INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Canepa Green Energy Opportunities I, S.á r.l. and
Canepa Green Energy Opportunities II, S.á r.l.

v.

Kingdom of Spain

(ICSID Case No. ARB/19/4)

PROCEDURAL ORDER No. 3

Decision on Bifurcation

Members of the Tribunal
Prof. Sean D. Murphy, President of the Tribunal
Prof. Silvina Sandra González Napolitano, Arbitrator
Mr. Peter Rees QC, Arbitrator

Secretary of the Tribunal
Ms. Ana Constanza Conover Blancas

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28 August 2020

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I. PROCEDURAL BACKGROUND

1. On 5 March 2020, the Tribunal issued Procedural Order No. 1, attaching a timetable for the arbitration at Annex A.

2. On 6 March 2020, the Tribunal issued Procedural Order No. 2, whereby it approved the Parties' agreement of 5 March 2020 to revise the hearing dates set out in Annex A to Procedural Order No. 1.

3. In accordance with the procedural calendar of the arbitration, the Claimants submitted their Memorial on 29 May 2020, together with the following accompanying documents: Appendices 1 and 2 (consolidated list of factual exhibits and consolidated list of legal authorities, respectively); witness statement of Mr. Francisco Félix Rodríguez Magdaleno; witness statement of Ms. Mónica Yolanda Garay Irízar; expert report titled "Changes to the Regulation of Wind Installations in Spain Since December 2012," prepared by José Antonio García and Richard Caldwell of The Brattle Group, including an index of exhibits BRR-0001 to BRR-0262; expert report titled "Financial Damages to Investors," prepared by Richard Caldwell and José Antonio García of The Brattle Group, including an index of exhibits BQR-0001 to BQR-0084; factual exhibits C-0001 to C-0158; and legal authorities CL-0001 to CL-0099 (the "**Memorial**").

4. On 10 July 2020, the Respondent submitted its statement of preliminary objections and request for bifurcation, together with the following accompanying documents: lists of factual exhibits and legal authorities; expert report titled "An expert report analysing and identifying the ultimate owners of Canepa Green Energy Opportunities I S.à.r.l. and Canepa Green Energy Opportunities II, S.à.r.l.," prepared by Gervase MacGregor, Eduardo Pérez Ruiz, Francisco Javier Espel Sesé, David Mitchell and Manuel Vargas González of BDO, including an index of documents 1 to 21; factual exhibits R-0001 to R-0045; and legal authorities RL-0001 to RL-0053 ("**Request for Bifurcation**").

5. On 7 August 2020, the Claimants submitted their observations on the Respondent's Request for Bifurcation, together with the following accompanying documents: Appendices 1 and 2 (consolidated list of factual exhibits and consolidated list of legal authorities, respectively); factual exhibits C-0159 to C-0163; and legal authorities CL-0100 to CL-0158 ("**Observations on Bifurcation**").

6. This procedural order sets out the Tribunal's decision on the Respondent's Request for Bifurcation.

II. THE PARTIES' POSITIONS ON BIFURCATION

A. The Respondent's Position

7. In its Request for Bifurcation, the Respondent raises seven preliminary objections. The Tribunal's allegedly lacks jurisdiction: **(a)** because the Claimants did not invest in Spain within the meaning of the Energy Charter Treaty ("**ECT**"); **(b)** because the true Claimants are of Spanish nationality and thus not protected under the ECT; **(c)** due to the Claimants' abuse of process; **(d)** due to the Respondent's denial of benefits to the Claimants under Article 17 of the ECT; **(e)** due to the "intra-EU" nature of the dispute; **(f)** due to the failure to fulfil the pre-requisites for arbitration set forth in Article 26 of the ECT; and **(g)** due to the lack of consent to arbitration of tax measures, including the Tax on the Value of Production of Electrical Energy ("**TVPEE**") established by Act 15/2012 of 27 December 2012 on Tax Measures for Energy Sustainability ("**Act 15/2012**"). These objections are summarized in section 1 below.

8. In putting forward its arguments, and as summarized in section 2 below, the Respondent proceeds on the basis that its objections are not frivolous, are not intertwined with the merits, and, if successful, would dispose of the claims or an essential part of the claims.[1]

[1] Request for Bifurcation, ¶¶ 9, 528-541.

1. The Respondent's Objections

a. Lack of Jurisdiction because the Claimants Did Not Invest in Spain

9. The Respondent submits that the Tribunal lacks jurisdiction over the dispute because the Claimants have failed to prove that they made an "investment" protected under Article 1(6) of the ECT.[2] The Respondent's arguments in this regard are three-fold.

10. *First*, the Respondent states that the Claimants allege to have invested through a share purchase agreement signed on 4 August 2011 ("**SPA**"). However, Canepa Green Energy Opportunities I, S.á r.l. ("**Canepa I**") and Canepa Green Energy Opportunities II, S.á r.l. ("**Canepa II**") were not constituted until November and December 2011, respectively. Accordingly, the Claimants did not exist at the time when they claim to have made their investment and, therefore, they could not have made it.[3]

11. *Second*, the Respondent claims that the limited evidence provided by the Claimants shows that they did not make any contribution to the amount alleged as investment; rather, the funds at issue originated from the Claimants' shareholders. As a result, Canepa I and Canepa II did not undertake any risk. Therefore, the Respondent submits that the Claimants have not made any investments in an objective sense.[4]

12. *Finally*, based on the expert report attached to its Request for Bifurcation concerning the Claimants' shareholding structure, the Respondent concludes that the Claimants do not directly or indirectly control the assets related to this arbitration. Therefore, the assets at issue do not qualify as "investments" under Article 1(6) of the ECT.[5]

[2] *Ibid*., ¶¶ 12-15, 142-211.
[3] *Ibid*., ¶¶ 13, 36, 41, 47-48, 56, 153-158, 207.
[4] *Ibid*., ¶¶ 14, 159-188, 208-209.
[5] *Ibid*., ¶¶ 15, 36, 189-205, 210-211.

b. Lack of Jurisdiction because the True Claimants Are of Spanish Nationality

13. The Respondent claims that piercing the corporate veil of the Claimants shows that it is actually a group of Spanish companies formed by Azora Capital, S.L. and other entities ("**Azora**") that has made the relevant investment in this case. Therefore, the Claimants do not meet the jurisdictional requirement set out in Article 26(1) of the ECT, which requires investors to be nationals "of another Contracting Party" (i.e., other than Spain).[6]

14. Based on the documentation provided by the Claimants with their Memorial, the Respondent provides a chronological account of the investment process in this case which, in its view, proves that "the investment was negotiated, agreed, executed and controlled from Spain, by people and entities linked to the Spanish group Azora."[7]

15. For instance, according to the Respondent, the public deed of Canepa Green Energy España S.L. ("**Canepa España**"), a party to the SPA entered into to acquire the Spanish entities that own the wind power-generation installations at issue in this arbitration ("**wind parks**"), shows that Canepa España's registered office is that of Azora and Canepa España's chairman of the board of directors is also Azora's administrator. The Respondent argues that this evidences Azora's control over Canepa España.[8]

16. The Respondent adds that the doctrine of piercing the corporate veil is a technique that has been applied by international tribunals on many occasions. It is justified in this case to prevent a Spanish company from filing a claim against Spain under the dispute resolution mechanism that is exclusively provided for foreign investors under the ECT.[9]

[6] *Ibid*., ¶¶ 16-17, 212-237.
[7] *Ibid*., ¶ 60; *see also ibid*., ¶¶ 61-141, 215, 234.
[8] *Ibid*., ¶¶ 44-46, 216.
[9] *Ibid*., ¶¶ 222-226, 236.

c. Lack of Jurisdiction Due to Claimants' Abuse of Process

17. The Respondent claims that Canepa I and Canepa II were established in Luxembourg with the sole purpose of resorting to arbitration against Spain under the ECT, which is tantamount to an abuse of process and contrary to the principle of good faith.[10]

18. The Respondent submits that the Claimants are "two shell companies lacking any business activity"[11] that were created through subscription to capital increases in Spanish companies "when the investment had already been agreed (in August 2011), without personnel or resources, and once the dispute was absolutely foreseeable."[12] The Claimants' incorporation for the mere purpose of filing an arbitration claim under Article 26 of the ECT against Spain therefore represents "a typical case of abuse of process and prohibited Forum Shopping."[13] Such an abuse of process, which is in violation of international law,[14] should lead the Tribunal to declare a lack of jurisdiction.

d. Lack of Jurisdiction Due to ECT Article 17

19. The Respondent claims that, pursuant to Article 17 of the ECT, it is entitled to deny the benefits of the ECT to the Claimants and did, in fact, properly deny such benefits on 10 July 2020, in its Request for Bifurcation. This denial of benefits was made on the basis that the Claimants are purportedly owned and controlled by investors of a non-Party to the ECT (i.e., not by Luxembourg nationals), and do not have substantial business activities in Luxembourg.[15]

[10] *Ibid*., ¶¶ 18-19, 238-355.
[11] *Ibid*., ¶ 234; *see ibid*., ¶¶ 272-314.
[12] *Ibid*., ¶ 239; *see ibid*., ¶¶ 315-350.
[13] *Ibid*., ¶ 264.
[14] *Ibid*., ¶¶ 246-263.
[15] *Ibid*., ¶¶ 20, 356-405.

20. The Respondent alleges that it has exercised its right to deny the advantages of Part III of the ECT to the Claimants in a timely and appropriate manner based on the following: **(a)** the ECT does not establish a time limit concerning the exercise of this right; and **(b)** it was only upon the review of the documentation provided by the Claimants with their Memorial that the Respondent was able to realize that they are shell companies owned by entities that are constituted in countries that are not Contracting Parties to the ECT.[16]

e. Lack of Jurisdiction over an Intra-European Union Dispute

21. The Respondent argues that the Tribunal does not have jurisdiction under Article 26 of the ECT over disputes between a national of the European Union ("**EU**") and an EU member State.[17]

22. The Respondent notes that the EU is a Contracting Party to the ECT and, if the Claimants are nationals of an EU member State, then (vis-à-vis Spain) they do not originate from "another Contracting Party" as required under Article 26 of the ECT.[18] Further, the Respondent submits that the autonomy and the primacy of EU law, which require that intra-EU investment disputes be resolved solely within the EU legal system, are applicable as a matter of customary international law,[19] treaty law,[20] and general principles of law.[21] Among other things, the Respondent argues that the express wording, purpose and context of the ECT leads to the conclusion that EU Member States did not consent to the arbitration of intra-EU disputes under Article 26 of the ECT.[22] Further, to the extent that there exists any conflict between the ECT and EU law, the latter should still prevail according to the proper application of Articles 30 and 59 of the Vienna Convention on the Law of

[16] *Ibid*., ¶¶ 20, 363, 391.
[17] *Ibid*., ¶¶ 21, 406-459.
[18] *Ibid*., ¶ 21.
[19] *Ibid*., ¶¶ 420-434.
[20] *Ibid*., ¶¶ 435-454.
[21] *Ibid*., ¶¶ 455-459.
[22] *Ibid*., ¶ 436.

Treaties, thereby leading to a dismissal of this case.[23] The Respondent sees as pertinent the March 2018 judgment of the Court of the European Union in the *Achmea* case,[24] as well as the declaration adopted by certain EU Member States in January 2019 on the interpretation to be given to Article 26 of the ECT.[25]

f. Lack of Jurisdiction Due to Failure to Fulfil Arbitration Pre-requisites

23. The Respondent argues that the Tribunal lacks jurisdiction because the Claimants failed to comply with two of the conditions precedent set out in Article 26 of the ECT, which are necessary to submit the dispute to arbitration. The Respondent claims that **(a)** the Claimants did not properly notify Spain of a dispute (ECT Article 26(1)); and **(b)** the Claimants did not comply with the mandatory three-month cooling-off period to engage in a good-faith attempt to seek an amicable settlement with respect to their claims (ECT Article 26(2)).[26]

24. The Respondent argues that the Claimants' notice of dispute is invalid and should be considered as legally non-existent because it was submitted in English, not in Spanish, which is the only official language recognised in Spain.[27] Because the Claimants did not properly submit their notification of dispute to the Respondent, they failed to attempt to settle the dispute amicably as required by Article 26(2) of the ECT.[28]

g. Lack of Jurisdiction over Tax Measures

25. Finally, the Respondent claims that, pursuant to the exception for tax measures contained in Article 21 of the ECT, it has not consented to the Tribunal's jurisdiction to hear alleged

[23] *Ibid*., ¶¶ 437-452.
[24] *Ibid*., ¶¶ 445-446.
[25] *Ibid*., ¶¶ 447-448.
[26] *Ibid*., ¶¶ 22, 460-473.
[27] *Ibid*., ¶¶ 465-467, 470.
[28] *Ibid*., ¶¶ 472-473.

breaches of ECT Article 10(1) related to the TVPEE, a 7% tax on the value of energy production that was imposed in Act 15/2012.[29]

26. The Respondent argues that: **(a)** Article 21 of the ECT establishes that the ECT does not generate obligations or rights with respect to taxation measures of the Contracting Parties, with certain exceptions not applicable here; **(b)** Article 10(1) of the ECT, on which the Claimants attempt to base their claims, does not create obligations for the Contracting Parties relating to taxation measures; **(c)** the TVPEE is a taxation measure; and, accordingly, **(d)** the Tribunal lacks jurisdiction to hear alleged breaches of Article 10(1) of the ECT related to the TVPEE.[30]

2. Appropriateness of Bifurcation in this Case

27. The Respondent states that the Tribunal's power to analyse jurisdictional issues as preliminary questions is derived from Article 41 of the ICSID Convention and Rule 41(3) of the ICSID Arbitration Rules.[31] Moreover, bifurcation is a standard procedure in the context of ICSID arbitration.[32]

28. The Respondent identifies a so-called "triple test" that has been applied by previous arbitral tribunals when examining if a proceeding should be bifurcated and alleges that such test is met in this case, as indicated below.[33] In this regard, the Respondent points to *Glamis Gold Ltd. v. United States of America*, which considered: **(a)** "whether the objection is substantial in as much as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding"; **(b)** whether the objection if granted "results in a material reduction of the proceedings at

[29] *Ibid*., ¶¶ 23-24, 474-519.
[30] *Ibid*., ¶¶ 479, 518.
[31] *Ibid*., ¶¶ 520-521.
[32] *Ibid*., ¶ 522.
[33] *Ibid*., ¶¶ 524-527.

the next phase"; and **(c)** whether the objection is "so intertwined with the merits that it is very unlikely that there will be any savings in time or cost."[34]

29. *First*, the Respondent states that none of its objections are frivolous. On the contrary, they are based on the provisions of the ECT, other applicable provisions of international law, and a review of documentation from the record of the case.[35]

30. *Second*, in view of the complexity of this case, bifurcation would be consistent with the principles of procedural economy and efficiency. Bifurcating the jurisdictional and the merits phases would save considerable time, costs and human resources. It may put an end to the arbitration proceedings or substantially reduce their material scope. Should the Tribunal uphold the Respondent's jurisdictional objections without bifurcation, this would render the merits phase futile and would prove highly inefficient for the Tribunal and the Parties.[36]

31. *Finally*, the Respondent submits that its objections to the Tribunal's jurisdiction are not linked to the merits of the case "since their validity is assessed by reading the Memorial on the Merits and the documents substantiating the Claimants' alleged investment."[37]

B. The Claimants' Position

32. The Claimants request the Tribunal to dismiss the Request for Bifurcation. The Claimants emphasize that the Respondent has not met its burden of proof and that the application of the relevant standard requires that the objections be joined to the merits.[38]

33. The Claimants' observations with respect to each of the Respondent's objections are summarized in section 1 below. The Claimants' position on the applicable legal standard

[34] *Ibid*., ¶ 525.
[35] *Ibid*., ¶¶ 528-536.
[36] *Ibid*., ¶¶ 537-540.
[37] *Ibid*., ¶ 541.
[38] Observations on Bifurcation, ¶¶ 10, 44.

and a brief summary of the reasons why they consider that bifurcation is not appropriate in this case are included in section 2 below.

1. The Claimants' Observations on the Respondent's Objections

a. Lack of Jurisdiction because the Claimants Did Not Invest in Spain

34. The Claimants refer to the Respondent's assertions that Canepa I and Canepa II: **(a)** were not constituted at the time the investment vehicles entered into the SPA to acquire the wind parks; **(b)** have not made an investment within the meaning of Article 1(6) of the ECT because they purchased shares in the investment vehicles through an increase of capital and with money derived from a loan; and **(c)** have no control or possession over the investment because they are not the ultimate owners of the wind parks.

35. *First*, the Claimants allege that their ownership of the wind parks at issue is not disputed; the two Claimants each own a majority of shares in two Spanish entities, which in turn own the wind parks.[39] Moreover, the fact that the SPA was entered into on 4 August 2011 does not mean that the Claimants did not make an "investment" under Article 1(6) of the ECT. The SPA simply contemplated that various steps would occur before the acquisition was completed, including the incorporation of the Claimants in November/December 2011, after which they acquired their shares in the two Spanish entities.[40]

36. *Second*, the Claimants assert that they have made substantial investments in the wind power-generation sector in Spain within the meaning of Article 1(6) of the ECT, in the form of shareholding and debt interests in investment vehicles (that in turn own the wind parks), claims to money, returns, and rights conferred by law. The Claimants' investments involved a contribution of economic resources (i.e., a EUR 26 million payment for shares in investment vehicles) that were intended to be a long-term investment. Moreover, there

[39] *Ibid*., ¶ 53.
[40] *Ibid*., ¶¶ 54-55.

is no requirement in the ECT that an investor assume risk, nor with respect to the origin of the capital used to make an investment.[41]

37. *Third*, the Claimants argue that whether the Claimants are the ultimate owners of the wind parks is irrelevant for determining the Tribunal's jurisdiction, given that the ECT does not require that an investor be the ultimate or beneficial owner of an investment.[42]

38. The Claimants conclude that this objection does not warrant bifurcation since it is frivolous and includes allegations by the Respondent which are intertwined with the merits of the dispute, such as facts concerning how and when the investment was concluded.[43]

b. Lack of Jurisdiction because the True Claimants Are of Spanish Nationality

39. The Claimants reject the Respondent's objection that lifting the corporate veil would show that the actual investor in this dispute is Azora, a Spanish entity, and not the Claimants.[44]

40. *First*, among the reasons to consider this objection as frivolous, the Claimants mention that neither Article 1(7) of the ECT nor Article 25(1)(b) of the ICSID Convention require or allow the Tribunal to pierce a company's corporate veil when ruling on jurisdiction, and previous tribunals have held that the corporate veil should not be pierced except in exceptional circumstances such as fraud, which is inapposite in this case.[45]

41. *Second*, in any event, a determination as to the nature of Azora's activities in relation to the Claimants' investments would require an analysis inextricably linked to the merits of the case. Thus, it would be inappropriate to deal with this issue by way of bifurcation.[46]

[41] *Ibid*., ¶¶ 49, 56-65.
[42] *Ibid*., ¶¶ 66-72.
[43] *Ibid*., ¶¶ 46, 73-74.
[44] *Ibid*., ¶¶ 75-85.
[45] *Ibid*., ¶¶ 77-83.
[46] *Ibid*., ¶¶ 84-85.

c. Lack of Jurisdiction Due to Claimants' Abuse of Process

42. The Claimants reject the Respondent's allegation that Canepa I and Canepa II were incorporated for the sole purpose of gaining access to international arbitration.

43. *First*, the Claimants submit that the intention for the investment to be made by means of Luxembourg investors was envisaged from the outset of the planning in mid-2011, "and there can be no serious suggestion that this was carried out in bad faith as a form of abusive forum shopping (nor is there any evidence of this)."[47]

44. *Second*, the Claimants argue that the disputed measures were not foreseeable at the time of their investment, as several prior arbitral tribunals have confirmed.[48]

45. *Finally*, the Claimants argue that this objection does not warrant bifurcation because it is intertwined with the merits of the case. In particular, the Respondent's allegations overlap with the assessment of the Claimants' legitimate expectations when making the investment, which requires an understanding of the merits of the Claimants' case.[49]

d. Lack of Jurisdiction Due to ECT Article 17

46. The Claimants reject the Respondent's allegation that the Tribunal lacks jurisdiction because, pursuant to Article 17(1) of the ECT, Spain has denied the Claimants the advantages of Part III of the ECT. The Claimants submit that this objection is insufficient to warrant bifurcation for two main reasons.[50]

47. *First*, the denial of benefits clause has no relevance to the Tribunal's jurisdiction: it only applies to the substantive provisions under Part III of the ECT and not to the Contracting State's offer to submit disputes to arbitration.[51]

[47] *Ibid*., ¶¶ 43, 89-93.
[48] *Ibid*., ¶¶ 94-97.
[49] *Ibid*., ¶¶ 98-102.
[50] *Ibid*., ¶¶ 103-120.
[51] *Ibid*., ¶¶ 106-109.

48. *Second*, in any event, the denial of benefits clause **(a)** does not operate automatically and the host State (i.e., Spain) must affirmatively exercise its right to deny those benefits to the Claimants; and **(b)** must be invoked before the institution of an arbitral proceeding in order to apply to the Claimants. In addition, the Claimants mention that no ECT tribunal has ever found there to be a valid denial of benefits clause with retroactive effect.[52]

e. Lack of Jurisdiction over an Intra-European Union Dispute

49. The Claimants argue that the Respondent's "intra-EU" objection is frivolous and does not warrant bifurcation.[53]

50. The Claimants submit that there is no "disconnection clause" in the ECT that could have the effect of limiting either the EU's or its Member States' consent to arbitration under ECT Article 26. In the absence of such a clause, there is no doubt that the ECT applies to intra-EU disputes.[54]

51. Further, the Claimants assert that in "total, 35 separate ECT tribunals have faced the Intra-EU Objection and each of those tribunals has rejected it."[55] The Claimants indicate a series of reasons why other tribunals have rejected this objection, explain that the *Achmea* judgment is not relevant to disputes arising under the ECT, and regard the declaration by the certain EU Member States in January 2019 as likewise irrelevant, for several reasons.[56]

f. Lack of Jurisdiction Due to Failure to Fulfil Arbitration Pre-requisites

52. The Claimants refute the Respondent's assertions that they failed to properly notify Spain of the dispute, and, consequently, failed to attempt amicable settlement of the dispute, as

[52] *Ibid*., ¶¶ 110-120.
[53] *Ibid*., ¶¶ 43, 121-132.
[54] *Ibid*., ¶¶ 123-125.
[55] *Ibid*., ¶ 122.
[56] *Ibid*., ¶¶ 126-132.

required by Article 26 of the ECT prior to commencing arbitration. In the Claimants' view, this objection is frivolous and does not warrant bifurcation.

53. In this regard, the Claimants submit that: **(a)** there is no requirement in the ECT that a letter notifying of a dispute be sent in the official language of the host State; **(b)** Spain itself responded in English to the Claimants' letter, and subsequently met with the Claimants' representatives in the period between the notice letter and the Request for Arbitration; and, in any event **(c)** such objection goes to the admissibility of the claims and not to the Tribunal's jurisdiction.[57]

g. Lack of Jurisdiction over Tax Measures

54. Finally, the Claimants address Spain's objection that the Tribunal does not have jurisdiction to hear the Claimants' claims relating to the TVPEE because it constitutes a "taxation measure" within the meaning of Article 21(7) of the ECT.

55. The Claimants submit that the Tribunal should not bifurcate based on this objection for two main reasons: **(a)** the TVPEE constitutes only one of eight disputed measures in this case and, therefore, a ruling concerning this measure would not be dispositive of all or a large portion of the case; and **(b)** this objection is closely tied to the merits of the dispute, as it will require an assessment of the regulatory measures giving rise to the Claimants' claims.[58]

2. Inappropriateness of Bifurcation in this Case

56. In addressing why the standard has not been met for bifurcation, the Claimants initially submit that, in the ICSID context, there is no presumption in favour of bifurcation and,

[57] *Ibid*., ¶¶ 6, 133-151.
[58] *Ibid*., ¶¶ 6, 42, 152-161.

further, that Spain bears the burden of demonstrating that granting its request would be procedurally efficient and in the interest of fairness.[59]

57. The Claimants agree with the Respondent that the Tribunal has broad discretion with respect to procedure for deciding jurisdictional objections, and that the ICSID Convention and the ICSID Arbitration Rules are silent on the test to be applied to a request for bifurcation. In addition, the Claimants agree on the "triple test" proposed by the Respondent, albeit the Claimants put forward that the overriding principle is that bifurcation should only proceed if it would improve the procedural efficiency of the arbitration. Moreover, the Claimants submit that the three factors applicable to determine whether bifurcation is appropriate are cumulative (i.e., the objections must be substantial in the sense of being non-frivolous; must result in a material reduction of the disputed issues or the termination of the case if upheld; *and* must not be inextricably intertwined with the merits).[60]

58. *First*, whether or not the objection is substantial (or non-frivolous) relates to the objection's prospect of success and is of primary importance in weighing up procedural efficiency. In this case, Spain must show both that its objections have a real prospect of success and that bifurcation will result in procedural efficiency.[61]

59. *Second*, the Tribunal must consider whether the objections, if successful, will result in a material reduction in the length or costs of the proceeding, including at the merits phase of the dispute.[62]

60. *Third*, the jurisdictional objections must not be inextricably linked to the merits. Therefore, bifurcation should be declined when doing so would prejudge any subsequent decision or

[59] *Ibid*., ¶¶ 13-16.
[60] *Ibid*., ¶¶ 11-12, 17-18, 20-23.
[61] *Ibid*., ¶¶ 24-29.
[62] *Ibid*., ¶¶ 30-31.

would lead the parties to repeat material submissions in the various stages of the proceedings.[63]

61. The Claimants argue that Spain, for each objection, has failed to explain why, if successful, bifurcation would be conducive to procedural economy. Also, some of the objections (regarding denial of benefits and cooling-off period) are outside the scope of the Tribunal's power to bifurcate as they do not relate to the Tribunal's jurisdiction.[64]

62. The Claimants submit that bifurcation is not justified in this case given that all of the Respondent's objections are frivolous, would not materially reduce the scope of the merits phase, are intertwined with the merits, and/or are non-jurisdictional in nature. In addition, if bifurcation is granted and a subsequent decision on jurisdiction were not to dispose of the entirety of the case, the Claimants' case on the merits would likely not be heard until, at least, the end of 2021 or the beginning of 2022. This would result in "a vast delay that will bring with it unnecessary costs to the Claimants."[65]

63. Based on the above, the Claimants request the Tribunal to dismiss the Request for Bifurcation.

III. THE TRIBUNAL'S ANALYSIS

64. While the following does not reference all aspects of the arguments advanced by the Parties, the Tribunal has fully considered those arguments in reaching its decision. Further, at this stage in the proceedings, this decision is necessarily based on a preliminary review of the claims and the objections to jurisdiction. Consequently, this decision does not reflect the Tribunal's views on the merits of those objections, nor on the merits of the underlying dispute, but only on whether the proceedings in this case should be bifurcated.

[63] *Ibid*., ¶¶ 32-35.
[64] *Ibid*., ¶ 38.
[65] *Ibid*., ¶ 9.

65. The decision to bifurcate the proceedings is a matter for the Tribunal's discretion under the ICSID Convention and the applicable ICSID Arbitration Rules. Article 41(2) of the ICSID Convention provides:

> Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

66. In addition, ICSID Arbitration Rule 41(4) stipulates that the Tribunal "may deal with the objection as a preliminary question or join it to the merits of the dispute." Notably, unlike some other tribunals such as the International Court of Justice, where proceedings on the merits are suspended upon receipt of preliminary objections,[66] no such action is mandated by the ICSID Convention or the ICSID Arbitration Rules. The ICSID Arbitration Rules prior to 2004 did provide for such suspension,[67] but that provision was dropped in the amendments adopted in 2004. As such, there is no presumption in favour of bifurcation in ICSID proceedings. Further, the Respondent, as the requesting Party on this issue, bears the burden of demonstrating that the facts currently in the record merit a conclusion by the Tribunal that bifurcation is merited.

67. The Parties are essentially in agreement on the relevant factors that should be considered in determining whether to bifurcate proceedings, with both Parties citing to *Glamis Gold v. United States* and other decisions.[68] While the Respondent correctly notes that *Glamis Gold* was decided in the context of an UNCITRAL arbitration, the Tribunal finds (and both Parties agree[69]) that the three factors identified in that decision essentially have been imported into the ICSID context by many ICSID tribunals. Those factors are: **(a)** whether the objection is *prima facie* serious and substantial; **(b)** whether the objection is not

[66] International Court of Justice, Rules of Court, Article 79*bis* (3).
[67] ICSID Rules of Procedure for Arbitration Proceedings (1984), Rule 41(3) ("Upon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended.").
[68] Request for Bifurcation, ¶¶ 523-26; Observations on Bifurcation, ¶¶ 17-35.
[69] Request for Bifurcation, ¶ 526; Observations on Bifurcation, ¶ 21.

intertwined with the merits; and **(c)** whether the objection is capable, if successful, of disposing of the claims or an essential part of the claims.

68. The analysis of a bifurcation request is rarely blessed with absolute certainty as to whether bifurcation would be procedurally fair and efficient. The Tribunal is principally weighing the fairness to the Claimants in not unnecessarily prolonging the proceedings (with the attendant costs) as against the efficiencies that might be gained by disposing of all or large parts of the case at a preliminary stage. Having carefully considered the submissions of the Parties, the majority of the Tribunal concludes that the three factors indicated above weigh in favour of not addressing the Respondent's jurisdictional objections at a preliminary stage.

A. Lack of Jurisdiction because the Claimants Did Not Invest in Spain

69. The Respondent maintains that the manner in which the investments were structured – the conclusion of the SPA on 4 August 2011, the economic contribution of the Claimants, and the degree of risk assumed by the Claimants – preclude regarding the Claimants as having "invested" in Spain within the meaning of the ECT and the ICSID Convention. Further, the Respondent maintains that the Claimants do not have indirect control or possession of any such investments because the Claimants are not the ultimate owners of those investments. As such, the Tribunal lacks jurisdiction over the claims.

70. Respondent has advanced its position while, at the same time, indicating that "the determination of who the investor is, how the investment is prepared and negotiated, and how the investment is undertaken, is riddled with vague and imprecise statements."[70] The Tribunal majority regards that position as somewhat diminishing the force of the Respondent's position, in that the Respondent bears the burden of demonstrating that its objections are *prima facie* serious and substantial, a burden carried not by indicating that

[70] Request for Bifurcation, ¶ 35.

the facts are unclear, but by showing that the facts are unlikely to support the Tribunal's jurisdiction.

71. On the facts before it, the Tribunal majority does not see the conclusion of the SPA in August 2011 as calling into question the existence of an "investment" in this case. It appears that the Spanish entities Los Valles de Retuerta (which later changed its name to Canepa España) and Herome Inversiones 2011 ("**Herome**") entered into the August 2011 SPA to acquire the Spanish entities that own the wind parks at issue in this case.[71] This agreement appears to constitute one of a sequence of steps, notably including: the incorporation of the Claimants on 11 November 2011 (Canepa I) and 8 December 2011 (Canepa II); the acquisition on 12 December 2011 by Canepa I of 90% of the share capital of Canepa España; the acquisition on 26 December 2011 by Canepa II of 90% of the share capital of Herome;[72] the acquisition by Canepa España and Herome on 28 December 2011 of certain wind parks;[73] and the acquisition by Canepa España and Herome on 2 March 2012 of certain other wind parks,[74] for a total of five wind parks.[75] The Claimants' case appears to be that, after this time (commencing in December 2012), the Respondent engaged in conduct that violated the Claimants' investment rights under the ECT. The Claimants' case does not appear to be that the investments occurred on some date prior to the incorporation of the Claimants.

72. The Tribunal majority acknowledges that various statements found in the Claimants' pleadings refer to the "Claimants" taking action of one kind or another prior to December 2011. The Tribunal interprets such statements as a short-hand way of referring to steps that were taken leading up to the formal incorporation of the Claimants as legal persons, by those interested in pursuing these investments. For purposes of whether there is an "investment" falling within the scope of the ECT, however, the salient issue is whether the

[71] Request for Arbitration, ¶ 53.
[72] Request for Arbitration, ¶ 53.
[73] Observations on Bifurcation, ¶ 53, n. 60; Memorial, § 3.1; Claimants' Exhibit C-24.
[74] Observations on Bifurcation, ¶ 53, n. 60; Memorial, § 3.1; Claimants' Exhibit C-25.
[75] Request for Arbitration, ¶ 51.

Claimants, first, were incorporated in Luxembourg and, second, thereafter made an investment in Spain. From the record as it currently stands, this appears to be the case.

73. The Respondent argues that there was no "investment" because the Claimants did not make an economic contribution nor assumed any risk when acquiring the investment. The Tribunal majority regards factors such as whether there was "a contribution," "an element of risk," or "a certain duration" as helpful when analysing whether an unusual transaction falls within the scope of a particular treaty's definition of "investment." In this instance, however, ECT Article 1(6) contains a rather broad definition of "investment," as Respondent itself recognizes.[76] That definition encompasses "every kind of asset, owned or controlled directly or indirectly by an Investor," to include "any property rights" and "a company or business enterprise, or shares, stock or other forms of equity participation in a company or business enterprise." Further, the definition does not include any express requirement that there be an economic contribution or an element of risk for there to be an "investment," as has been noted by other tribunals.[77]

74. On the facts currently before the Tribunal, the Claimants in December 2011 acquired shares in Canepa España and Herome, apparently by means of increasing their capital. Regardless of the details of how the acquisition occurred, including whether the capital originated from a loan made to the Claimants, it appears that, as of December 2011, the Claimants owned directly or indirectly assets in Spain, through equity participation in Spanish enterprises. Such facts do not suggest an unusual or doubtful transaction, such as a sale of goods, that would or might fall outside the scope of an ECT "investment." Rather, the acquisition of shares in a foreign company is a common vehicle for making an investment. As such, at

[76] Request for Bifurcation, ¶ 162.
[77] See, e.g., *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016 (CL-0136), ¶ 158 ("[T]here is no requirement for any assumption of risk contained in the ECT or the ICSID Convention, just as there is no requirement for funds to be brought into a State from overseas in order for a national of one State to have an investment in another State."); *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017 (CL-0082), ¶ 228 ("the origins of capital invested by an Investor in an Investment are not relevant for purposes of jurisdiction.").

this time, it appears that the Claimants economic activity falls within the scope of the definition of "investment."

75. The Respondent also maintains that the Claimants are not the ultimate owners or beneficial owners of the wind parks, and therefore do not have indirect control over them, such that there is no "investment" by the Claimants. Here, too, there is no provision within the ECT that requires an investor to be the beneficial owner of the investment, either in ECT Article 1(6) or in ECT Article 1(7). The latter defines an "investor" with respect to a Contracting Party as being either: "(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law; [or] (ii) a company or other organisation organised in accordance with the law applicable in that Contracting Party." In short, neither the definition of "investment" nor of "investor" contains a beneficial ownership requirement, as has been noted by other tribunals.[78]

76. The observations above cast doubt on whether the Respondent's first objection is *prima facie* serious and substantial. Moreover, detailed exploration of these issues would require careful analysis of the facts relating to the acquisition of the wind parks, including the corporate structures involved in the acquisition and the exact financial arrangements by which the asserted investment occurred, matters that are central to the merits of the case.

77. As noted at the outset of the Tribunal's analysis, the observations above are without prejudice to the possibility that, upon full briefing, there may be merit to the Respondent's objection. At this stage, however, the Tribunal majority does not see this objection to the Tribunal's jurisdiction as most efficiently addressed in a bifurcated proceeding.

[78] See, e.g., *Antin Infrastructure Services Luxembourg S.à r.l. and Antin Energia Termosolar B.V. v Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 (CL-0085), ¶ 262 ("Article [1(6)] refers to direct or indirect control or ownership, but nowhere in its text or in the context of the ECT is there a requirement that only the real and ultimate owner or beneficiary may submit claims to arbitration.").

B. Lack of Jurisdiction because the True Claimants are of Spanish Nationality

78. On the facts pled by the Claimants, both of the Claimants are private limited liability companies incorporated in accordance with the laws of Luxembourg. The Respondent maintains, however, that "it is clear that the investment was negotiated, agreed, executed and controlled from Spain, by people and entities linked to the Spanish group Azora."[79] Given that the ECT does not envisage dispute settlement between a Spanish investor and the Spanish government, the Respondent objects that the Tribunal has no jurisdiction over this case.

79. As with the prior objection, the Respondent indicates that the information provided by the Claimants is "insufficient and fragmented."[80] At the same time, the Respondent has presented the BDO Expert Report, for the purpose of analysing the shareholder structure of the Claimants and their relationship to Azora. That report, however, also appears cautious in its characterization of the facts. Among other things, it finds that "there are several relationships between Azora and Canepa that *could suggest* that the same people who control the Claimants *may also control* Azora."[81] The uncertainties expressed by both the Respondent and that BDO Expert Report about the facts as currently understood, again somewhat diminish the force of the Respondent's position, in that the Respondent bears the burden of demonstrating that its objections are *prima facie* serious and substantial, a burden carried not by indicating that the facts are unclear, but by showing that the facts are unlikely to support the Tribunal's jurisdiction.

80. One thrust of this objection appears to follow portions of the first objection, by raising questions about steps that occurred prior to the date of the investment in December 2011, and by calling into question whether the Claimants are the ultimate owners or beneficial owners of the wind parks. In that regard, the Tribunal majority again recalls that the Claimants' case does not appear to be that the investments occurred on some date prior to

[79] Request for Bifurcation, ¶ 60.
[80] *Ibid*., ¶ 60.
[81] *Ibid*., BDO Expert Report, ¶ 86 (emphasis added).

the incorporation of the Claimants, and that there is no provision within the ECT that requires an investor to be the beneficial owner of the investment.

81. Another thrust of this objection is that the Claimants are effectively controlled by Spanish nationals, such that the nationality of the Claimants cannot be regarded as that of Luxembourg. The Respondent, however, has not advanced any support for the proposition that, under the ECT Article 1(7) or under the "first limb" of ICSID Convention Article 25(2)(b), the nationality of a juridical person turns on anything other than the place of incorporation.[82] In other words, the Respondent has not demonstrated the existence of an "effective control test" for purposes of determining a claimant corporation's State of incorporation under the relevant provisions of the ECT or the ICSID Convention.[83]

82. The Tribunal majority regards the observations above as casting doubt on whether the Respondent's second objection is *prima facie* serious and substantial. Moreover, as was the case for the first objection, detailed exploration of these issues would require careful analysis of the facts relating to the acquisition of the wind parks, including the corporate structures involved in the acquisition and the exact financial arrangements by which the asserted investment occurred, matters that are central to the merits of the case.

83. As noted at the outset of the Tribunal's analysis, the observations above are without prejudice to the possibility that, upon full briefing, there may be merit to the Respondent's

[82] If the Claimants were seeking protection not based on their nationality but, rather, based on being subject to "foreign control" under the "second limb" of ICSID Convention Article 25(2)(b), then issues of control would be relevant. That second limb, however, does not appear to be pertinent to the facts of this case.
[83] See, e.g., *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, Arbitration SCC V 2013/153, Award, 12 July 2016 (CL-0137), ¶ 670 ("the Arbitral Tribunal notes that the ECT does not contain, like other Treaties, a derogation clause excluding the application of the criterion of constitution [a legal entity] under the laws of the country of another Contracting State where a legal entity is controlled by nationals of the other Contracting State."); and *TSA Spectrum de Argentina, S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008 (RL-0015), ¶ 144 ("The first clause of [ICSID Convention] Article 25(2)(b) mentions only the 'nationality' of a Contracting State other than the State party to the dispute. In other words, it uses as a criterion the formal legal concept of nationality, which for legal persons is determined by one of the two generally accepted criteria of the place of incorporation or the seat (*siège social*) of the corporation. There is no reference here to 'control', whether foreign or other, nor any mention of 'piercing' or looking beyond this nationality.").

objection. At this stage, however, the Tribunal majority does not see this objection to the Tribunal's jurisdiction as most efficiently addressed in a bifurcated proceeding.

C. Lack of Jurisdiction Due to Claimants' Abuse of Process

84. The Claimants maintain that their incorporation in Luxembourg occurred and was justified for reasons independent of any issues of dispute settlement under the ECT. Indeed, the Claimants assert that the dispute that has arisen was not foreseeable in December 2011, when such incorporation occurred and the investment was made.

85. The Respondent, however, argues that the incorporation of the Claimants in Luxembourg in late 2011 was solely for the purpose of changing the domicile of investments that were materially undertaken by Spanish entities, thereby allowing access to investor-State arbitration under the ECT. For the Respondent, such steps constitute an abuse of process, essentially in the form of forum shopping, which should lead this Tribunal to conclude that it lacks jurisdiction in this case.

86. The Tribunal notes that the incorporation of an investor in a particular State prior to the making of an investment, for the purpose of taking advantage of a bilateral or multilateral investment treaty in case a dispute arises, standing alone, is not generally regarded as an abuse of process. Rather, issues of abuse of process typically are advanced in circumstances where, *after* a dispute has arisen, a transfer of nationality occurs to take advantage of investor-State arbitration[84] or, at a minimum, the transfer of nationality occurs when there is foreseen a specific future dispute as a very high probability.[85] The Tribunal majority is

[84] See, e.g., *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (RL-0006), ¶ 135 ("Phoenix bought an 'investment' that was already burdened with the civil litigation as well as the problems with the tax and customs authorities. … In other words, all the damages claimed by Phoenix had already occurred and were inflicted on the two Czech companies, when the alleged investment was made.").

[85] See, e.g., *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012 (RL-0005), ¶ 2.99 ("In the Tribunal's view, the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy. In the Tribunal's view, before that dividing-line is reached, there will be ordinarily no abuse of process…."); and *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case

of the view that determining whether there has been such an abuse of process by the Claimants would require a much more developed factual record spanning the entire period of the asserted investment, including not just the various elements concerning the incorporation of the Claimants and the acquisition of the investments, but also the extent to which a dispute was foreseeable at the time of the incorporation, as opposed to the events giving rise to the dispute occurring only after the incorporation. As the Respondent itself notes, the examination of the circumstances that might warrant a finding of abuse of process "requires analysis of *all of the facts of the case*, individually and as a whole."[86] For the Tribunal majority, this includes not just facts leading up to December 2011, which the Respondent carefully recounts in detail in its request,[87] but also the facts that unfolded thereafter specific to the Claimants' investment.

87. Although a finding on this third objection in favour of the Respondent would have the effect of ending the case, the Tribunal majority regards the steps needed to address the objection as most efficiently undertaken in the context of a full briefing by the Parties on the merits, rather than an analysis conducted only in a jurisdictional proceeding. As such, the Tribunal majority does not see this objection to the Tribunal's jurisdiction as most efficiently addressed in a bifurcated proceeding.

D. Lack of Jurisdiction Due to ECT Article 17

88. The Claimants have brought their claims against the Respondent pursuant to the dispute settlement procedure available under the ECT. The Respondent, however, maintains that the Claimants are not protected under the ECT pursuant to ECT Article 17, because the

No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014 (RL-0049), ¶ 79 ("The Tribunal considers that it is clearly an abuse for an investor to manipulate the nationality of a company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration. In particular, abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith who is fully aware prior to the change in nationality of the 'legal dispute,'….").

[86] Request for Bifurcation, ¶ 267 (emphasis added); *see ibid*., ¶ 265 ("All of the circumstances of the specific case must be analysed in detail to confirm the existence of abuse of process.").

[87] *Ibid*., ¶¶ 307-50.

"Claimants are mere instrumental masks whose possession corresponds to companies located in tax havens that are not part of the ECT"[88] and the "activity and structure of the Claimant's shareholders constitutes transactions prohibited by the Kingdom of Spain."[89] As such, the Tribunal has no jurisdiction in this case.

89. Article 17 of the ECT, which is entitled "Non-Application of Part III in Certain Circumstances," provides as follows:

> Each Contracting Party reserves the right to deny the advantages of this Part to:
>
> (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised; or
>
> (2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:
>
> (a) does not maintain a diplomatic relationship; or
>
> (b) adopts or maintains measures that:
>
> (i) prohibit transactions with Investors of that state; or
>
> (ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.

90. The Tribunal is of the view that Article 17 addresses the scope of the substantive provisions of ECT Part III, and does not address whether this Tribunal has jurisdiction over the dispute that has arisen in this case. In other words, assuming that the conditions set forth in ECT Article 26 are met, then that article establishes the jurisdiction of this Tribunal to decide a dispute concerning an alleged breach of an obligation set forth in Part III. When exercising that jurisdiction, the Tribunal may find on the merits that an obligation set forth in Part III

[88] *Ibid*., ¶ 361.
[89] *Ibid*., ¶ 405.

was or was not violated, or may find that Article 17 operates so as to deny the advantages of the Part III protections. In either event, the Tribunal majority is of the view that it would be passing judgment upon the merits of the claims, not on its jurisdiction to decide the claims. Indeed, the location of Article 17 within Part III, rather than appearing as a component of Article 26, is suggestive of a desire by the Contracting Parties that jurisdiction exists to resolve a dispute relating to whether the conditions of Article 17 have been met.[90] As such, the Tribunal majority regards the Respondent's fourth objection as not falling within the scope Article 41 of the ICSID Convention, and is not properly addressed through a bifurcation proceeding.

E. Lack of Jurisdiction over an Intra-European Union Dispute

91. The Claimants in this case are incorporated in Luxembourg, which is a Member State of the EU. Further, the Claimants have brought a claim against the Kingdom of Spain, another Member State of the EU.

92. The Respondent objects that Article 26 of the ECT does not apply to such an intra-EU dispute. In its view, allowing such a dispute to be decided by arbitration would contravene the rules of the EU internal market, notably the autonomy and primacy of EU law. In this regard, the Respondent views as relevant the decision of the Court of Justice of the European Union in the *Achmea* case, as well as the January 2019 declaration by certain EU Member States. The Respondent's position is supported by the statement made by the European Commission in its request to intervene in this case, which is a part of the record before the Tribunal. By contrast, the Claimants maintain that the objection is "plainly frivolous,"[91] viewing the *Achmea* judgment as not relevant to the ECT and the January 2019 declaration as not pertinent to this case. As previously noted, the Claimants assert

[90] See, e.g, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 (RL-0019), ¶ 148 ("the object and purpose of the ECT, in the Tribunal's view, clearly requires Article 26 to be unaffected by the operation of Article 17(1)").
[91] Observations on Bifurcation, ¶ 132.

that "35 separate ECT tribunals have faced the Intra-EU Objection and each of those tribunals has rejected it."[92]

93. The Tribunal is not prepared at this stage in the proceedings to view the objection as not serious and substantial. Among other things, the Tribunal is not bound by the decisions of other tribunals, and there are some developments, such as the January 2019 declaration, which were not before some of those other tribunals.

94. Even so, the Tribunal is cognizant that this issue has arisen in numerous intra-EU investor-State arbitrations under the ECT and that, in virtually all cases, the issue was not addressed through bifurcation. The Tribunal is inclined not to do so as well, finding that it would benefit from a better understanding of the provisions at issue under the ECT, their application in the context of this particular case, and their relation to EU law. For example, such relationships might concern analysing whether the particular benefits granted to the Claimants in this case were inconsistent with EU law and whether the particular Spanish measures contested by the Claimants in this case were taken in implementation of EU law. That better understanding will best be reached by means of a thorough airing of the facts and law of this case, approximating what would be necessary at a merits stage.

95. As such, the Tribunal regards the steps needed to address the fifth objection as most efficiently undertaken in the context of a full briefing by the Parties on the merits. Therefore, the Tribunal does not see this objection to the Tribunal's jurisdiction as most efficiently addressed in a bifurcated proceeding.

F. Lack of Jurisdiction Due to Failure to Fulfil Arbitration Pre-requisites

96. Based on the facts currently before the Tribunal, it appears that the Claimants notified the Respondent of the existence of a dispute and requested negotiations pursuant to ECT Article 26 by letter of June 2015, and then followed up again by letter in June 2017. The Respondent, however, argues that it was not validly notified of the dispute in accordance

[92] *Ibid*., ¶ 122.

with Article 26 prior to the commencement of the arbitral proceedings in February 2019, because Claimants' correspondence was in English and not in Spanish.

97. On the present record, it appears that this sixth objection *prima facie* is not serious and substantial. While further development of the factual record may prove otherwise, it appears that the Respondent reacted in writing to the Claimants' request in August 2017, and did so in English,[93] after which the two sides met in person in September 2017. The proceedings in this case were then commenced in February 2019. Under these circumstances, it appears that the Respondent was on notice as to the existence of a dispute and of a request for an amiable settlement, both in writing and through an in-person meeting. In such circumstances, the Tribunal does not view it as appropriate for this objection to serve as a basis for bifurcation of the proceedings.

G. Lack of Jurisdiction over Tax Measures

98. Among the Claimants' claims is a claim arising out of a 7% tax levy that was imposed by the Respondent in 2015. While the Claimants maintain that the levy was not a *bona fide* tax measure, the Respondent argues that it was, and further that the ECT Article 21 precludes application of the ECT to taxation measures, except in limited circumstances not at issue in this case.

99. The Tribunal regards this seventh objection *prima facie* as serious and substantial. At the same time, this claim appears to represent just a portion of the Claimants' overall claims, such that disposition of this issue through bifurcation would not, standing alone, materially reduce the scope of the merits stage, and thus would not promote efficiency in the disposition of this case. In such circumstances, the Tribunal does not view it as appropriate for this objection to serve as a basis for bifurcation of the proceedings.

[93] *Ibid*., ¶ 148.

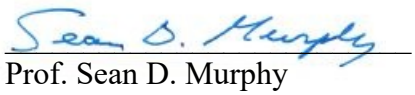
IV. ORDER

100. For the foregoing reasons, the Tribunal, by majority, determines and orders as follows:

a. The Respondent's Request for Bifurcation is denied; and

b. The procedural calendar set forth in Option 2.2 of Procedural Order No. 2 is now in effect, and therefore the Counter-Memorial on the Merits and Memorial on Jurisdiction is due on 6 November 2020.

On behalf of the Tribunal,



Prof. Sean D. Murphy
President of the Tribunal
Date: 28 August 2020