out in Claimant's Reply, which Claimant maintains.

Hamburg, 17 July 2026

Luther Rechtsanwaltsgesellschaft mbH

