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 ALL MEMBERS OF THE TRIBUNAL

Chair of the Administrative Council
Mr. David R. Malpass

Secretary of the Tribunal
Ms. Catherine Kettlewell

Date: 18 October 2022

REPRESENTATION OF THE PARTIES

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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 parties' representatives and their addresses are listed above.

5. This decision addresses the Respondent's proposal to disqualify all of the members of the Tribunal in the present proceedings, received on 17 May 2022. Below is a summary of the procedural history relevant to this proposal.

II. PROCEDURAL HISTORY

6. On 17 May 2022, the Respondent filed its proposal for the disqualification of the Arbitral Tribunal together with Annexes 1 through 45 ("**Resp. Annex**") (the "**Respondent's Disqualification Proposal**").

7. On the same date, the Secretary-General transmitted a copy of the Respondent's Disqualification Proposal to the Claimants and the members of the Tribunal. In accordance with ICSID Arbitration Rule 9(6), the Secretary-General informed the parties that the proceeding would be suspended until the Respondent's Disqualification Proposal was decided and that the Hearing scheduled for May 23-27 2022 was accordingly suspended. By the same communication, the Secretary-General established a calendar for the written submissions of the parties and explanations of the members of the Tribunal.

8. On 19 May 2022, the Claimants filed a reply to the Respondent's Disqualification Proposal together with Annexes 1 through 7 ("**Cl. Annex**") (the "**Claimants' Reply**").

9. On 25 May 2022, Mr. Michael Collins furnished his explanations. On the same date Prof. Dr. Guido Santiago Tawil and Dr. Ioana Knoll-Tudor submitted separate letters indicating that all the relevant elements were contained in Mr. Collins' explanations and that they had nothing to add ("**Arbitrators' Explanations**").

10. On 1 June 2022, the Claimants informed ICSID that they did not consider it necessary to submit any further observations. On the same date, the Respondent filed further observations regarding the Respondent's Disqualification Proposal together, with Annexes 46 through 51 ("**Respondent's Further Observations**").

III. THE PARTIES' SUBMISSIONS

A. The Respondent's Disqualification Proposal

11. The Respondent proposed the disqualification of all of the members of the Tribunal on the grounds that they had "made recent decisions that reveal [the Tribunal's] lack of impartiality in relation to the case" and that those "decisions clearly prejudice the Respondent's position in favour of the Claimant."[1]

12. According to the Respondent, the Tribunal's lack of impartiality was demonstrated by: "(i) unequal treatment with respect to the intervention of the Quantum Experts at the Hearing, (ii) unequal treatment of the Parties with respect to the arguments raised by Spain: the Tribunal has disregarded in advance Spain's position on jurisdiction and the merits of the case by refusing to hear the experts presented by the Respondent on issues of utmost relevance such as EU law (determinative of the Tribunal's lack of jurisdiction, and applicable to the merits of a strictly European dispute) and Spanish regulatory law, (iii) failure to comply with the basic rules of the ICSID Convention and Procedural Order No. 1 regarding the languages of the proceedings, and (iv) lack of impartiality in deciding

[1] Respondent's Disqualification Proposal, ¶ 3.

that the Hearing should be held in a virtual format when the facts demonstrate that the Parties and the Tribunal could meet in person in Washington D.C."[2]

a. Legal Standard

13. The Respondent relies on the ICSID Convention, other applicable international conventions, international custom, and the general principles of law recognized by civilized nations as direct sources of Public International Law pursuant to Article 38 of the Statute of the International Court of Justice, to support its disqualification proposal.[3]

14. The Respondent submits that arbitrators must exercise independent and impartial judgment pursuant to Articles 57 and 14 of the ICSID Convention and Rule 9 of the ICSID Rules of Arbitration.[4] The Respondent adds that the purpose of the challenge for disqualification "is to preserve the integrity of the Tribunal and the arbitration process."[5]

15. The Respondent notes that while there is a difference among the texts of Article14 of the ICSID Convention in the three official languages, this difference can be resolved by the application of Article 33(4) of the Vienna Convention on the Law of the Treaties ("**VCLT**")[6] to conclude that, as applied in numerous cases, the arbitrators are required "to be both independent and impartial."[7]

16. Spain contends that the interpretation of Articles 14 and 57, in accordance with Article 31 and 32 of the VCLT, would result in taking into account rules of international law which would be applicable to the parties in this proceeding, *i.e.* Germany and Spain. Specifically, the European Union Charter of Fundamental Rights and the European Convention on Human Rights which provide that a "fair trial requires 'an independent and impartial Tribunal'" and that a judge or arbitrator must be disqualified if there is any "reasonable

[2] Respondent's Disqualification Proposal, ¶ 6.
[3] Respondent's Disqualification Proposal, § II.
[4] Respondent's Disqualification Proposal, ¶¶ 10-28.
[5] Respondent's Disqualification Proposal, ¶ 12.
[6] Respondent's Disqualification Proposal, ¶18, citing **Resp. Annex-02**, Vienna Convention on the Law of Treaties. 23 May 1969. Article 33(4).
[7] Respondent's Disqualification Proposal, ¶18.

doubt or indication of lack of impartiality."[8] Spain argues that this is also the standard adopted by the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines**").[9]

17. According to Spain, "the objective standard based on the reasonable analysis of evidence by a third party" is the legal standard applicable in accordance with international conventions which has also been confirmed in ICSID arbitrations.[10] Spain adds that Article 14(1) "only requires 'the appearance of such dependence or bias'"[11] and, therefore, the "challenging party does not need to prove actual bias and a risk or reasonable apprehension of bias is sufficient."[12] In this case, Spain argues, the arbitrators manifestly lack impartiality and independence and should therefore be disqualified.[13]

18. The Respondent also refers to the word "manifestly" in Article 57 to point out that the provisions cannot be interpreted to "impose extra requirements for a disqualification not existing in the EUCFR, the ECHR or the IBA Guidelines."[14] According to the Respondent, the term manifest means "obvious or evident, or highly probable, not just possible or almost certain."[15] Spain argues that an arbitrator must be disqualified if there is "'any indication' of its lack of independence or impartiality."[16]

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[8] Respondent's Disqualification Proposal, ¶¶ 23-24. *See* **Resp. Annex-06**, European Union Charter of Fundamental Rights 2012/C 326/02; **Resp. Annex-07**, European Convention on Human Rights. *See also*, Respondent's Further Observations, ¶ 10.

[9] Respondent's Disqualification Proposal, ¶ 24.

[10] Respondent's Disqualification Proposal, ¶ 88, citing **Resp. Annex-14**, *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 ("***Burlington***"), ¶¶ 65 and 77; **Resp. Annex-15**, *Repsol S.A. and Repsol Butano S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Proposed Challenge of the Majority of the Tribunal, 13 December 2013 ("***Repsol***"), ¶¶ 71-72.

[11] Respondent's Disqualification Proposal, ¶ 89.

[12] Respondent's Disqualification Proposal, ¶ 90, citing **Resp. Annex-17**, *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator, 19 December 2002.

[13] Respondent's Disqualification Proposal, ¶¶ 92-93.

[14] Respondent's Disqualification Proposal, ¶ 25

[15] Respondent's Disqualification Proposal, ¶ 26; comparing to **Resp. Annex-08**, *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***"), ¶¶ 40-41;**Resp. Annex-09**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 ("***Suez II***"), ¶¶ 40-41; **Resp. Annex-10**, *AWG Group v. Argentine Republic* (UNCITRAL), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007 ("***AWG***"), ¶¶ 40-41.

[16] Respondent's Disqualification Proposal, ¶ 28.

19. The Respondent also relies on "international custom in arbitration practice" that requires "(1) impartiality and independence on the arbitrators; and (2) that they can be disqualified when there is reasonable doubt about the lack of those qualities."[17] Spain argues that "manifestly" in Article 57 of the ICSID Convention cannot be interpreted against "the international custom, reflected in international conventions, in the practitioners' 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."[18]

20. Spain argues that in this case, the different treatment of the experts by the Tribunal and in the organization of the hearing, shows lack of impartiality and disregard for the Respondent's position. According to Spain, international arbitration practice "admits the disqualification of the arbitrators when there is any 'reasonable doubt' of lack of independence or impartiality" and that this is reiterated practice accepted by States.[19]

21. Finally, the Respondent also alleges that, as a general principle of law, adjudicators must be independent and impartial and a lack of these qualities would require disqualification if "there is any slight doubt that they are biased."[20] The Respondent contends that general principles of law do not require strict evidence of bias, but rather that bias could be inferred from the facts of the case.[21] The Respondent argues that the lack of independence and impartiality of a Tribunal, as seen in other ICSID cases, is a violation to the right to be heard and, consequently, the a party's right of defense.[22]

22. The Respondent concludes that, even with the stricter application of the disqualification standards under public international law, the proposal for disqualification must be granted to preserve the independence and impartiality of the proceeding.[23]

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[17] Respondent's Disqualification Proposal, ¶ 31.
[18] Respondent's Disqualification Proposal, ¶ 35.
[19] Respondent's Disqualification Proposal, ¶¶ 95-96.
[20] Respondent's Disqualification Proposal, ¶ 37.
[21] Respondent's Disqualification Proposal, ¶ 38.
[22] Respondent's Disqualification Proposal, ¶¶ 97-101, citing **Resp. Annex-19**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision of the ad hoc Committee on an Application for the Annulment of the Arbitral Award, 5 February 2002, ¶ 57; **Resp. Annex-20**, *Klöckner Industrie-Anlagen GmbH and Others v. Republic of Cameroon and Société Camerounaise des Engrais,* ICSID Case No ARB/81/2, Annulment Decision, 3 May 1985, ¶ 95.
[23] Respondent's Disqualification Proposal, ¶ 105.

b. Grounds for Disqualification

23. The Respondent challenges the members of the Tribunal on four grounds:

a. Lack of impartiality, by treating the parties unequally with respect to the intervention of the Quantum Experts at the Hearing;

b. The Tribunal treated the parties unequally, disregarding Spain's position on jurisdiction and on the merits of the case by refusing to hear the experts presented by the Respondent on issues of utmost relevance such as EU law and Spanish regulatory law;

c. The Tribunal failed to comply with the basic rules of the ICSID Convention and Procedural Order No. 1 regarding the languages of the proceedings; and

d. The Tribunal decided that the Hearing should be held virtually, when the facts demonstrated that the parties and the Tribunal could have met in person in Washington, D.C.

24. **On the first ground**, the Respondent explains that the parties provided different views with respect to the agenda for the Hearing. Both proposals were consistent in proposing the presentations and cross-examinations of the experts on the same day. After the Tribunal issued Procedural Order No. 6, which divided the examination of the Respondent's quantum expert, BDO, in two days (Expert's presentation on Day 3 and cross-examination on Day 4), Spain submitted a request for reconsideration. The Tribunal then decided to have BDO's oral presentation and cross-examination on Day 4 but its PowerPoint presentation to be submitted on Day 3. This decision, Spain argues, was unjustified and was not required from the Claimants' quantum expert, Compass Lexecon.[24]

25. According to the Respondent, the Claimants had an advantage by having the presentation of the Respondent's Quantum expert more than 14 hours before the cross-examination of these experts.[25]

[24] Respondent's Disqualification Proposal, ¶¶ 41-53.
[25] Respondent's Disqualification Proposal, ¶ 53.

26. **On the second ground**, the Respondent argues that the lack of impartiality is also evidenced by the Tribunal's refusal to hear the experts presented by Spain on "two fundamental issues: European Union law and Spanish regulatory law."[26]

27. According to Spain, both topics are important to the arguments made by the parties in this case and questioning the experts would "guarantee the right of each Party to present its case."[27] The Respondent further argues that the Tribunal is "not fulfilling its obligation to be impartial and has already prejudged its decision" on the issues addressed by these experts by failing to call them for examination at the hearing.[28]

28. **On the third ground**, the Respondent claims that the Tribunal unilaterally decided that the pre-hearing would be conducted solely in English, despite the procedural languages of the proceeding being English and Spanish.[29]

29. **On the last and fourth ground**, the Respondent argues that the Tribunal's bias was also manifest when it "opted to impose a hybrid format for the Hearing" which was not proposed by the parties, and noted that the fact that the Tribunal was able to be in-person in Washington, D.C. demonstrated that an in-person hearing was possible.[30]

B. The Claimants' Response

30. The Claimants contend that the Respondent's proposal to disqualify the members of the Tribunal is "frivolous" and that the Respondent's intent was to "postpone the hearing by months." The Claimants note that the alleged grounds are either time-barred, have already been decided by the Chair of the Administrative Council, or are within the Tribunal's procedural discretion.[31]

a. Legal Standard

31. The Claimants submit that the legal standard to be applied is in Articles 14(1) and 57 of the ICSID Convention and that disqualification is warranted when an arbitrator lacks the

[26] Respondent's Disqualification Proposal, ¶ 54.
[27] Respondent's Disqualification Proposal, ¶ 61.
[28] Respondent's Disqualification Proposal, ¶¶ 66-67.
[29] Respondent's Disqualification Proposal, ¶¶ 70-74.
[30] Respondent's Disqualification Proposal, ¶¶ 75-86.
[31] Claimants' Reply, ¶ 1.

necessary independence and impartiality. The impartiality and independence, the Claimants add, must be assessed from the perspective of an objective third party.[32]

32. The Claimants also submit that "only a 'manifest' lack of independence or impartiality suffices" and that many decisions on challenges confirm that manifest means "evident or obvious".[33]

b. Grounds for Disqualification

33. **<u>On the first ground</u>**, the Claimants assert that Spain's allegation that the requirement for valuation experts to hand in PowerPoint slides one day before their testimony demonstrates bias of the Tribunal, is wrong.[34]

34. The Claimants argue that this is an area where the Tribunal has discretion to decide the procedural schedule and that adverse procedural decisions do not constitute a disqualification ground. The Claimants further argue that requiring BDO to provide the PowerPoint slides several hours before their presentation does not impose a burden on Spain nor does it provide an unfair advantage to the Claimants.

35. The Claimants note that the Tribunal's decision, contained in the letter of 13 May 2022, envisaged the possibility of changing the schedule and that the Claimants wrote to Spain with their position on the direct presentations and cross-examination but received no response.[35] The Claimants also note there was no agreement on the proposed schedule,

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[32] Claimants' Reply, ¶ 2, citing *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013 ("***Blue Bank* 2013 Decision**"), ¶¶ 58-61.

[33] Claimants' Reply, ¶ 3, citing *Blue Bank* 2013 Decision, ¶¶ 58-61; *Burlington*, ¶ 68; *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014 ("***Caratube***"), ¶ 55; *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 ("***ConocoPhillips* 2014 Decision**"), ¶ 47; *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***"), ¶ 39; *Interocean Oil Development Company et al. v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Decision on the Proposal to Disqualify all Members of the Arbitral Tribunal, 3 October 2017 ("***Interocean***"), ¶ 65; *Canepa Green Energy Opportunities v. Spain*, ICSID Case No. ARB/19/4, Decision on the Second Proposal to Disqualify Mr. Peter Rees QC, 10 February 2020, ¶ 52; *Landesbank Baden-Württemberg et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Proposal for Disqualification of all Members of the Tribunal, 15 December 2020 ("***Landesbank***"), ¶ 126.

[34] Claimants' Reply, ¶ 5.

[35] Claimants' Reply, ¶ 10; **Cl. Annex 4**, Email from Claimants to Respondent, 13 May 2022.

specifically on the examination of quantum experts, when preparing the parties' comments to the draft procedural order for the organization of the hearing.[36]

36. **On the second ground**, the Claimants argue that Spain's claim that the issues had been raised since the beginning of the proceedings is misleading, as the expert reports of Professor Gosalbo (Spain's expert on the intra-EU objection) and Professor Laguna (Spain's expert on Spanish law) were not submitted with the Counter-Memorial but with Spain's Rejoinder, without their experts responding to the Claimants' Reply or new arguments in the Reply.[37]

37. According to the Claimants, the Tribunal decided not to call Spain's legal experts on the basis of paragraph 18.3 of Procedural Order No. 1 and a party does not have a right to call its own witness or expert under such provision or under international law. The Claimants argue that the Tribunal would be capable of reading the expert reports and Spain has not provided any inference or evidence that "the Tribunal would not read and evaluate Professor Gosalbo's or Professor Laguna's expert reports."[38]

38. **On the third ground**, the Claimants argue that Spain's allegation concerning this ground is incorrect. The Claimants point to Spain's own evidence provided in support of this ground for disqualification, noting that Spain had already consented to speak in English during the first session. The Claimants further add, "neither before nor during the pre-hearing session did Spain's counsel apply to conduct the session in a bilingual format."[39]

39. **On the fourth ground**, the Claimants allege that this ground for disqualification was not submitted promptly as the Tribunal's decision in this respect was communicated on 14 March 2022 and its decision on Spain's request for reconsideration was communicated on 22 March 2022. In support of this argument, the Claimants point to the decisions in *Vivendi v. Argentina (II)* and *Fábrica de Vidrios Los Andes v. Venezuela* where the proposal was

[36] Claimants' Reply, ¶ 11; **Cl. Annex 5**, Excerpt Transcript of Case Management Conference, 22 April 2022.
[37] Claimants' Reply, ¶ 13.
[38] Claimants' Reply, ¶ 16.
[39] Claimants' Reply, ¶ 20.

filed 53 and 45 days after the relevant facts, respectively, was considered belated or time barred.[40]

40. Lastly, according to the Claimants, this ground has no merits. The Claimants point out that the Tribunal's decision in this regard was reasonable to "serve[] the health of the participants, the foreseeability of the process and its expeditiousness."[41] In the Claimants' view, the Tribunal's decision was within its procedural discretion and further argues that "[d]isqualification proposals for virtual hearings have been rejected."[42]

C. Mr. Collins', Prof. Dr. Tawil's and Dr. Knoll-Tudor's Explanations

41. On 25 May 2022, Mr. Collins furnished his explanations. Prof. Dr. Tawil and Dr. Knoll-Tudor indicated that they had no explanations to add. Mr. Collins' letter will be referred hereafter as the *Arbitrators' Explanations* given that Prof. Dr. Tawil and Dr. Knoll-Tudor joined with these explanations.

42. **On the first ground**, the Arbitrators' Explanations point out that the concern was to conduct the proceedings "efficiently" and by making the best and most sensible "use of the time available."[43] The Arbitrators explained that Spain's second request for reconsideration was not denied, but rather that the Tribunal posed alternative approaches to the parties, with no decision made before the Respondent's Disqualification Proposal was filed.

43. The Arbitrators' Explanations pointed out that "[t]he Tribunal's final decision on when the quantum experts should circulate their PowerPoint slides, in advance of their testimony, would have been included as part of the Tribunal's decision, had the parties not agreed on

[40] Claimants' Reply, ¶ 22, citing *Suez; Suez II*; *AWG*, ¶ 26; *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on the Proposal to Disqualify a Majority of the Tribunal, 16 June 2015 ("***Fábrica* 2015 Decision**"), ¶¶ 43-46.
[41] Claimants' Reply, ¶ 23.
[42] Claimants' Reply, ¶ 24, citing *Vattenfall AB et al. v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the Proposal for Disqualification of the Three Members of the Tribunal, 8 July 2020; *Vattenfall AB et al. v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Recommendation Pursuant to the request by ICSID Dated 8 May 2020 on the Respondent's Proposal to Disqualify All Members of the Arbitral Tribunal Dated 16 April 2020, 6 July 2020; *Landesbank*, ¶¶ 137, 144.
[43] Arbitrators' Explanations, p. 1.

the approach to be adopted, and would have taken full account of the submissions that had been made by both parties on the point."[44]

44. **On the second ground**, the Arbitrators' Explanation point to paragraph 18.3 of Procedural Order No.1, which allowed the Tribunal to pose questions to witnesses or experts not called by either party to testify at the hearing. They further explain that, on the basis of this provision and after consideration of both expert reports, they decided not to put any questions to these two expert witnesses.

45. The Arbitrators' Explanations further note that "[h]ad the hearing gone ahead as planned, the two reports [Professor Gosalbo's and Professor Laguna's reports] would have been considered and evaluated by the Tribunal along with all the other evidence in the case; and insofar as they express opinions that the Respondent invited the Tribunal to accept, would have been treated by the Tribunal as part of the Respondent's case on the legal issues that they address."[45]

46. **On the third ground**, the Arbitrators' Explanations note that, as the Respondent agreed to hold the first session in English, the Secretariat similarly proposed to hold the pre-hearing conference in English. The Arbitrators' Explanations indicate that no objection was raised by either Party before or during the pre-hearing conference and the Tribunal was not aware this was a concern until the Respondent's Disqualification Proposal was submitted.[46]

47. **On the fourth and final ground**, the Arbitrators' Explanations note that the decision to hold the hearing remotely was taken "after carefully balancing competing considerations" and having heard both parties on the issue.[47] They further explain that the decision for the members of the Tribunal, who had not met in person before, to meet in person in Washington, DC was to ensure they were able to discuss particular matters raised during the hearing.

48. The Arbitrators' Explanations point out that the Respondent's suggestion to have them attend in person while the Claimants were not in a position to travel to Washington, DC

[44] Arbitrators' Explanations, p. 2.
[45] Arbitrators' Explanations, p. 2.
[46] Arbitrators' Explanations, p. 2.
[47] Arbitrators' Explanations, p. 3.

was inappropriate, since it "would not have afforded the parties the 'equality of arms' that they both rightly insist upon."[48]

D. Respondent's Further Observations

49. On the legal standard, the Respondent reiterated its arguments which, it submitted, were not contested by the Claimants or the challenged members of the Tribunal. Specifically, Spain restated its argument that "conventions and rules mentioned are not restricted to judicial proceedings" and that this "means that if there is any reasonable doubt or indication of a lack of impartiality… the arbitrator must be disqualified."[49] The Respondent repeated that this is the criteria adopted by the IBA Guidelines on Conflict of Interest in International Arbitration.

50. **On the first ground**, the Respondent pointed to the parties' agreement in draft Procedural Order no. 6, provided to the Tribunal, and added that the procedure should be guided, firstly, by the agreement of the parties as stated in Rule 20(2) of the ICSID Rules of Arbitration.[50] The specific point of the examination of experts, Spain argues, was agreed between the parties to be that they would "intervene in unity of act."[51] This is that "the submission of the PPT presentations, the oral presentations, the cross-examination, the re-direct and any questions from the members of the Tribunal would take place continuously on the same day, without being divided into different hearing days."[52]

51. Spain responded to the Claimants' argument that the BDO PowerPoint presentation would be submitted several hours after Compass' presentation and would not pose a burden on Spain or an unfair advantage to the Claimants by saying that the presentation would have to be sent "around 17 hours before its intervention" and that this "requirement was not imposed on the Claimants' experts."[53]

52. According to the Respondent, when addressing the two options provided by the Tribunal in its letter, the Claimants rejected all proposals and the Tribunal rejected them as well.

[48] Arbitrators' Explanations, p. 3.
[49] Respondent's Further Observations, ¶ 10.
[50] Respondent's Further Observations, ¶¶ 31, 88.
[51] Respondent's Further Observations, ¶ 31.
[52] Respondent's Further Observations, ¶ 31.
[53] Respondent's Further Observations, ¶ 15.

Spain argues that in any event, the two alternatives did not guarantee the equality of arms.[54] The Respondent argues that the Tribunal should have made an impartial decision in its 6 May 2022 letter and stated "clearly and unequivocally… that in the interest[] of ensuring equality of arms between the Parties the advance notice with which the slides presentations [sic] of both teams of experts were to be sent would be the same in respect of their oral interventions."[55]

53. Spain alleges that "there was absolutely nothing objectively and reasonably justifying the Tribunal's decision to order that only the Respondent's expert had to anticipate their PowerPoint presentation beyond what was reasonable or procedurally required."[56]

54. Regarding the Arbitrators' Explanations, the Respondent argues that it was unnecessary for the Tribunal to arrange the schedule in such a manner that it would "unnecessarily shorten and compress the interventions of the Parties in such a way as to create an imbalance between them."[57] According to Spain, the Tribunal's decision on the BDO PowerPoint presentation, which violated the equality of arms, should not have been dependent on the decision of the legal experts intervention, which violated the right of defense by not allowing Spain's presentation of its case.[58]

55. **On the second ground**, the Respondent argues that it finds it inconceivable that the Tribunal, who did not have specific knowledge of the issues concerning jurisdiction and EU law, did not call its legal experts to question them.[59] According to Spain, the Tribunal's decision not to call its legal experts was beyond the application of paragraph 18.3 of Procedural Order No. 1 but rather a "sign that the Arbitral Tribunal has already decided the case in hand."[60]

56. On this point, Spain concludes that the "lack of questions to the Spanish experts by the Challenged Tribunal is a clear demonstration of the lack of impartiality of the latter, which

[54] Respondent's Further Observations, ¶ 89.
[55] Respondent's Further Observations, ¶ 28.
[56] Respondent's Further Observations, ¶ 36 (emphasis omitted).
[57] Respondent's Further Observations, ¶ 79 (emphasis omitted).
[58] Respondent's Further Observations, ¶¶ 80-84.
[59] Respondent's Further Observations, ¶ 45.
[60] Respondent's Further Observations, ¶ 50.

has not allowed the Kingdom of Spain to defend its position in the proceedings."[61] According to the Respondent, the Tribunal did not provide specific reasons that lead to the decision of not asking questions to Spain's legal experts.[62] The Respondent also argues that the Tribunal deprived them of means of defense when it expected Spain's counsel to respond to questions on the topics handled by the experts.[63]

57. **On the third ground**, the Respondent reiterates its position and adds that the fact that it agreed to have the first session in English was in "deference by the Kingdom of Spain to the other parties involved in the meeting, but does not imply a waiver by the Respondent that the rest of the proceedings and meetings between the Parties and the Tribunal should be conducted in accordance with the procedural rules, i.e. in a bilingual manner."[64] The Respondent adds that the disregard of the Respondent's language is another example of bias.[65] Finally, Spain indicates that the email provided on the logistics of the pre-hearing organizational meeting indicating that it would be held in English, was a statement and not a proposal to the parties to choose.[66]

58. **The fourth and final ground**, the Respondent added that the individual decision on the format of the hearing is evidence of the lack of impartiality of the members of the Tribunal, although, on its own, is not a ground for disqualification and is the reason it was not raised before.[67] According to the Respondent, there was no evidence on why an in-person hearing was impractical.[68] The Respondent concluded on this ground that this was "another clear demonstration of the Challengued [sic] Tribunal's lack of impartiality."[69]

59. Regarding the Arbitrators' Explanations, the Respondent argues that the President of the Tribunal did "not establish the reasons that led the Challenged Tribunal to '[the hearing

[61] Respondent's Further Observations, ¶ 53 (emphasis omitted).
[62] Respondent's Further Observations, ¶¶ 92-98.
[63] Respondent's Further Observations, ¶ 100.
[64] Respondent's Further Observations, ¶ 55.
[65] Respondent's Further Observations, ¶ 56.
[66] Respondent's Further Observations, ¶ 103.
[67] Respondent's Further Observations, ¶¶ 59-60.
[68] Respondent's Further Observations, ¶ 61.
[69] Respondent's Further Observations, ¶ 69.

format] decision."[70] Furthermore, Spain adds, the virtual format of the hearing was imposed on the Respondent.[71]

IV. ANALYSIS

A. Timeliness

60. ICSID Arbitration Rule 9(1) requires a proposal for disqualification to be filed "promptly."[72]

61. As the ICSID Convention and applicable Arbitration Rules do not specify a number of days within which a disqualification proposal must be filed, the timeliness of a disqualification proposal must be determined on a case-by-case basis.[73]

62. In *BSG*, a disqualification proposal filed 7 days after the tribunal's ruling giving rise to the proposal was considered timely.[74] In *Fábrica*, a challenge filed 45 days after the latest fact on which it was based was considered untimely.[75] In *Burlington*, two grounds were dismissed because they related to facts which had been public for more than 4 months prior to filing the challenge.[76]

63. The timeliness of three of the four grounds raised in the Respondent's Disqualification Proposal has not been argued and the Chair is satisfied that, with respect to these grounds, the Proposal was submitted in a timely manner as required by Rule 9(1).

64. The Claimants have contested the timeliness of the Respondent's fourth ground for disqualification (*i.e.* the Tribunal's decision to hold the hearing by video-conference). The Respondent's Disqualification Proposal was filed on 17 May 2022, *i.e.* 64 days from the date of the Tribunal's decision to hold the hearing by video-conference (14 March 2022),

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[70] Respondent's Further Observations, ¶ 104.
[71] Respondent's Further Observations, ¶¶ 104-113.
[72] ICSID Arbitration Rule 9(1): "A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor."
[73] *See, e.g., Interocean*, ¶ 71; *BSG*, ¶ 60; *Fábrica* 2015 Decision, ¶ 40; *ConocoPhillips* 2104 Decision, ¶ 39; *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**"), ¶ 68; *Burlington*, ¶ 73.
[74] *BSG*, ¶ 62.
[75] *Fábrica* 2015 Decision, ¶¶ 44-46.
[76] *Burlington*, ¶¶ 71-75.

and 56 days from the date of the Tribunal's decision on the Respondent's request for reconsideration on the matter (22 March 2022).

65. In the Chair's view, the Respondent's fourth ground for disqualification does not fall within a time range that could be considered *timely*, if calculated from the latest fact which is the basis for this specific ground. Spain argues, however, that with respect to the format of the hearing, the issue had been raised repeatedly and that "this circumstance, on its own, was not a ground for the disqualification of the Arbitral Tribunal, that's the reason why it has not been raised before."[77]

66. Accepting, for the sake of argument, that the Tribunal's decision on the hearing format is not the latest fact to be considered with regard to the fourth ground's *timeliness*, the Chair will proceed to review its merits, together with the other grounds for disqualification.

B. The Legal Standard

67. The Proposal seeks to disqualify the three members of the Tribunal pursuant to Article 57 of the ICSID Convention and ICSID Arbitration Rule 9.

68. 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.

[77] Respondent's Further Observations, ¶ 59.

69. Several decisions have concluded that the word "manifest" in Article 57 of the Convention means "evident" or "obvious,"[78] and that it relates to the ease with which the alleged lack of the required qualities can be perceived.[79]

70. 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.

71. 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.[80]

72. 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 "protect parties against arbitrators being influenced by factors other than those related to the merits of the case."[81]

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[78] *See e.g., BSG*, ¶ 54; *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* 2014 Decision, ¶ 47; *Abaclat* 2014 Decision, ¶ 71; *Burlington*, ¶ 68; *Repsol*, ¶ 73; *Blue Bank* 2013 Decision, ¶ 61; *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.

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

[80] *See, e.g., Blue Bank* 2013 Decision, ¶ 58; *Burlington*, ¶ 65; *Repsol*, ¶ 70; *BSG*, ¶ 56; *Conoco* 2014 Decision, ¶ 50; *Blue Bank* 2018 Decision, ¶ 77; *Abaclat* 2014 Decision, ¶ 74.

[81] *See, e.g., Caratube*, ¶ 53; *Blue Bank* 2013 Decision, ¶ 59; *Repsol*, ¶ 71; *Conoco* 2014 Decision, ¶ 51; *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, ¶ 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, ¶ 43.

73. 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.[82]

74. The parties agree that Article14 of the ICSID Convention requires arbitrators to be both independent and impartial and that the legal standard to be applied to a proposal to disqualify an arbitrator is an "objective standard based on a reasonable evaluation of the evidence by a third party."[83] Accordingly, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.

75. The Respondent has referred to other standards in its pleadings. 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

76. Spain claims that certain decisions taken by the Tribunal in relation to the Hearing demonstrate lack of impartiality.[84]

77. Upon careful consideration of the parties' submissions and the Arbitrators' Explanations, the Chair finds that a third party undertaking a reasonable evaluation of the facts underlying the Respondent's disqualification grounds would not conclude that the Tribunal manifestly lacks the qualities required under Article 14(1) of the ICSID Convention.

78. *First*, requiring the Respondent to submit the quantum expert's PowerPoint presentation prior to its oral presentation was not a decision that had been finalized by the Tribunal. On 13 May 2022, the Tribunal invited the parties to agree on an adjustment of the schedule, having decided on the participation of Spain's legal experts.[85] No final decision was made prior to the submission of the Respondent's Disqualification Proposal. The Respondent's premise for its allegation of unequal treatment has not materialized and thus no lack of

[82] *See, e.g*; *Blue Bank* 2013 Decision, ¶ 59; *Burlington*, ¶ 66; *Repsol*, ¶ 71; *Caratube*, ¶ 57; *BSG*, ¶ 57; *Conoco* 2014 Decision, ¶ 52; *Conoco* 2015 Decision, ¶ 83; *Abaclat* 2014 Decision, ¶ 76.
[83] *See, e.g., Conoco* 2014 Decision, ¶ 53; *Blue Bank* 2018 Decision, ¶ 79; *BSG*, ¶ 58; *Conoco* 2015 Decision, ¶ 84.
[84] Respondent's Disqualification Proposal, ¶ 39.
[85] **Cl. Annex 3**, Letter from the Tribunal, 13 May 2022.

impartiality has been demonstrated. Accordingly, this *first ground* for disqualification is rejected.

79. *Second*, the Tribunal's decision on whether to hear oral testimony from Spain's legal experts was within its discretion. Paragraph 18.3 of Procedural Order No. 1 reads "[a]ny witness or expert whose written statement has been advanced by the requested Party with the written submissions shall give testimony at the oral hearing only if the opposing party calls this witness/expert for cross-examination or if the Tribunal deems it necessary to put questions to this witness/expert."[86] In light of this provision, the Tribunal had discretion to call any expert that had not been called by the opposing party. As the Arbitrators' Explanations note, the decision not to hear Prof. Gosalbo was taken after careful consideration of both expert reports. Moreover, the Arbitrators' Explanations confirm that the legal expert reports, which were submitted without objection from the Claimants, "are part of the record" and as such, will be "considered and evaluated by the Tribunal along with all the other evidence in the case."[87] The Chair does not see any facts that evidence unequal treatment between the parties, and no lack of impartiality has been demonstrated. The *second ground* for disqualification is thus rejected.

80. *Third*, holding the pre-hearing session in English only followed the same format as the first session, which had not been challenged by either party. The parties were notified on 8 April 2022 that "[s]imilarly to the first session, the pre-hearing session will be conducted in English."[88] Spain had sufficient time to raise concerns and request Spanish interpretation prior to the 15 April 2022 pre-hearing conference and chose not to do so. It is true that English and Spanish are the procedural languages in this case, but Procedural Order No. 1 does not provide for any specific language to be used for such specific purposes.[89] The Chair does not consider that holding the pre-hearing session solely in English demonstrates bias or unequal treatment between the parties nor any lack of impartiality from the members of the Tribunal. The *third ground* for disqualification is thus rejected.

[86] **Cl. Annex 1**, Procedural Order No. 1, § 18.3.
[87] Arbitrators' Explanations, p. 2.
[88] **Resp. Annex 37**, Email ICSID Secretariat to Parties, 8 April 2022.
[89] **Cl. Annex 1**, Procedural Order No. 1, § 11.

81. *Fourth*, the decision on the modality of the hearing was discussed between the parties and the Tribunal in advance of the Tribunal's decision. Considering the surrounding circumstances, Spain failed to demonstrate unequal treatment of the parties. The Arbitrators' Explanations noted that if Spain were to be allowed to attend the hearing in person in Washington DC while the Claimants were attending virtually,[90] that would have positioned the parties in a different level playing field. The facts underlying this ground do not demonstrate bias from the members of the Tribunal.

82. The Respondent's proposal for disqualification is based – chiefly - on Spain's dissatisfaction with the Tribunal's rulings regarding hearing-related issues. As previously decided by the Chair, "[t]he mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality or independence, as required by Articles 14 and 57 of the ICSID Convention. If it were otherwise, proceedings could continuously be interrupted by the unsuccessful party, prolonging the arbitral process."[91]

83. The Chair has also observed in the recent past that "[n]either the ICSID Convention nor the ICSID Arbitration Rules contemplate a disqualification proceeding as a mechanism to overturn procedural decisions that dissatisfy one of the Parties. Nor is a Party's dissatisfaction with a procedural ruling the threshold to measure whether there is a manifest lack of impartiality or independence of the Tribunal."[92]

84. Furthermore, as previously concluded by the Chair , the purpose of Article 57 of the ICSID Convention is "to ensure that arbitrators possess the qualities required by Article 14(1) of the ICSID Convention," and that this Article is "not the appropriate mechanism to address allege failures in the Tribunal's reasoning."[93]

85. The Tribunal exercised its powers under the ICSID Convention and Rules, issuing the necessary decisions for the conduct of the proceedings. It did so after giving the parties the opportunity to be heard and taking into consideration their respective concerns. As noted in prior decisions, a procedural disagreement—or the fact that the tribunal's decision was

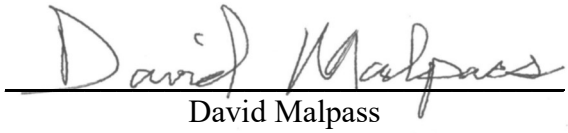
[90] Arbitrators' Explanations, p. 3.
[91] See *Abaclat* 2014 Decision, ¶80.
[92] *Landesbank*, ¶ 143.
[93] *AS PNB Banka and others v. Republic of Latvia* (ICSID Case No. ARB/17/47), Decision on the Proposals to Disqualify Messrs. James Spigelman, Peter Tomka and John M. Townsend, June 16, 2020, ¶164.

supported by the claimants and opposed by the respondent—cannot reasonably provide a basis for an inference of bias.

86. In these circumstances, a third party undertaking a reasonable evaluation of the Tribunal's decisions regarding the submission of PowerPoint presentations of quantum experts in different days, not calling Spain's legal experts for examination, using English only during the pre-hearing meeting and the virtual modality of the hearing, in the context of the surrounding facts, would not conclude that they evidence a manifest lack of the qualities required under Article 14(1) of the ICSID Convention. Accordingly, the Respondent's disqualification proposal must be rejected.

V. DECISION

87. 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 all the members of the Tribunal in this case.



David Malpass
Chair of the ICSID Administrative Council