INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

VM SOLAR JEREZ GMBH;
M SOLAR VERWALTUNGS GMBH;
SOLARIZZ HOLDING VERWALTUNGS-GMBH;
M SOLAR GMBH & CO. KG;
SOLARIZZ HOLDING GMBH & CO. KG; AND
DR. HELMUT VORNDRAN
(CLAIMANTS)

and

KINGDOM OF SPAIN
(RESPONDENT)

ICSID Case No. ARB/19/30

DECISION ON THE PROPOSAL TO DISQUALIFY PROF. DR. GUIDO SANTIAGO TAWIL

Chairman of the Administrative Council
Mr. David R. Malpass

Secretary of the Tribunal
Ms. Catherine Kettlewell

Date: 24 July 2020

REPRESENTATION OF THE PARTIES

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Mr. Alberto Torró Molés
Ms. Elena Oñoro Sáinz
Mr. Juan Antonio Quesada Navarro
Ms. Gloria de la Guardia Limeres
Ms. Ana María Rodríguez Esquivias
Mr. Javier Comerón Herrero
Ms. Eugenia Cediel Bruno
Mr. Luis Vacas Chalfoun
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I. INTRODUCTION AND THE PARTIES

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

2. The Claimants are VM Solar Jerez GmbH, M Solar Verwaltungs GmbH, Solarizz Holding Verwaltungs-GmbH, M Solar GmbH & Co. KG, Solarizz Holding GmbH & Co. KG, each constituted under the laws of Germany, and Dr. Helmut Vorndran, a national of Germany (jointly, "the **Claimants**").

3. The Respondent is the Kingdom of Spain ("**Spain**" or "the **Respondent**").

4. The Claimants and the Respondent are hereinafter collectively referred to as "the **Parties**" and the term "**Party**" refers to either the Claimants or the Respondent. The Parties' representatives and their addresses are listed above.

5. This decision addresses the Respondent's Proposal to Disqualify Prof. Dr. Guido Santiago Tawil in the present proceedings. Below is a summary of the procedural history relevant to this decision.

II. PROCEDURAL HISTORY

6. On 17 September 2019, ICSID received a Request for Arbitration submitted by the Claimants against Spain.

7. On 4 October 2019, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the ICSID Convention.

8. By a letter of 3 December 2019, the Claimants informed ICSID that they opted for the formula in Article 37(2)(b) of the ICSID Convention. Therefore, the Tribunal would

consist of three arbitrators, one arbitrator appointed by each party, and a presiding arbitrator to be appointed by agreement of the parties.

9. On the same date the Claimants appointed Professor Dr. Guido Santiago Tawil, a national of the Argentine Republic, as an arbitrator in this case.

10. On 5 December 2019, Prof. Tawil accepted his appointment as an arbitrator in this case. Prof. Tawil provided a signed declaration and an accompanying statement pursuant to Rule 6(2) of the ICSID Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**"). The Secretariat transmitted the signed declaration and statement to the Parties on 9 December 2019. In his statement, Prof. Tawil disclosed the following:

> "Although there are no circumstances that, in my opinion, should affect my reliability to render an independent judgement in this case, I consider my duty to disclose the following facts:
>
> - Claimant counsel in the case (Dr. Sabine Konrad) acted as counsel representing the party that appointed me in the Opic v Venezuela case (ICSID Case No. ARB/10/14). The case was initiated in 2010 and an award was rendered in 2013.
>
> - I have been appointed in three cases to which Respondent is a party. While two of those cases, the Charanne and Isolux SCC cases ended in 2016, I also act in the Steag v. Kingdom of Spain case (ICSID Case ARB/15/4), which is still pending.
>
> To the best of my knowledge, I have had no other present or past relationship with the parties or counsel acting in the present case."

11. On 11 December 2019, the Respondent appointed Dr. Ioana Knoll-Tudor, a national of Romania, as an arbitrator in this case.

12. On 13 December 2019, Dr. Knoll-Tudor accepted her appointment and provided a signed declaration pursuant to ICSID Arbitration Rule 6(2).

13. By communications of 13 December 2019, the Parties informed the Centre of an agreed formula to appoint the president of the Tribunal in this case.

14. On 29 January 2020, the Parties informed the Centre of an amendment to the agreed formula to select the president of the Tribunal in this case. The Parties selected a list of candidates and then ranked each candidate in order of preference.

15. On 16 March 2020, the Parties informed the Centre of their agreement to seek the appointment of Mr. Michael Collins, a national of the United Kingdom.

16. On 20 March 2020, Mr. Collins accepted his appointment as presiding arbitrator and provided his signed declaration pursuant to ICSID Arbitration Rule 6(2).

17. On the same date, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was deemed to have been constituted on 20 March 2020, in accordance with ICSID Arbitration Rule 6(1).

18. On 2 April 2020, the Respondent proposed the disqualification of Prof. Tawil, in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (the "**Proposal**").

19. On the same date, the Centre informed the Parties that the proceeding had been suspended until the Proposal was decided, pursuant to ICSID Arbitration Rule 9(6). The Parties were also informed that the Proposal would be decided by the other Members of the Tribunal, Mr. Michael Collins and Dr. Ioana Knoll-Tudor (the "**Unchallenged Arbitrators**"), in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4).

20. On 3 April 2020, the Centre transmitted to the Parties and Prof. Tawil the procedural calendar for the submission of written observations on the Proposal, which had been fixed by the Unchallenged Arbitrators, as follows:

    i. 17 April 2020 - the Claimants to submit a response to the Respondent's Proposal;

    ii. 24 April 2020 - Prof. Tawil to furnish any explanations;

    iii. 1 May 2020 - the Parties to submit any further observations on the Proposal.

21. On 17 April 2020, in accordance with the procedural calendar, the Claimants filed their Response to the Proposal ("**Response**"), requesting the two Unchallenged Arbitrators to reject the Proposal.

22. On the same date Prof. Tawil furnished his explanations pursuant to ICSID Arbitration Rule 9(3). By letter of 17 April 2020, the Parties were invited to submit their final observations by 24 April 2020.

23. On 24 April 2020, the Respondent filed Further Observations in relation to its request for disqualification (the Respondent's **"Further Observations**"). The Claimant did not file any further observations.

24. By letter of 29 April 2020 the Unchallenged Arbitrators invited the Respondent to provide a copy of the decision of the Board of the Stockholm Chamber of Commerce in *FREIF Eurowind Holdings Ltd. v. Spain* [SCC Case No. 2017/060], dated 7 January 2020 (the "***FREIF* Disqualification Decision**"), to which the Respondent had referred in its Further Observations. The Unchallenged Arbitrators indicated that no further submissions were required.

25. On 1 May 2020, the Respondent furnished the Unchallenged Arbitrators with a copy of the *FREIF* Disqualification Decision.

26. On 15 May 2020, the two Unchallenged Arbitrators advised the Secretary-General that they were equally divided with respect to the Respondent's Disqualification Proposal. On the same date, ICSID informed the Parties that pursuant to Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4), the Proposal would be decided by the Chair of the Administrative Council.

27. On 17 May 2020, the Claimants requested an opportunity to comment on the *FREIF* Disqualification Decision. On 18 May 2020 both parties were offered the opportunity to simultaneously submit additional comments on the *FREIF* Disqualification Decision. On 19 May 2020, the Respondent requested information on the basis for the Secretariat's offer to accept further comments on the *FREIF* Disqualification Decision. The Secretariat replied on 22 May 2020 extending the deadline for the parties to comment on the *FREIF*

Disqualification Decision. On 27 May 2020, both parties submitted additional comments on the *FREIF* Disqualification Decision.

28. On 18 June 2020, the Respondent inquired whether the Secretariat would request the Permanent Court of Arbitration ("**PCA**") for a recommendation of the Disqualification Proposal of Prof. Tawil. On 23 June 2020, the Secretariat responded that the Secretary-General concluded that the circumstances of the case did not justify requesting an external recommendation.

III. THE PARTIES' SUBMISSIONS

A. The Respondent's Disqualification Proposal and Further Observations

29. In support of its disqualification proposal, the Respondent relies on the ICSID Convention, other applicable international conventions, international custom and the general principles of law recognized by civilized nations as reflected in Article 38 of the Statute of the International Court of Justice.[1]

30. The Respondent submits that arbitrators must exercise independent and impartial judgment pursuant to Articles 57 and 14 of the ICSID Convention.[2]

31. The Respondent notes the difference among the three original texts of Article 14 of the ICSID Convention. While the English version of Article 14 refers to persons who "may be relied upon to exercise independent judgment" and the French text states that persons appointed to panels must "*offrir toute guarantie d'indépendance dans l'exercice de leur fonctions*", the Spanish version provides that arbitrators must "*inspirar plena confianza en su imparcialidad de juicio*."

32. In view of the difference among the three authentic language versions of Article 14 of the ICSID Convention, the Respondent argues that this Article should be interpreted in accordance with Article 33(4) of the Vienna Convention on the Law of Treaties as requiring arbitrators to be independent and impartial.[3] In this context, it notes that "among

[1] Proposal, ¶ 2 and¶ 6.
[2] Proposal, ¶¶ 8-10.
[3] Proposal, ¶ 12, citing Vienna Convention on the Law of Treaties. 23 May 1969. Article 33(4), **Annex 03**.

the objectives and purposes of the ICSID Convention is the peaceful settlement of investment disputes through conciliation or arbitration that must respect the due and fair process"[4] which includes the fundamental right to be heard by an independent and impartial tribunal.

33. The Respondent also relies on "international custom in arbitration practice" to argue that ICSID arbitrators can be disqualified if there is "any reasonable doubt"[5] concerning their independence and impartiality. It argues that the word "manifestly" in Article 57 of the ICSID Convention cannot be interpreted "against the international custom, reflected in international conventions, in the practicioners (sic) rules and in national legislations …[that] guarantee the disqualification of the arbitrators when there is a justifiable and reasonable doubt about their independence or impartiality."[6]

34. In this respect, the Respondent supports its allegation on Article 10(1) of the UNCITRAL Arbitration Rules, to General Principle 1 of the IBA Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines**"), to the American Arbitration Association International Arbitration Rules and to the Rules of the London Court of International Arbitration.[7]

35. Finally, the Respondent also relies on "general principles of law recognized by civilized nations," which, it submits, guarantee the independence and impartiality of adjudicators[8] by allowing for challenge and disqualification if there is "any slight doubt that they are biased."[9]

36. The Respondent submits that Articles 57 and 14 of the ICSID Convention must therefore be interpreted as "an obligation" to disqualify an arbitrator if there is "any indication" of

[4] Proposal, ¶ 13.
[5] Proposal, ¶ 26.
[6] Proposal, ¶ 30.
[7] Proposal, ¶¶ 14, 24-30, citing IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by resolution of the IBA Council 2014, General Principle 1, **Annex 04**; American Arbitration Association (AAA) - International Arbitration Rules as amended ad effective September 1, 2000 (Rules for International Arbitration of the American Arbitration Association (AAA), article 7, **Annex 05**; London Court of International Arbitration Rules (LCIA), 1998, article 5.2. **Annex 06**.
[8] Proposal, ¶¶ 31-33.
[9] Proposal, ¶ 32.

lack of independence or impartiality, or "any slight doubt" that the adjudicator is biased.[10] The Respondent contends that general principles of law do not require the challenging party to prove actual bias. Rather, according to the Respondent, it is enough that such bias can be inferred from the facts of the case.[11]

37. On this basis, the Respondent concludes that the applicable international framework allows for disqualification if there are "justifiable doubts" as to the arbitrator's independence or impartiality.

38. The applicable standard, according to the Respondent, is an "objective standard based on the reasonable analysis of evidence by a third party."[12] The Respondent further argues that Article 14(1) "only requires 'the appearance of such dependence or bias,'" as decided by the Committee in the *EDF* case. [13]

39. Based on this standard, the Respondent challenges the appointment of Prof. Tawil on two grounds, namely:

    a. That Prof. Tawil had three previous appointments by investors in arbitration cases against Spain[14] that allegedly share multiple common factual and legal issues with the present case,[15] and

    b. That Prof. Tawil prejudged core issues arising in the present case, as evidenced by his dissenting opinions rendered in *Charanne* and *Isolux*.[16]

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[10] Proposal, ¶¶ 23, 32.
[11] Proposal, ¶ 33.
[12] Proposal, ¶¶ 53-54, citing *Blue Bank International & Trust (Barbados) Ltd v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/12/20, Decision on the Proposal to Challenge the Majority of the Tribunal Submitted by the Parties, 12 November 2013 ("***Blue Bank* 2013 Decision**"), ¶¶ 58, 37, **Annex 11**; *Burlington Resources, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on the Proposal to Challenge Mr. Francisco Orrego Vicuña, 13 December 2013, ¶¶ 65, 77 ("***Burlington***"), **Annex 12**, and *Repsol S.A. and Repsol Butano S.A. v. Argentine Republic*, ICADI Case No. ARB/12/38, Decision on the Proposed Challenge of the Majority of the Tribunal, 13 December 2013 ("***Repsol***"), ¶¶ 71-72, **Annex 13**.
[13] Proposal ¶ 55, citing *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic,* ICSID case No. ARB/03/23, Decision dated 5 February 2016 ("***EDF***"), ¶ 126, **Annex 14.**
[14] Specifically, *Charanne and Construction Investments v. Kingdom of Spain,* SCC Case No. V062/2012 ("***Charanne***"); *Isolux Netherlands, BV v. Kingdom of Spain,* SCC Case No. V2013/153 ("***Isolux***"), and *STEAG GmbH v. Kingdom of Spain,* ICSID case ARB/15/4 ("***STEAG***").
[15] Proposal, ¶ 43.
[16] Proposal, ¶ 45.

40. **<u>On the first ground</u>**, the Respondent argues that multiple appointments in different cases against the same party give rise to a two-fold risk of bias:

> (a) on one hand, a possible economic benefit of prospective regular appointments by claimants.
>
> (b) on the other hand, the possibility that the arbitrator may be influenced by factors outside of the record in the instant case resulting from knowledge derived from similar or identical cases.[17]

41. The Respondent points out that multiple appointments carry a risk of bias. To this end, the Respondent cites several provisions included in the Orange list of the IBA Guidelines. It further relies on other decisions on disqualification proposals that address the issue of multiple appointments as a risk of a potential conflict of interest (*e.g. Tidewater*[18]).

42. The Respondent acknowledges that multiple appointments could not, *per se*, be a cause for disqualification, without any other circumstance, but submits that they are not "innocuous."[19] Citing the decision in *Opic Karimum*, and noting that Prof. Tawil was involved in this decision, the Respondent submits that:

> "multiple appointments of an arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge"

and that:

> "In a dispute resolution environment, a party's choice of arbitrator involves a forensic decision that is clearly related to a judgment by the appointing party and its counsel of its prospects of success in the dispute. … multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be

[17] Proposal, ¶ 39.
[18] Proposal, ¶ 38, citing *Tidewater Inc. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10.5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, 23 December 2010 ("***Tidewater***"), ¶ 62, **Annex 27**.
[19] Proposal, ¶ 41.

> successful with the multiple appointee as a member of the tribunal than would otherwise be the case."[20]

43. Relying on *Serafín García Armas,*[21] the Respondent argues that the concerns raised by multiple appointments of the same arbitrator could be further exacerbated if the proceedings require the examination of the same issues of fact and law.[22]

44. The Respondent argues that the three previous proceedings in which Prof. Tawil sat as an arbitrator (*Isolux, Charanne, STEAG*) shared "essential similarities"[23] with the current proceeding, *i.e*. the three of them (i) were against the same respondent (Spain), (ii) relate to the same disputed measures concerning the renewable energy sector, over similar periods of time and (iii) were based on the ECT. [24] The Respondent further suggests that these similarities increase the risk of bias inherent in multiple appointments.[25]

45. **On the second ground**, the Respondent submits that in two previous cases – *Charanne* and *Isolux*– Prof. Tawil already expressed his views on a number of issues that also arise in the present case. The Respondent submits that clearly he has "prejudged the core issues in discussion in the case at hand."[26]

46. In particular, the Respondent points to four issues upon which it considers that Prof. Tawil has already expressed his views and prejudged the present case. These issues are:[27]

    i. the Tribunal's jurisdiction to decide on intra-EU disputes (a German Claimant investors against the Kingdom of Spain) pursuant to the ECT;

    ii. whether Royal Decree 661/2007 ("**RD 661/2007**") and Royal Decree 1578/2008 ("**RD 1578/2008**") were issued with the aim of attracting

[20] Proposal, ¶ 41, citing *Opic Karimum Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, 5 May 2011 ("***OPIC Karimum***"), ¶ 47, **Annex 29**.
[21] *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, Decision on Disqualification of Arbitrator Mr Guido Santiago Tawil, 8 May 2013 ("***Serafin García Armas***"),¶ 49, **Annex 28**.
[22] Proposal, ¶ 42, citing *Serafín García Armas*, ¶ 49, **Annex 28**.
[23] Further Observations, ¶ 37.
[24] Proposal, ¶¶ 43-44.
[25] Proposal, ¶ 44.
[26] Proposal, ¶ 45.
[27] Proposal, ¶ 50.

investors and whether they created, by themselves, legitimate expectations for investors;

iii. whether the regulatory regime at the time of the investment constituted a guarantee of special remuneration that excluded any subsequent modifications, and

iv. the fact that in his previous decisions, Prof. Tawil relied on two "very concrete elements", namely (i) the temporary scope of RD 661/2007; and (ii) the fact that it was intended to attract certain groups of investments, both elements having been underscored by the Claimants in their Request for Arbitration.

47. The Respondent also relies on the brevity of Prof. Tawil's dissents in the *Charanne* and *Isolux* cases, pointing out that Prof. Tawil barely referenced the evidence in the record, and they lacked a solid analysis as to why he considered the reasoning of the majority ill-founded or flawed.[28]

48. Finally, the Respondent requests that if the challenge decision is to be taken by the Chair of the ICSID Administrative Council because the Unchallenged Arbitrators are equally divided, the recommendation of the PCA should be sought "as an independent third party that can appreciate better .. whether [there] is or is not a lack of independence and impartiality of the Challenged Arbitrator."[29]

49. In its Further Observations the Respondent reiterates its reliance on Article 38 of the International Court of Justice Statute and submits that the ICSID Convention requires a harmonious interpretation of other international instruments. The Respondent further refers to other treaties to which Germany and Spain are party, including Article 47 of the European Union Charter of Fundamental Rights, Article 6 of the European Convention on Human Rights, and Article 10 of the United Nations Universal Declaration of Human Rights, and submits that "the ICSID Convention cannot be interpreted as if the State Parties

[28] Proposal, ¶ 47.
[29] Proposal, *Petitum*, ¶ 80(c).

have lowered the independence and impartiality standards of the adjudicators or have renounced the fundamental rights of the parties in a dispute."[30]

50. The Respondent further refers to standards of disqualification pursuant to national legislation, citing in particular a recent decision of the Stockholm Chamber of Commerce in which a similar application brought by Spain seeking the disqualification of Prof. Kaj. Hobér was successful.[31]

51. The Respondent contends that the applicable test in ICSID cases cannot be different because Article 57 of the ICSID Convention uses the word "manifestly". According to the Respondent, "it is enough that bias can be inferred from the facts of the case and that must determine the success of the challenge."[32]

52. The Respondent rejects the Claimants' arguments concerning its allegedly contradictory behaviour in other proceedings as unfounded and irrelevant, and submits that the only issue to be decided is whether there are doubts as to the independence and impartiality of Prof. Tawil.[33]

53. The Respondent accepts it bears the burden of proof and submits that it has satisfied such burden by identifying:[34]

    i. the three previous proceedings on which Prof. Tawil has been appointed by the claimants in cases brought against Spain;

    ii. the essential similarities among the four proceedings;

    iii. the fact that in two of these cases Prof. Tawil has already expressed his opinion in a way that allows no room for a different decision in the present proceeding;[35] and

[30] Further Observations, ¶¶ 11-14.
[31] Further Observations, ¶¶ 15-18, citing *FREIF Eurowind Holdings Ltd. v. Spain*, SCC Case No. 2017/060.
[32] Further Observations, ¶ 20.
[33] Further Observations, ¶¶ 26-33.
[34] Further Observations, ¶¶ 34-40.
[35] Further Observations, ¶ 38.

iv. the substantial similarities of Prof. Tawil's opinions in the *Charanne* and *Isolux* cases (including a cross-reference in the latter to his earlier dissent in the former),[36] and the "blatant lack of reference" in both of his dissenting opinions in both cases to the evidence on record.

54. The Respondent also submits that Prof. Tawil's "ominous silence" in not seeking to confront the grounds for disqualification in his explanations contrasts with his position when challenged in *Serafín García Armas*, and shows that he lacks the necessary independence and impartiality in this case.[37]

55. The Respondent further argues that Prof. Tawil did not try to explain any difference between the two previous cases (*Isolux* and *Charanne*) and the present case.

56. The Respondent points out that in the present case, the disputed measures are RD/661/2007, RD 1566.2010, Royal Decree 1565/2010, Royal Decree Law 14/2010, Royal Decree Law 1/2012, Law 15.2012, Royal Decree Law 2/2013, Electricity Sector Act 24/2013, Royal Decree 413/2014 and Ministerial Orders of 2014 and their effect in the Claimants' alleged investment in the photovoltaic plants since 2008. [38]

57. In this respect, the Respondent recalls that in the *Charanne* case the photovoltaic facilities were acquired in 2009 and the disputed measures were mainly implemented in 2010. According to the Respondent, Prof. Tawil "expressed an opinion considering that RD 661/2007 contained a stabilization representation that Claimants were entitled to rely upon, so that no changes whatsoever could be introduced by the Kingdom of Spain."[39]

58. With respect to the *Isolux* case, the Respondent points out that it also involved alleged investors in photovoltaic plants and that the dispute referred to events that took place in 2013. According to the Respondent, in that case Prof. Tawil repeated the views expressed

[36] *Isolux*, Prof. Dr. Guido S. Tawil Dissenting Opinion, p. 1.
[37] Further Observations, ¶¶ 65-69. In that case Professor Tawil explained that in the four previous cases involving Venezuela in which he had been appointed the factual and legal issues were different from the factual and legal issues arising in the case in which he was challenged.
[38] Further Observations, ¶ 58.
[39] Further Observations, ¶ 59, citing *Charanne*, Final Award, Dissenting opinion of Prof. Tawil, 21 January 2016, **Annex 26**.

in the *Charanne* case. [40] The Respondent argues that in both dissenting opinions, Prof. Tawil concludes that the Spanish regulation contained stabilization commitment regardless of whether there was a specific representation made to an investor.[41]

B. The Claimants' Response

59. The Claimants contend that the Respondent's proposal to disqualify Prof. Tawil lacks any merit.

60. The Claimants submit that the legal standard to be applied is in Articles 57 and 14(1) of the ICSID Convention and that disqualification is only mandated when an arbitrator lacks the necessary independence and impartiality. The impartiality and independence, Claimants add, must be assessed from the perspective of an objective third party.[42]

61. The Claimants also submit that only a manifest lack of the qualities required by Article 14(1) of the ICSID Convention is sufficient, and that "manifest" is now understood in ICSID practice to mean "evident" or "obvious" – thereby setting a particularly high threshold, upon which the challenging party bears the burden of proof.[43]

62. **On the first ground**, the Claimants argue that the previous three appointments by investors against Spain are a non-issue with regard to Prof. Tawil's independence and impartiality. The Claimants point out that Spain has conceded that "the mere fact of multiple appointments could not be, per se, a cause for disqualification always, without any other circumstances."[44] The Claimants add that "other circumstances" are not present in this case where the challenged arbitrator has not received multiple appointments from the same party, or the same law firm, which are the situations addressed by Sections 3.1.3 and 3.3.8 of the IBA Guidelines' Orange List.[45] The Claimants reject the Respondent's contention that the IBA Guidelines can be applied by way of analogy to a case where the same

[40] Further Observations, ¶ 60, citing *Isolux,* Award, Dissenting Opinion Prof. Tawil, 12 July 2016, **Annex 25**.
[41] Further Observations, ¶ 62(B).
[42] Response, pp. 1-2, citing *Blue Bank* 2013 Decision, ¶ 60, **Attachment 1**.
[43] Response, pp. 2-3.
[44] Response, p. 3, citing Proposal, ¶ 41.
[45] The claimants in each case in each of the four cases against Spain in which Prof. Tawil has been appointed are different. The same law firms (Bird & Bird LLP and Latham & Watkins LLP) acted for the claimants in the *Charanne* and *Isolux* cases, but a different law firm is acting for the claimants in the *STEAG* case (Clifford Chance LLP), and yet another law firm is acting for the Claimants in this case (Morgan Lewis & Bockius LLP).

arbitrator has been appointed by different claimants in a number of cases against the same respondent. The Claimants also submit that the cases relied upon by the Respondent in support of its argument (*Tidewater* and *Opic Karimum*) actually support the Claimants' position, in that the challenges in both cases were dismissed notwithstanding the fact of multiple appointments by the same party, represented by the same law firms.[46]

63. **On the second ground**, the Claimants point out that the Respondent has not challenged Prof. Tawil's appointment in *STEAG*, which is the third of his prior appointments, although the Respondent has known of his dissents in the two earlier cases since June / July 2016.[47] Accordingly, the Claimants submit that the Respondent ought to be found to have waived any alleged conflict arising out of Prof. Tawil's previous dissents.

64. The Claimants further indicate that in the present case the Respondent proposed a number of individuals as presiding arbitrator who had previously sat, or currently are sitting, in renewable energy arbitrations in which Spain was (or is) the respondent. In particular, they point to the Respondent's proposal of Mr. Yves Derains, who was the president of the tribunal that rendered the majority award in the Respondent's favor in *Isolux*.[48] The Claimants submit that this particular conduct contradicts the Respondent's current position.

65. The Claimants also submit that the decisive fact pattern in this arbitration is fundamentally different from the fact patterns in *Charanne* and *Isolux*. The Claimants' case is based on two factual premises: that (i) the Claimants' investments were made under RD 661/2007 in reliance on Spain's assurances of stability contained therein, and (ii) the Claimants' investments were negatively impacted by the elimination of the *Régimen Especial* as of 2012. In contrast, *Charanne* was concerned with investments that were impacted only by the 2010 Measures, and not by the 2013 Measures;[49] *Isolux* , on the other hand, concerned an investment made in 2012 (*i.e.* after the 2010 Measures, in the context of a different regulatory environment). According to the Claimants, the present case can be distinguished

[46] Response, pp. 3-5.
[47] The tribunal's award in *Charanne* is dated 21 January 2016; in *Isolux* it is dated 12 July 2016.
[48] Response, pp. 6-7.
[49] Response, p. 7, citing *Charanne*, Award, 21 January 2016, ¶¶ 481, 542, **Attachment 16**.

from *Charanne* and *Isolux*, since it deals with an investment made in 2009 (*i.e.* before the 2010 Measures) and that primarily impacted by the 2013 Measures.[50]

66. The Claimants submit that no criticism can be levelled at Prof. Tawil on the ground that his dissenting opinions were too short or lacked depth of analysis. On the contrary, their comparative brevity is consistent with the practice in many other ICSID arbitrations.[51]

67. The Claimants add that Spain's allegations regarding Prof. Tawil's alleged prejudgment of the intra-EU objection in *Charanne* and *Isolux* is also a non-issue. The Claimants point out that the intra-EU objection has been rejected by 20 tribunals. Additionally, the awards and dissents in *Charanne* and *Isolux* pre-date the Achmea judgment of 6 March 2018.[52]

68. The Claimants object to any involvement of the PCA in this disqualification matter. They submit that the Respondent failed to point to any legal source that would allow for its involvement, and that there are no exceptional circumstances in this case that would warrant such a course.[53]

C. Prof. Tawil's Explanations

69. On April 17, 2020, Prof. Tawil sent the following message to the ICSID Secretariat in relation to the Respondent's Proposal for his disqualification:

> "(…) after carefully reviewing the parties' submissions on the matter I find the proposal for my disqualification with no merits.
>
> I hereby reaffirm my independence and impartiality to act in this case and fully confirm my December 5, 2019 declaration."

D. Parties' Comments on the *FREIF* Disqualification Decision

a. The Respondent's Final Comments

70. The Respondent contends that ICSID proceedings are not an "isolated island" within the applicable international law. Rather, the law applicable to this case (as in the *FREIF*

[50] Response, pp. 7-8.
[51] Response, p. 8.
[52] Response, p. 8-10.
[53] Response, pp. 11-12.

Disqualification Decision) refers to a common legal basis that includes international conventions, general principles of law recognized by civilized nations, and international custom.[54] The Respondent concludes that all of these sources result in the "necessity of a guarantee of impartial arbitrators/adjudicators, and all of them lead to the necessity of the disqualification of Mr. Tawil."[55]

71. The Respondent further argues that the UNCITRAL Rules and the IBA Guidelines provide for the disqualification of an arbitrator if there are *any* doubts concerning impartiality or independence. According to the Respondent, the disqualification of arbitrator Kaj Hobér in *FREIF* strengthens the guarantees of an arbitral proceeding.[56]

72. The Respondent reiterates the alleged factual and legal similarities of this case with *Charanne* and *Isolux* with respect to which Prof. Tawil already expressed his opinion. Consequently, according to the Respondent, it is clear that Prof. Tawil has prejudged core issues relevant for this case.

73. The Respondent further compares the factual basis of the disqualification of Mr. Hobér in the *FREIF* case with the present proposal for disqualification *i.e.* a single dissenting opinion on the issues to be resolved in the *FREIF* case against the backdrop of similar factual and legal.[57] According to the Respondent Prof. Tawil has already expressed his views on the same legal and factual issues (RD 661/2007, the changes to the Spanish Legal Framework, the ECT) in two cases. The Respondent argues that if in the *FREIF* Disqualification Decision the conclusion was that Mr. Hobér did not offer a guarantee of impartiality precisely because of his dissenting opinion, that this same reasoning should apply to Prof. Tawil.[58]

b. The Claimants' Final Comments

74. The Claimants argue that the *FREIF* Disqualification Decision lacks any persuasive force for this disqualification proposal and that it must be distinguished on four grounds.[59] **First**,

[54] Respondent's Comments on *FREIF* Disqualification Decision, 26 May 2020, ¶ 23.
[55] Respondent's Comments on *FREIF* Disqualification Decision, 26 May 2020, ¶ 23.
[56] Respondent's Comments on *FREIF* Disqualification Decision, 26 May 2020, ¶ 24.
[57] Respondent's Comments on *FREIF* Disqualification Decision, 26 May 2020, ¶ 39.
[58] Respondent's Comments on *FREIF* Disqualification Decision, 26 May 2020, ¶¶ 40-41.
[59] Claimants' Comments on *FREIF* Disqualification Decision, 22 May 2020, p. 1.

that the applicable law is different. The Claimants note that the SCC Board applied Swedish law to this decision and a legal standard specific to the jurisprudence of the Swedish Supreme Court. According to the Claimants, the "most evident manifestation for the distinct legal standards in SCC and ICSID arbitrations is the *KS Invest v. Spain* case were the disqualification proposal regarding Prof. Hobér was rejected even though Spain made the same arguments as in the SCC Case No. 2017/060."[60]

75. **Second**, the Claimants argue that there is no overlap in the factual matrix with the cases in which Prof. Tawil sat earlier. They note that the *Charanne* case concerned the 2010 Measures and the *Isolux* case concerned an investment made after 2010. The Claimants repeat that the present arbitration is related to (i) the Claimants' investment made under RD 661/2007 and (ii) the Claimants were impacted by the 2013 Measures.[61]

76. **Third**, the Claimants note that Spain has not challenged Prof. Tawil in all of his arbitrations against Spain[62] unlike Spain's challenge of Prof. Hobér in all of his ongoing arbitrations.[63]

77. **Fourth**, the Claimants reiterate that Spain's behavior in this arbitration is contradictory to Spain's own conduct in proposing candidates for president of this tribunal that had previously rendered decisions in Spain arbitrations.[64]

IV. ANALYSIS

78. The Chair of the Administrative Council has considered all of the parties' submissions but will refer to them only inasmuch as they are relevant for the present Decision.

79. The Chair observes, at the outset, that the Proposal was promptly submitted after the constitution of the Tribunal and neither party has contested its timeliness.

[60] Claimants' Comments on *FREIF* Disqualification Decision, 22 May 2020, pp. 1-2.
[61] Claimants' Comments on *FREIF* Disqualification Decision, 22 May 2020, pp. 1-2.
[62] The other case is *STEAG*.
[63] Claimants' Comments on *FREIF* Disqualification Decision, 22 May 2020, pp. 2-3.
[64] The Claimants point to Spain proposing Professor Philippe Sands, Dr. Anna Joubin-Bret, Professor Alain Pellet, and Mr. Yves Derains. Claimants' Comments on *FREIF* Disqualification Decision, 22 May 2020, p. 3, *see also* **Attachment 73**.

A. The Request for a Third Party Recommendation

80. The Respondent has asked that the Disqualification Proposal be referred to a third party for an independent recommendation.[65] In accordance with Article 58 of the ICSID Convention, the decision on a proposal to disqualify an arbitrator shall be taken by the Chair where the co-arbitrators are equally divided.[66] The Chair has requested external recommendations prior to deciding on a disqualification proposal on rare occasions, and on the basis of the specific circumstances of the case. Even in those instances, it has been explicitly stated that the final decision on the proposal would be taken by the Chair, as required by Article 58 of the ICSID Convention.

81. The circumstances in the present case do not justify requesting an external recommendation. Accordingly, the Chair decides the Disqualification Proposal on the basis of the Parties' submissions and Prof. Tawil's Explanations, in accordance with Articles 57 and 58 of the ICSID Convention and ICSID Arbitration Rule 9.

B. Legal Standard

82. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It provides that:

> A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

[65] Respondent's Proposal, ¶ 79; Further Observations, ¶¶ 70-72, and Respondent's Comments on *FREIF* Disqualification Decision, ¶ 20.

[66] ICSID Convention, Art. 58 ("The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. [...].").

83. Several decisions have concluded that the word "manifest" in Article 57 of the Convention means "evident" or "obvious,"[67] and that it relates to the ease with which the alleged lack of the required qualities can be perceived.[68]

84. The required qualities are stated in Article 14(1) of the ICSID Convention, which provides:

> Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

85. While the English version of Article 14 refers to "independent judgment," and the French version to "*toute garantie d'indépendance dans l'exercice de leurs fonctions*" (guaranteed independence in exercising their functions), the Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). Given that all three versions are equally authentic, it is understood that pursuant to Article 14(1) arbitrators must be both impartial and independent.[69]

86. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both

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[67] *See e.g., BSG Resources Ltd et al. v. Republic of Guinea*, ICSID Case No. ARB/14/22, Decision on the Proposal to Disqualify all Members of the Arbitral Tribunal, 28 December 2016 ("***BSG***") ¶ 54, **Attachment 5**; *Fábrica de Vidrios Los Andes, C.A. and Owen s-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Reasoned Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, 28 March 2016 ("***Fábrica* 2016 Decision**") ¶ 33; *ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, 1 July 2015 ("***Conoco* 2015 Decision**") ¶ 82; *ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, 5 May 2014 ("***Conoco* 2014 Decision")** ¶ 47, **Attachment 4**; *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014, ("***Abaclat* 2014 Decision**") ¶ 71; *Burlington*, ¶ 68, **Annex 12**; *Repsol*, ¶ 73, **Annex 13**; *Blue Bank* 2013 Decision, ¶ 61, **Annex 11**; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Proposal of the Bolivarian Republic of Venezuela to Disqualify Mr. Alvaro Castellanos, 2 March 2018 ("***Blue Bank* 2018 Decision**") ¶ 78.

[68] *See, e.g., BSG*, ¶ 54, **Attachment 5**; *Conoco* 2014 Decision, ¶ 47, **Attachment 4**; *Blue Bank* 2018 Decision, ¶ 78; *Fábrica* 2016 Decision, ¶ 33; *Abaclat* 2014 Decision, ¶ 71.

[69] *See, e.g., Blue Bank* 2013 Decision, ¶ 58; **Annex 11**; *Burlington*, ¶ 65, **Annex 12**, *Repsol*, ¶ 70, **Annex 13**; *BSG*, ¶ 56, **Attachment 5**; *Conoco* 2014 Decision, ¶ 50, **Attachment 4**; *Blue Bank* 2018 Decision, ¶ 77; *Abaclat* 2014 Decision, ¶ 74.

"protect parties against arbitrators being influenced by factors other than those related to the merits of the case."[70]

87. Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather, it is sufficient to establish the appearance of dependence or bias.[71]

88. The legal standard applied to a proposal to disqualify an arbitrator is an "objective standard based on a reasonable evaluation of the evidence by a third party."[72] Therefore, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.[73]

89. The Respondent has referred to other sets of standards in their arguments. While such standards may serve as useful guidance, the Chair is bound by the standard set forth in the ICSID Convention. Accordingly, this decision is made in accordance with Articles 57 and 58 of the ICSID Convention.

C. Application of the Standard

a. Prof. Tawil's multiple appointments

90. The first ground invoked in Spain's proposal for disqualification of Prof. Tawil relates to his multiple appointments by investors in other cases against Spain with similar issues to the present arbitration.

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[70] *See, e.g., Caratube International Oil Company LLP & Mr. Devincci Salah v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014 ("***Caratube***"), ¶ 53; **Annex 17**, *Blue Bank* 2013 Decision, ¶ 59, **Annex 11**; *Repsol*, ¶ 70, *Conoco* 2014 Decision, ¶ 51, **Attachment 4**; *Blue Bank* 2018 Decision, ¶ 77; *BSG*, ¶ 57; *Fábrica* 2016 Decision, ¶ 29; *Conoco* 2015 Decision, ¶ 81; *Burlington*, ¶ 66; *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, 20 May 2011 ("***Universal***"), ¶ 70; *Urbaser S.A. and Others v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010 ("***Urbaser***"), ¶ 43.

[71] *See, e.g*; *Blue Bank* 2013 Decision, ¶ 59; **Annex 11**, *Burlington*, ¶ 66, **Annex 12**, *Repsol*, ¶ 71, **Annex 13**; *Caratube*, ¶ 57; **Annex 17**; *BSG*, ¶ 57, **Attachment 5**; *Conoco* 2014 Decision, ¶ 52, **Attachment 4**; *Conoco* 2015 Decision, ¶ 83; *Abaclat* 2014 Decision, ¶ 76.

[72] *See, e.g., Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007 ("***Suez***"), ¶ 39; *Blue Bank* 2013 Decision, ¶ 60; **Annex 11**, *Caratube*, ¶ 54; **Annex 17**; *BSG*, ¶ 58, **Attachment 5**; *Conoco* 2014 Decision, ¶ 53, **Attachment 4**; *Blue Bank* 2018 Decision, ¶ 79, *Fábrica* 2016 Decision, ¶¶ 30-32; *Conoco* 2015 Decision, ¶ 84.

[73] *See, e.g., Conoco* 2014 Decision, ¶ 53, **Attachment 4;** *Blue Bank 2018 Decision*, ¶ 79; *BSG*, ¶ 58; *Conoco 2015 Decision*, ¶ 84.

91. Spain argues that multiple appointments involve a double risk: (i) the incentive of an economic benefit derived from potential future appointments by investors and (ii) the knowledge acquired from similar or identical cases. Spain conceded that multiple appointments by investors in itself is not sufficient basis for a disqualification, but then added that there are "other circumstances" that call for Prof. Tawil's disqualification. These "other circumstances" are the alleged overlap of factual and legal issues with the current case.

92. The existence of multiple appointments does not establish by itself a manifest lack of independence and impartiality. In each case, the arbitrator exercises the same independent arbitral function.[74] Objective circumstances must be present to demonstrate that the arbitrator's ability to exercise independent judgment can be questioned. A decision to disqualify an arbitrator may arise from several factors, which collectively support a founded concern about the independence or impartiality of that arbitrator. Repeated appointments by investors and income from that arbitration work has not been considered sufficient in and of itself to establish lack of independence and impartiality.[75]

93. There are multiple and relevant differences between the other cases against Spain in which Prof. Tawil was appointed (*i.e. Charanne*, *Isolux*, and *STEAG*) with the present case. On the basis of the evidence provided, these cases involved different (i) investors; (ii) law firms representing the Claimants; (iii) dates of the alleged investment and (iv) measures. Thus, the mere existence of these multiple appointments do not rise to the level that would merit questioning the independence and impartiality of an arbitrator.

94. In these circumstances, the Chair concludes that there is no objective basis to suggest that Prof. Tawil will not evaluate the present case with an open mind or that his independence and impartiality would be affected by his appointments in other cases against Spain.

95. The first ground for disqualification submitted by Spain is therefore rejected.

[74] *Tidewater*, ¶ 60, **Annex 27**,
[75] *See e.g. Tidewater*, ¶ 60, **Annex 27**.

b. **Prof. Tawil's dissenting opinions**

96. The second ground for disqualification is that Prof. Tawil has prejudged core issues in the present case as reflected in his dissenting opinions in the *Charanne* and *Isolux* cases.

97. The Respondent's position is that Prof. Tawil has expressed his views with respect to: (i) the Tribunal's jurisdiction on intra-EU disputes; (ii) whether RD 661/2007 and RD 1578/2008 were aimed to attract investment and created legitimate expectations; and (iii) that the regulatory investment constituted a guarantee which excluded subsequent modifications.

98. Additionally, Spain claims that Prof. Tawil's lack of independence and impartiality is further evidenced by the absence of any further elaboration in his explanations.

99. The Claimants assert that the factual premises in this arbitration are different from the fact pattern in the *Charanne* and *Isolux* cases (different time of investments and alleged measures). The Claimants also point out that Prof. Tawil has not been challenged in the other ICSID case involving Spain (*i.e. STEAG*).

100. The fact that an arbitrator has expressed views on issues of law or fact common to two or more arbitrations in which that arbitrator is involved is not —without more— evidence of bias or the appearance thereof.

101. On the basis of the information on file, the *Charanne* and *Isolux cases* involved investments in Spain by unrelated companies represented by different law firms, made at different times, and allegedly affected by different measures.

102. As other tribunals in cases involving Spain have decided, these distinctions are relevant in the context of renewable energy cases. Even in cases where the issues could be similar, the arguments, and the manner in which they are presented by different parties, could differ depending on the particularities of each case.

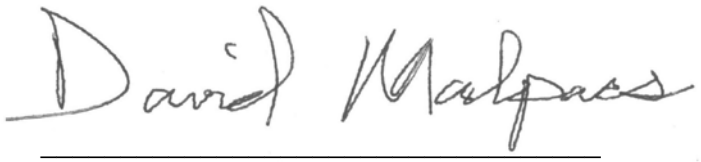
103. In these circumstances, a third party undertaking a reasonable evaluation of the facts would not conclude that Prof. Tawil manifestly appears to lack the required impartiality and independence to decide this case.

104. The second ground for disqualification submitted by Spain is also rejected.

V. DECISION

105. Having considered all the facts alleged and the arguments submitted by the Parties, and for the reasons stated above, the Chair rejects the Respondent's Proposal to Disqualify Prof. Tawil in this case.

106. The allocation of costs incurred in connection with his decision is a matter for determination by the Tribunal in the course of the arbitration in accordance with ICSID Arbitration Rule 28(1), and the Chair makes no decision in this regard.



David Malpass
Chair of the ICSID Administrative Council