INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ESKOSOL S.P.A. IN LIQUIDAZIONE

Claimant

and

ITALIAN REPUBLIC

Respondent

ICSID Case No. ARB/15/50

DECISION ON RESPONDENT'S APPLICATION UNDER RULE 41(5)

Members of the Tribunal
Ms. Jean Kalicki, President
Prof. Dr. Guido Santiago Tawil
Prof. Brigitte Stern

Secretary of the Tribunal
Mr. Francisco Abriani

March 20, 2017

REPRESENTATION OF THE PARTIES

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TABLE OF CONTENTS

I. INTRODUCTION AND 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 on April 16, 1998 (the "**ECT**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "**ICSID Convention**").

2. The claimant is Eskosol S.p.A. *in liquidazione* ("**Eskosol**" or the "**Claimant**"), a company incorporated in the Italian Republic. The respondent is the Italian Republic ("**Italy**" or the "**Respondent**"). Eskosol and Italy are collectively referred to as the "**Parties**"; their respective representatives are identified above on page (i).

3. This dispute arises from a series of measures adopted by Italy that allegedly affected Eskosol's investments in a 120 megawatt photovoltaic energy project in Italy. At the time Eskosol started its project, photovoltaic plants in Italy were subject to a regulatory framework that guaranteed fixed payments (feed-in tariffs or "**FITs**") for a duration of 20 years for qualifying projects. According to Eskosol, in spite of the guarantees offered to attract investments, Italy "abruptly and drastically" altered the terms under which investors could benefit from FITs, depriving Eskosol of such incentives and destroying its investment in violation of Italy's obligations under Articles 10 and 13 of the ECT.[1]

4. The merits of such allegations are not the subject for today. This decision concerns a preliminary matter, namely Italy's application – submitted on November 18, 2016 – for dismissal of all of Eskosol's claims on the grounds that they are "manifestly without legal merit," pursuant to Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**").

[1] Request, ¶¶ 2-3 and 70 *et seq*.

II. PROCEDURAL HISTORY

5. On December 9, 2015, ICSID received Eskosol's Request for Arbitration of the same date (the "**Request**"), and on December 22, 2015, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention. In the Notice of Registration, the Secretary-General invited the Parties to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

6. In the absence of an agreement between the Parties on the method of constituting the Tribunal, by letter of March 14, 2016, Eskosol requested that the Tribunal be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention.

7. On March 15, 2016, Prof. Dr. Guido Santiago Tawil (Argentine) accepted his appointment as arbitrator by Eskosol, and on April 6, 2016, Prof. Pierre-Marie Dupuy (French) accepted his corresponding appointment as arbitrator by Italy. By letter of June 1, 2016, Eskosol requested that the President be appointed by the Chairman of the Administrative Council in accordance with Article 38 of the ICSID Convention. On June 21, 2016, ICSID circulated a ballot for President. Prof. Dupuy subsequently withdrew his acceptance of his appointment, effective June 25, 2016, and the ballot for the President was duly suspended. Prof. Brigitte Stern (French) thereafter accepted her appointment as arbitrator by Italy on August 1, 2016.

8. By email of August 2, 2016, Eskosol informed ICSID that it was in communication with Italy about a new method of constitution and asked that the ballot for appointment of the presiding arbitrator not be resumed. By email of August 10, 2016, Eskosol informed ICSID that the Parties expected to reach an agreement on the method by August 16, 2016, and by email of August 12, 2016, Eskosol further reported that the Parties had so agreed. Pursuant to the agreed method, the co-arbitrators were to select a candidate by September 12, 2016; should they be unable to reach a decision or should no candidate be confirmed within two weeks of that date, either Party could opt to renew the request for appointment under Article 38.

9. On September 13, 2016, Professors Tawil and Stern informed ICSID that on September 12, 2016, they notified the Parties of their selection of Mr. Neil Kaplan to serve as President in the proceedings. On September 15, 2016, ICSID informed the Parties that Mr. Kaplan was unavailable to serve as presiding arbitrator.

10. On September 20, 2016, Eskosol invoked Article 38 of the ICSID Convention and requested that ICSID initiate a new ballot procedure for appointment of the Tribunal President. On October 1, 2016, ICSID circulated a ballot to the Parties and invited them to submit their completed ballot forms by October 7, 2016. By letter of October 7, 2016, ICSID confirmed its receipt of Eskosol's ballot and requested that Italy return its ballot as soon as possible. By email of October 10, 2016, Italy informed the Centre that it intended to return its ballot by October 12, 2016. By letter of October 12, 2016, ICSID informed the Parties that the ballot had been successful, and that it would proceed to seek the acceptance of Ms. Jean Kalicki (U.S.) to serve as President. Ms. Kalicki accepted her appointment as President on October 19, 2016.

11. On October 19, 2016, in accordance with Rule 6(1) of the Arbitration Rules, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal therefore was deemed to have been constituted on that date. Mr. Francisco Abriani, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

12. Following certain correspondence with the Parties regarding their availability, on November 2, 2016, ICSID confirmed that the first session with the Parties would be held by teleconference on December 2, 2016.

13. On November 18, 2016, Italy filed an "Objection for Manifest Lack of Legal Merits" pursuant to Rule 41(5) of the Arbitration Rules (the "**Objection**"). The Parties thereafter filed certain proposals with regard to the briefing schedule for the Objection, with the common principle that written submissions would not be completed until after the first session, and a one-day hearing for oral argument was requested.

14. On December 2, 2016, the Tribunal held a first session with the Parties by teleconference in accordance with ICSID Arbitration Rule 13(1), during which *inter alia* certain

agreements were reached regarding the briefing schedule for the Objection. Pursuant to such agreements, on December 23, 2016, Eskosol filed its "Response to Respondent's Article 41(5) Objection" (the "**Response**").

15. On January 4, 2017, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English, and that the place of proceeding would be Paris, France. Procedural Order No. 1 also sets out the agreed schedule for the jurisdictional and merits phase of the proceedings.

16. On January 13, 2017, Italy filed its "Reply on Rule 41(5) Objection" (the "**Reply**"). On February 1, 2017, Eskosol submitted its "Rejoinder to Respondent's Rule 41(5) Objections" (the "**Rejoinder**").

17. On February 8, 2017, the Tribunal held a hearing at the World Bank in Paris regarding the Objection. Attending the hearing were:

Tribunal Members

- Ms. Jean Kalicki, President of the Tribunal
- Prof. Dr. Guido Santiago Tawil, Arbitrator
- Prof. Brigitte Stern, Arbitrator

ICISD Secretariat

- Mr. Francisco Abriani, Secretary of the Tribunal

On behalf of the Claimant

- Mr. Ricardo E. Ugarte, Winston & Strawn
- Mr. Marco Pocci, Winston & Strawn
- Mr. Alejandro I. Garcia, Winston & Strawn
- Mr. Stefano Scotti, Winston & Strawn
- Ms. Janet Hyun Jeong Kim, Winston & Strawn
- Mr. Giuseppe Spagnolo, Spagnolo & Partners

On behalf of the Respondent

- Mr. Giacomo Aiello, Avvocatura Generale dello Stato
- Ms. Maria Chiara Malaguti, Ministerio degli Affari Esteri e della Cooperazione Internazionale (Consultant)

Court reporter

- Ms. Claire Hill

18. The Tribunal has reviewed the Parties' respective submissions carefully and in their entirety.

III. FACTUAL BACKGROUND

19. For purposes of the pending Rule 41(5) application, it is neither necessary nor appropriate for the Tribunal to make findings of fact. However, for relevant background, the Tribunal notes the following allegations of fact presented by the Parties.

A. The Underlying Dispute

20. According to the Claimant, Eskosol S.r.l. was established on December 21, 2009, by its shareholders, including a Belgian company Blusun S.A. ("**Blusun**") (which at the time held a 50% equity stake) and four Italian nationals, Messrs. Vittorio Sisto, Roberto Scognamiglio, Luigi Dante and Gilberto Brana (each of whom at the time held a 12.5% equity stake). Blusun in turn was owned by two individuals, Messrs. Jean-Pierre Lecorcier, a French citizen, and Michael Stein, a German citizen. Eskosol was established as a limited liability partnership (in Italian, "*Società a responsabilità limitada*" or "*S.r.l.*") with a corporate capital of €10,000.[2]

21. On December 17, 2010, the partners in Eskosol S.r.l. increased the company's capital to €7,500,000. Blusun increased its equity in the company to 80%, with Messrs. Sisto and Scognamiglio each retaining a 10% equity.[3] On December 29, 2010, Eskosol S.r.l. was transformed into an Italian joint stock company (in Italian, "*Società per Azioni*" or "*S.p.A.*")

[2] Request, ¶ 38.
[3] Ibid., ¶ 47; Exhibit C-2, pp. 3-4.

and registered with the Italian Business Register – Company Registration Office.[4] From December 2010 to the present, Blusun has remained the owner of 80% of Eskosol's shares.[5]

22. According to the Claimant, Eskosol was intended to be the company under whose umbrella a number of solar photovoltaic ("**PV**") power plants were to be planned, developed, built and connected to the national grid. It argues that, as the project company, Eskosol was to channel monies into any companies under its umbrella, enter into agreements with third parties, hire personnel and be a point of contact with Italian authorities.[6]

23. The Claimant alleges that it made a number of investments in relation to the development of a solar energy generation project in Italy comprising 120 solar PV power plants.[7] Eskosol allegedly devoted approximately €38.5 million to the planning, construction and operation of the plants.[8] Between May 18, 2010 and July 26, 2010, Eskosol acquired 100% shareholding in 12 special purpose vehicle companies (collectively, the "**SPVs**"), which resulted in the availability to Eskosol of all permits, rights, entitlements and infrastructure necessary for it to bring the plants into operation within a time frame of less than one-and-a-half year.[9]

24. After the acquisition of the SPVs, Eskosol started work on the installation of a 150 to 180 kilometer private network of medium voltage electrical cables that was to connect each of the Eskosol plants to two dedicated medium to high-voltage substations.[10] The substations were built by an entity named Società Interconnessioni Brindisi S.r.l. ("**SIB**").[11] On December 29, 2010, Eskosol entered into an engineering, construction and procurement agreement (the "**EPC Contract**") with Siemens S.p.A. ("**Siemens**") for the construction and commissioning of the plants.[12]

[4] Request, ¶¶ 5-6, 48; Exhibit C-2.
[5] Request, ¶ 6; Exhibit C-2, p. 3.
[6] Request, ¶ 39.
[7] Ibid., ¶ 40.
[8] Ibid., ¶¶ 2-3.
[9] Ibid., ¶ 40.
[10] Ibid., ¶ 44.
[11] Ibid., ¶ 46.
[12] Ibid., ¶ 52.

25. On March 3, 2011, the Italian government issued Legislative Decree No. 28 (the "**Romani Decree**").[13] The Romani Decree limited the scope of the FITs then in force to those plants that entered into operation within roughly two months from its date of publication, while establishing that those plants that entered into operation after that date but before March 28, 2012, would receive a reduced FIT under then unknown terms and conditions.[14] According to the Claimant, this measure resulted in the decision of financial investors to withdraw their support to the Eskosol project. The adoption of the Romani Decree also allegedly led to the suspension of work on the plants, thus making completion in accordance with the timing set out in the EPC Contract unfeasible.[15]

26. On May 5, 2011, Italy's Ministry of Economic Development approved "**Conto Energia IV**" (or the "**Fourth Energy Account**")[16] which reduced the FITs then in force.[17] According to the Claimant, due to these various developments, there was a risk that Eskosol would receive no FITs at all.[18]

27. The Claimant asserts that the Eskosol Project became economically unviable as a result of these measures, and Eskosol had no alternative but to abandon its project. It was unable to pay its debts and was declared insolvent and placed under receivership on November 12, 2013.[19] Eskosol's bankruptcy receiver is Mr. Teodoro Contardi,[20] who has the power to institute proceedings on behalf of Eskosol, as a matter of Italian law.[21]

B. The *Blusun* Case

28. On February 21, 2014, ICSID registered an arbitration against Italy brought by Blusun and Messrs. Lecorcier and Stein (the "***Blusun* case**" and the "***Blusun* claimants**," respectively).[22] The pleadings in the *Blusun* case have not been made available for this

[13] Ibid., ¶ 56.
[14] Ibid., ¶¶ 57(1) and 57(2).
[15] Ibid., ¶¶ 59-61 and 64.
[16] Published in the Italian Official Gazette on May 12, 2011. See Request, ¶ 63.
[17] Request, ¶ 63.
[18] Ibid., ¶ 64.
[19] Ibid., ¶¶ 9, 65-69; Exhibit C-2, p. 3.
[20] Request, ¶ 9; Exhibit C-2, p. 4.
[21] Request, ¶ 9; Exhibit C-5.
[22] Request, ¶ 112; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3.

Tribunal's review, but it appears undisputed that the case involved the *Blusun* claimants' investments in Italy through Eskosol, and challenged various measures including the two that are at issue in this case, the Romani Decree and the Fourth Energy Account.[23]

29. Eskosol asserts that the *Blusun* claimants initiated and litigated that case without consulting with Eskosol itself or with its bankruptcy receiver.[24] Eskosol further asserts that the *Blusun* claimants have not cooperated with Eskosol's insolvency proceedings.[25]

30. When Eskosol filed its Request in this case on December 9, 2015, it acknowledged the pendency of the *Blusun* case, but stated that "[t]he present claim is distinct and separate from that being pursued" by the *Blusun* claimants.[26] Eskosol asserts that it asked ICSID to consolidate this case with the *Blusun* case, but the request was denied.[27]

31. Subsequently, on June 21, 2016, Eskosol filed an application in the *Blusun* case under Arbitration Rule 37(2) for leave to file a written submission as a non-party. Eskosol explained that it had initiated this case against Italy on its own behalf, that this case "arise[s] from the same factual matrix and adverse measures that are at issue in the *Blusun* arbitration," and that the claims advanced by the *Blusun* claimants were of an "abusive nature."[28] Eskosol asserted that "the *Blusun* Claimants appear to be attempting to abuse these proceedings by seeking damages to which only Eskosol is entitled," which would cause prejudice to Eskosol, its creditors and its minority shareholders.[29] It affirmed that the *Blusun* claimants "have no authority to represent Eskosol's interests" in the *Blusun* case, but nonetheless were attempting to obtain compensation "for all of Eskosol's losses … without the intent to channel these moneys into Eskosol so Eskosol can reimburse any such payments to the Eskosol Creditors."[30]

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[23] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award of December 27, 2016 (excerpts), Exhibit RL-021, ¶¶ 2, 321, 331-343 (***Blusun award***).
[24] Rejoinder, ¶ 122.
[25] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Application Under ICSID Arbitration Rule 37(2) of June 21, 2016, Exhibit R-003, ¶ 9.
[26] Request, ¶ 112.
[27] Hearing Transcript, February 8, 2017, at 107:12-20.
[28] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Application Under ICSID Arbitration Rule 37(2) of June 21, 2016, Exhibit R-003, ¶ 1.
[29] Ibid., ¶ 5.
[30] Ibid., ¶¶ 17, 36.

32. By the time Eskosol's Rule 37(2) application was filed in the *Blusun* case, the written phase of that case apparently had concluded, as had the evidentiary hearing on jurisdiction and the merits except for closing arguments.[31] On June 30 and July 1, 2016, Italy and the *Blusun* claimants apparently each filed observations on Eskosol's request.[32] On July 8, 2016, the arbitral tribunal in that case, composed of Judge James Crawford AC (President), Dr. Stanimir Alexandrov (appointed by the *Blusun* claimants) and Prof. Pierre-Marie Dupuy (appointed by Italy) (the "***Blusun* tribunal**"), apparently denied Eskosol's Rule 37(2) application.[33] This Tribunal has not been provided with a copy of the procedural order explaining that decision, nor with the observations on the application filed by either Italy or the *Blusun* claimants.

33. The *Blusun* tribunal thereafter proceeded to issue its final award on December 27, 2016 (the "***Blusun* award**").[34] From the limited excerpts of the *Blusun* award that have been made available for this Tribunal's review,[35] it appears that the *Blusun* tribunal denied the claims on the merits, finding *inter alia* that the Romani Decree and the Fourth Energy Account (a) did not violate various provisions of the ECT, and (b) in any event were not the operative cause of the failure of the underlying project in Italy.[36]

IV. THE RULE 41(5) STANDARD

34. Although the Parties disagree on application of the Rule 41(5) standard to the circumstances of this case, they largely agree on the basic elements of a Rule 41(5) inquiry ("manifestly without legal merit"). This precludes the need for the Tribunal to engage in extensive analysis of that standard.

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[31] ICSID website, https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/14/3 (describing procedural steps in the *Blusun* case).
[32] Ibid.
[33] Ibid. (referencing Procedural Order No. 5).
[34] Reply, ¶ 15; Blusun award, Exhibit RL-021.
[35] Italy contends that it is restricted by confidentiality obligations agreed in the *Blusun* case from submitting the full Award to this Tribunal. During the hearing, Italy stated that its confidentiality obligations contained exceptions permitting use of material if necessary for Italy's defense, on which basis it selected excerpts as "narrowly as needed" for submission at this stage of this case. Hearing Transcript, February 8, 2017, 134:16-21. Italy also stated that it would be permitted to submit the full award if this Tribunal ordered it to do so. Hearing Transcript, February 8, 2017, 134:5-6.
[36] Blusun award, Exhibit RL-021, ¶¶ 343, 394.

35. First, the Parties agree that Rule 41(5) pertains only to legal defects, including those involving either jurisdiction or the merits, but not to factual defects.[37] This does not mean that factual *premises* of claims may not be acknowledged in order to understand the essence of the legal claim asserted. Italy emphasizes that "the fact that a legal impediment is raised does not mean that no discussion of facts could be required,"[38] and relies on the decision in *Trans-Global v. Jordan* for the proposition that "it is rarely possible to assess the legal merits of any claim without also examining the factual premise upon which that claim is advanced."[39] Eskosol agrees that some discussion of facts may take place, but emphasizes that it should not be necessary to conduct an "in-depth inquiry into the facts of a case" in order to appreciate the legal defect,[40] and that "a significant factual inquiry is inappropriate under Rule 41(5)."[41]

36. In any event, the Parties agree that the Tribunal at this stage should not engage in any assessment of *disputed* facts. Eskosol contends that for Rule 41(5) purposes, "the facts as alleged by the claimant are taken at face value unless they are frivolous,"[42] and that "preliminary objections that require the tribunal to determine the contested factual issues, fall outside of the scope of this provision."[43] Italy appears to accept this proposition, as it asserts that "[a]ll impediments raised by Italy are legal in nature, not factual,"[44] and that

[37] Objection, ¶¶15-16; Response, ¶¶ 9, 11; Reply, ¶ 7.
[38] Reply, ¶ 10.
[39] Ibid., ¶ 11 (quoting *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, Exhibit CL-003, ¶ 97 (***Trans-Global v. Jordan***)).
[40] Response, ¶ 8 (quoting the *Practice Notes for Respondents in ICSID Arbitration*, ICSID (2015)).
[41] Rejoinder, ¶ 12.
[42] Ibid., ¶ 15 (citing *Trans-Global v. Jordan*, Exhibit CL-003, ¶ 105).
[43] Response, ¶ 11. Eskosol relies on the drafting history of Rule 41(5) as well as decisions rendered with respect to Rule 41(5) in several ICSID cases. *See* Response, ¶ 11 (citing Lars Markert, "Summary Dismissal of ICSID Proceedings," (2016) 31 ICSID Review 690, 702, Exhibit CL-22, and ICSID, Suggested Changes to the ICSID Rules and Regulations (2005), Exhibit CL-21), and Response, ¶ 13 (citing *PNG Sustainable Development Program Ltd v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Respondent's Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 28 October 2014, Exhibit CL-002, ¶ 93 (***PNG v. Papua New Guinea***); *MOL Hungarian Oil and Gas Company Plc v. Croatia*, ICSID Case No. ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 2 December 2014, Exhibit CL-015, ¶ 48 (***MOL v. Croatia***); *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent's Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009, Exhibit RL-002, ¶ 71 (***Brandes v. Venezuela***); and *Álvarez y Marín Corporación S.A. and others v. Panama*, ICSID Case No. ARB/15/14, Decision on Respondent's Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 4 April 2016, Exhibit CL-018, ¶ 96 (***Alvarez y Marín v. Panama***)).
[44] Reply, ¶ 9.

the factual predicates for its objections are all either undisputed,[45] or "come from the exhibits submitted by the Claimant with the Request for Arbitration"[46] or from excerpts provided from the *Blusun* award.[47] In its view, therefore, its Rule 41(5) objections "do[] not require any in-depth inquiry into the facts of the case."[48]

37. Second, the Parties agree that in order to be "manifestly" without legal merit, claims must be "plainly without merit" as a matter of law,[49] and that the burden to demonstrate this lies on Italy as the Rule 41(5) applicant.[50] Italy uses the additional formulation of "clearly and obviously" to construe the word "manifest,"[51] and Eskosol refers to tribunal decisions concluding that the defect must be "obvious and plain."[52] For purposes of this case the Tribunal sees no need to distinguish among the formulations of "plain," "clear," and "obvious," which all recognize that the "manifest" standard requires a very high degree of clarity, in the view of a tribunal, that the claims as presented cannot succeed as a matter of law.

38. The Parties do present different visions of the extent of analysis that may be appropriate for a tribunal to reach its decision that claims are manifestly without legal merit.

39. Italy contends that "although … the respondent must establish its objection clearly and obviously, the exercise to decide upon the matter might require some level of

[45] Ibid., ¶¶ 13-14 (citing as "undisputed" the fact of Eskosol's bankruptcy, two provisions of the Italian Bankruptcy Law regarding the powers of the receiver and the corresponding lack of powers of the bankrupt entity, and that Blusun established Eskosol "as the Italian vehicle" for its project and remained at all times its sole controlling shareholder).
[46] Ibid., ¶ 14 (referencing such exhibits as providing all the information needed "to sustain that Eskosol lacks the material qualities as an investor under the ECT").
[47] Ibid., ¶ 15.
[48] Ibid., ¶ 16.
[49] Response, subhead II.C; Reply, ¶ 7.
[50] Reply, ¶ 20 ("a manifest lack of legal merits means that the respondent must establish its objection clearly and obviously"); Rejoinder, ¶ 16 ("it is Italy that bears the burden of proving it is entitled to relief under Rule 41(5)."
[51] Reply, ¶ 20.
[52] Response, ¶ 17. The Claimant relies, in particular, on the following decisions: *Trans-Global v. Jordan*, Exhibit CL-003, ¶¶ 84 and 88; *Global Trading v. Ukraine*, Exhibit RL-003, ¶ 35; *Brandes v. Venezuela*, Exhibit RL-002, ¶¶ 62 and 63; *Elsamex, S.A. v. Honduras*, ICSID Case No. ARB/09/4, Decision on Elsamex S.A.'s Preliminary Objections, 7 January 2014, Exhibit CL-005, ¶ 129 (***Elsamex v. Mexico***); *RSM Production Corp. and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, Exhibit RL-004, ¶ 6.1.2 (***RSM v. Grenada***); *Alvarez y Marín v. Panama*, Exhibit CL-018, ¶¶ 79-80; and *PNG v. Papua New Guinea*, Exhibit CL-002, ¶ 88. See also Rejoinder, ¶ 13.

sophistication, as it is often the case in investment proceedings."[53] In making this statement relating to the meaning of "manifestly," Italy relies on the following passage from the decision in *Trans-Global v. Jordan*:

> The Tribunal considers that these legal materials confirm that the ordinary meaning of the word requires the respondent to establish its objection clearly and obviously, with relative ease and despatch. The standard is thus set high. Given the nature of investment disputes generally, the Tribunal nonetheless recognises that this exercise may not always be simple, requiring (as in this case) successive rounds of written and oral submissions by the parties, together with questions addressed by the tribunal to those parties. The exercise may thus be complicated; but it should never be difficult.[54]

Italy further relies on the decision rendered in *Global Trading v. Ukraine*, in which it claims the tribunal "discussed both factual evidence and complex legal issues" to reach a conclusion on the legal merits of the claim.[55]

40. By contrast, Eskosol emphasizes that precisely because the legal defect must be "obvious or plain *on its face*," the tribunal "should not need to undertake a significant effort to conclude that such a defect exists."[56] It argues that "a number of tribunals have concluded that a Rule 41(5) objection should be dismissed if deciding the challenge would require resolving novel, complex or difficult legal issues."[57] Eskosol relies on the following passage from *PNG v. Papua New Guinea*:

> In the opinion of the Tribunal, a case is not clearly and unequivocally unmeritorious if the Claimant has a tenable arguable case. Rule 41(5) is not intended to resolve novel, difficult or disputed legal issues, but instead only

[53] Reply, ¶ 20.
[54] *Trans-Global v. Jordan*, Exhibit CL-003, ¶ 88.
[55] Reply, ¶ 22, citing *Global Trading Resource Corp. and Globex Int'l, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, Exhibit RL-003, ¶ 56 (***Global Trading v. Ukraine***).
[56] Response, ¶ 17 (emphasis added). Eskosol relies, in particular, on the following decisions: *Trans-Global v. Jordan*, Exhibit CL-003, ¶ 84 and 88; *Global Trading v. Ukraine*, Exhibit RL-003, ¶ 35; *Brandes v. Venezuela*, Exhibit RL-002, ¶¶ 62 and 63; *Elsamex, S.A. v. Honduras*, ICSID Case No. ARB/09/4, Decision on Elsamex S.A.'s Preliminary Objections, 7 January 2014, Exhibit CL-005, ¶ 129 (***Elsamex v. Mexico***); *RSM Production Corp. and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, Exhibit RL-004, ¶ 6.1.2 (***RSM v. Grenada***); *Alvarez y Marín v. Panama*, Exhibit CL-018, ¶¶ 79-80; and *PNG v. Papua New Guinea*, Exhibit CL-002, ¶ 88. See also Rejoinder, ¶ 13.
[57] Response, ¶ 19.

to apply undisputed or genuinely indisputable rules of law to uncontested facts.[58]

41. The Tribunal accepts both propositions, which it does not believe are in tension with one another. Investment proceedings do involve a level of sophistication and the fact that the parties may consider it appropriate to brief legal objections at some length, in order to ensure an appropriate context for assessment, does not in and of itself render the objections too complex for resolution under the "manifest" standard. At the same time, the Rule 41(5) procedure is not intended, nor should it be used, as the mechanism to address complicated, difficult or unsettled issues of law.

V. ITALY'S FOUR RULE 41(5) OBJECTIONS

42. With this (largely shared) understanding of standards applicable to a Rule 41(5) analysis, the Tribunal turns below to Italy's objections.

43. Italy presents four separate grounds for its application that the Tribunal dismiss Eskosol's claims for manifest lack of legal merit:

a. Eskosol cannot be considered "a national of another Contracting State" under Article 25(2)(b) of the ICSID Convention, because on the date it submitted its request for arbitration, it no longer was under "foreign control" by virtue of Blusun's majority shareholding, but rather was under the control of a bankruptcy receiver in Italy and an Italian bankruptcy court;[59]

b. Eskosol does not qualify as an "investor" under either the ECT or the ICSID Convention, because in terms of its "material qualities," it was no more than the instrumentality in Italy for Blusun and Blusun's own shareholders;[60]

[58] *PNG v. Papua New Guinea*, Exhibit CL-002, ¶ 88-89. Eskosol contends that this standard explains why very few Rule 41(5) applications have succeeded. It argues that it is appropriate and necessary to apply a high standard at this juncture, because an unsuccessful Rule 41(5) applicant will have the opportunity to renew its objections as a later stage of the proceeding, while a successful Rule 41(5) application would deprive a claimant of its claim without a full hearing and opportunity to be heard. Response, ¶ 10.
[59] Objection, ¶ 9.
[60] Ibid., ¶ 10.

c. Under Article 26(3)(b)(i) and Annex 1D of the ECT, Italy declined to consent to arbitration of a dispute previously submitted to another forum, and this limitation on consent bars jurisdiction here in light of the prior initiation of *Blusun* case, which Italy describes as a "parallel proceeding[] with perfect identity of object and cause";[61] and

d. Public international law principles prohibit the prosecution of multiple claims in relation to the same prejudice, and preclude the opening of a new proceeding on a dispute that previously was submitted to another international arbitration tribunal (*lis pendens*),[62] or actually was decided by such a tribunal (*res judicata* or collateral estoppel).[63]

44. Eskosol argues that none of Italy's objections satisfy the requirements of Rule 41(5), because they "demand a significant factual inquiry" and "raise novel or complex legal issues." Eskosol also asserts that more fundamentally, the application should fail because the objections "lack merit under any standard," not only the "extremely onerous" standard set forth in Rule 41(5).[64]

A. Eskosol's Nationality and the Notion of "Foreign Control" Under Article 25(2)(b) of the ICSID Convention

1. Italy's position

45. Italy starts from the proposition that pursuant to Article 25(1) of the ICSID Convention, access to ICSID arbitration is available for investors that are a "national of another Contracting State," meaning a State *other* than the host State.[65] Italy also notes that Article 25(2)(a) of the ICSID Convention expressly forbids individual investors from bringing a claim against their own State.[66]

46. Italy acknowledges that Article 25(2)(b) of the ICSID Convention extends access to arbitration, in certain circumstances, to local companies established in the host State.

[61] Ibid., ¶ 11.
[62] Ibid., ¶ 13.
[63] Reply, ¶ 53.
[64] Response, ¶ 4.
[65] Objection, ¶¶ 22-23.
[66] Ibid., ¶ 26.

Article 25(2)(b) provides that for purposes of Article 25(1), a "[n]ational of another Contracting State" means:

> any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

Italy construes this provision as allowing "a foreign investor and the host State to agree that the local company, established in the host state by a foreign investor in order to make the investment, may be considered, because of foreign control, as a national of another Contracting State, so that the local entity may have recourse to available ICSID arbitration."[67] In Italy's view, Article 25(2)(b) constitutes an exception that allows a departure from the principle of incorporation or *siège social* in favor of one based on foreign control.[68]

47. Relying on the decision on jurisdiction rendered in *Autopista Concesionada de Venezuela, C.A. v. Republic of Venezuela*, Italy asserts that Article 25(2)(b) imposes two conditions, both of which must be satisfied autonomously:

    i. that "[t]he parties have agreed to treat the said company as a national of another Contracting State for the purposes of [the] Convention"; and

    ii. that "[t]he said company is subject to foreign control".[69]

48. According to Italy, both conditions must be assessed at the date of consent to arbitration.[70]

[67] Ibid., ¶ 28. See also ¶ 27.
[68] Ibid., ¶ 28.
[69] Ibid., ¶ 31. *Autopista Concesionada de Venezuela, C.A. v. Republic of Venezuela* (ICSID Case No. ARB/00/5), Decision on Jurisdiction, 27 September 2001, Exhibit RL-008, ¶¶ 103-104 ("***Autopista v. Venezuela***").
[70] Objection, ¶¶ 62 *et seq*.

a. The agreement of the parties

49. Italy notes that in this case, the only agreement relevant to Eskosol's nationality is the ECT, as "Italy did not sign any agreement, neither with Eskosol nor with Blusun," to treat Eskosol as a national of another Contracting State.[71] Italy emphasizes that there is no obligation under Italian law to establish a domestic company to benefit from the incentives for photovoltaic energy production, and that Blusun and Messrs. Lecorcier and Stein "decided to proceed that way for business reasons" rather than from any requirements imposed by Italy.[72]

50. Italy argues that like the ICSID Convention, the ECT was intended solely for the protection of foreign investors, not nationals of the host State,[73] and accordingly "a domestic company is protected under the ECT only as far as its protection amounts in fact to that of the foreign investor."[74] Italy suggests that Article 26(7) of the ECT should be read in this context.[75] Article 26(7) provides as follows:

> An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State."

51. Italy contends that by virtue of this passage, it "only agreed to accept that a locally incorporated company be admitted to an ICSID arbitration as a means to protect the interests of a foreign investor, not to protect those of national investors."[76] In particular, it argues, Article 26(7) cannot be construed as agreeing to allow a locally incorporated

[71] Ibid., ¶ 33.
[72] Ibid., ¶ 33.
[73] Ibid., ¶¶ 35-36, citing ECT Article 26(1).
[74] Ibid., ¶ 38.
[75] Ibid., ¶ 39.
[76] Ibid., ¶ 41. Italy adds that "Article 26(7) of the ECT establishes an exception for those cases where a foreign investor cannot otherwise receive protection, and to avoid that changes in legal status (for instance because the company has been nationalized or expropriated by the State, and the investor contest[s] the very same measure) jeopardize a consistent application of Article 26."

company the right to access ICSID arbitration after it has entered into receivership, because from that date forward, the local entity effectively is under the control of its receiver and the Italian bankruptcy courts, not of its shareholders.

b. The requirement of "foreign control"

52. Italy argues that even if Article 26(7) of the ECT were sufficient to establish an agreement by Italy with respect to foreign control, it still remains necessary to verify independently that foreign control exists, because an agreement between the parties cannot be used to contravene the purpose for which the ICSID Convention was intended.[77] With respect to the requirement of an objective inquiry into foreign control,[78] Italy relies on *Vacuum Salt v. Ghana*[79] and *National Gas v. Egypt*.[80] As the *National Gas* tribunal explained:

> The objective test is raised by the words "because of foreign control"; and it is not met simply by meeting the subjective test: these two tests are not the same. As was decided in *Vacuum Salt*, "[...] the parties' agreement to treat Claimant as a foreign national 'because of foreign control' does not *ipso jure* confer jurisdiction. The reference in Article 25(2)(b) to 'foreign control' necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so […]"[§ 36]. … Accordingly, the Tribunal decides that this objective test is not satisfied by mere agreement of the Parties in this case: "foreign control" must be established objectively.

53. Italy acknowledges that the ICSID Convention itself contains no definition of "foreign control," and that the *travaux préparatoires* of the Convention suggest an intent to provide considerable discretion in this respect to the agreement of the parties. However, Italy quotes this passage from *Vacuum Salt* for the proposition that such an agreement applies only if it is based on reasonable criteria:

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[77] Ibid., ¶¶ 42-44.
[78] Ibid., ¶ 45.
[79] Ibid., ¶¶ 42-43 (quoting *Vacuum Salt Products Ltd. V. Government of the Republic of Ghana* (ICSID Case No. ARB/92/1), Award, 16 February 1994, RL-010, ¶¶ 36-37 (***Vacuum Salt v. Ghana***) for the proposition that "in addressing the present claim of jurisdiction grounded on the second clause of Article 25(2)(b) it is the task of the Tribunal thus to determine whether or not the Convention limit has been exceeded. In undertaking this task the Tribunal first must ascertain where that Convention limit lies.").
[80] Objection, ¶ 45 (quoting *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014, Exhibit RL-009, ¶ 133 (***National Gas v. Egypt***).

> As the consent of the parties is in broad principle the "cornerstone of the jurisdiction of the Centre" … it is accorded considerable respect and is not lightly to be found to have been ineffective. Thus the acknowledged authority on the Convention states in specific regard to Article 25(2)(b) that "any stipulation … based on a reasonable criterion should be accepted" and that jurisdiction should be declined "only if … to do so would permit parties to use the Convention for purposes for which it was clearly not intended" […] Then it is "only … where such foreign control cannot be postulated on the facts on the basis of the application of any reasonable criterion that a tribunal … would not [accept jurisdiction], because in such a case the parties would purport to use the Convention for purposes for which it was not intended."[81]

54. Italy observes that "Article 26(7) ECT refers to '*foreign control*', and not to '*majority of shares*' or '*majority of capital*'," as do certain Italian BITs that Eskosol invokes as guidance.[82] Moreover, while Article 26 itself contains no definition of "control," Italy observes that the ECT parties agreed to the following "Understanding" regarding the meaning of "control" for purposes of the definition of "Investment" under Article 1:

> UNDERSTANDING with respect to Article 1(6)
>
> For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's
>
> (a) financial interest, including equity interest, in the Investment;
>
> (b) ability to exercise substantial influence over the management and operation of the Investment; and
>
> (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.[83]

55. In Italy's view, this Understanding clearly states that "what matters is control *in fact,* to be determined after an examination of the actual circumstances in each situation," and that "substantial influence over the management or operation of the entity is of essence."[84] Italy

[81] Objection, ¶¶ 42-43 (quoting *Vacuum Salt v. Ghana,* RL-010, ¶¶ 36-37) (citations omitted).
[82] Reply, ¶ 32.
[83] Objection, ¶ 46 (quoting Final Act of the European Energy Charter Conference, Section IV ("Understandings"), ¶ 3 ("With respect to Article 1(6)")); Reply, ¶ 31.
[84] Objection, ¶ 47.

suggests that the same type of focus on *actual* control, and not simply control presumed from shareholder status, should govern the objective assessment of foreign control required by the ICSID Convention.[85] In Italy's view, "whereas majority shareholding might be a significant indicator of control, this is precisely because management control in that case is presumed, unless other elements lead to a different conclusion."[86] Here, as discussed further below, Italy contends that Eskosol's bankruptcy filing is they key element that dictates the result of an "actual control" analysis.

c. The date on which foreign control must be established

56. Italy appears to acknowledge that the language of Article 26(7) of the ECT distinguishes, for purposes of access to arbitration by locally incorporated companies, between the date on which the nationality of the company must be established ("on the date of the consent in writing") and that on which foreign control must be shown ("before a dispute between it and that Contracting Party arises"). It contends, however, that only *one* date is relevant for purposes of the separate (objective) inquiry into foreign control under Article 25(2)(b) of the ICSID Convention: "[i]rrespective of the language of the agreement between the parties, the objective conditions of foreign control under Article 25(2)(b) ICSID must exist *at the time of consent*."[87] Italy relies on the following statement by Professor Schreuer:

> [F]oreign control must have existed at the time of the agreement. Since the agreement to treat the local company as a national of another Contracting State is closely linked to consent between the parties … the foreign control must have existed at the time of consent.[88]

57. Italy's position is that "ICSID lacks competence" over claims brought by companies that, on the date of consent, are effectively controlled by nationals of the State against which the claim is brought.[89] In making this argument, Italy relies on the decisions and awards

[85] Ibid., ¶ 48 (quoting *National Gas v. Egypt*, Exhibit RL-009, ¶¶ 135-136, regarding the advantages of a "realistic look at the true controllers" and a determination where control is "actually" exercised).
[86] Reply, ¶ 31.
[87] Objection, ¶ 65 (emphasis added).
[88] Ibid., ¶ 66 (quoting C. Schreuer *et al.*, *The ICSID Convention: A Commentary* (2d ed. 2009), Exhibit RL-017, p. 329); Response, ¶ 4.
[89] Objection, ¶ 63.

rendered in *SOABI v. Senegal*,[90] *Vacuum Salt v. Ghana*,[91] and *National Gas v. Egypt*.[92]

58. Italy contends that the date on which the Parties consented to ICSID arbitration is the date on which Eskosol submitted the Request, *i.e.* December 9, 2015.[93] As discussed below, it argues that on this date Eskosol already was under receivership, and consequently no longer was subject to foreign control.[94]

d. The facts of foreign control in this case

59. Italy contends that Eskosol has not been controlled by Blusun "since at least November 2013," when it was declared bankrupt,[95] because since that date as a matter of Italian law it has been under the control of an Italian judge and an Italian receiver, both appointed by an Italian bankruptcy court.[96] Italy explains that pursuant to Articles 31 and 42 of the Bankruptcy Law, "[t]he Court order [that starts the bankruptcy proceeding] deprives the debtor of the right to manage his business and to dispose of his assets," and therefore from that moment, "[c]ustody and management of assets become the duty of the receiver, who does it under the supervision of the presiding judge and to the satisfaction of the creditors."[97] In Italy's view, what matters is that because of bankruptcy, the controlling

[90] Ibid., ¶ 63 (quoting *Société Ouest Africaine des Bétons Industriels (SOABI) v. Republic of Senegal*, ICSID Case No. ARB/82/1, Decision on Jurisdiction, 1 August 1984, Exhibit RL-016, ¶ 29 (***SOABI v. Senegal***): "The Tribunal observes that status as a 'national of another Contracting State' is to be established, in the case of a juridical person, *with reference to the date on which the parties agreed to submit the dispute to the Centre*") (emphasis added by Italy).
[91] Objection, ¶ 64 (quoting *Vacuum Salt v. Ghana*, Exhibit RL-010, ¶ 35: "the Tribunal's decision on the matter before it ultimately must turn on *whether or not 'foreign control' as contemplated by the second clause of Article 25(2) (b) existed as a matter of fact on the date of consent*") (emphasis added by Italy).
[92] Objection, ¶¶ 67-69 (quoting *National Gas v. Egypt*, Exhibit RL-009, ¶¶ 132-133).
[93] Objection, ¶ 62.
[94] Ibid., ¶ 70.
[95] Ibid., ¶¶ 49-51.
[96] Ibid., ¶¶ 52-53; Reply, ¶ 26.
[97] Objection, ¶¶ 54-56. Italy quotes the relevant Articles as follows:

> Article 31: The receiver has the administration of the bankruptcy estate and performs all the operations of the procedure under the supervision of the Presiding Judge and the Creditors' Committee, within the functions assigned to it.
> Article 42: The bankruptcy order from the time it is issued *deprives the bankrupt of the right to administer and dispose of the assets in his possession* at the date of the decree (emphasis added by Italy).

shareholder is deprived of its management powers (both "regular" and "in relation to existing assets") and consequently has no actual control of the company.[98]

60. Italy further argues that pursuant to Article 146 of the Bankruptcy Law, shareholders lose the power to bring actions on behalf of the company, which in the event of bankruptcy can be initiated only by the receiver, subject to authorization from the judge and after hearing from the creditors' committee.[99] In this case, Italy points out that the filing of the Request was authorized by Mr. Contardi, Eskosol's receiver.[100]

61. On this basis, Italy contends that the ECT's control inquiry can lead to only one conclusion, because "power to manage a company is inherent to the concept of control under the ECT."[101] Because Eskosol's shareholders no longer exercised actual control of the company by the date of consent to ICSID, Eskosol cannot invoke the foreign nationality of such shareholders to establish jurisdiction pursuant to Article 25(2)(b) of the ICSID Convention.[102]

62. In Italy's view, this conclusion is appropriate to be drawn at the Rule 41(5) stage, because (a) the date of Eskosol's bankruptcy and the contents of Articles 31 and 42 of the Italian Bankruptcy Law are undisputed;[103] (b) these are the only facts that are relevant to Eskosol's nationality for jurisdictional purposes, as all other issues are a matter of law regarding interpretation of Article 25 of the ICSID Convention and Article 26 of the ECT;[104] and (c) its objection requires only "a straightforward interpretation of treaty provisions and their relationships under the general rules of international law on the law of treaties, as well as of general principles of law," and the Tribunal can make a decision with the instruments at its disposal at this stage of the procedure.[105]

[98] Reply, ¶ 30.
[99] Objection, ¶ 57 (referencing Bankruptcy Law, Exhibit RL-15, Article 146).
[100] Objection, ¶ 57; see also Request, ¶ 9.
[101] Reply, footnote 24.
[102] Objection, ¶ 58.
[103] Reply, ¶¶ 13-14.
[104] Ibid., ¶ 13.
[105] Reply, ¶ 23.

2. Eskosol's position

63. Eskosol argues that it "has standing *ratione personae* within the terms of Article 25(2)(b) of the ICSID Convention as a result of the application of Article 26(7) of the ECT."[106] In its view, under Article 26(7) of the ECT "an ECT Member State consents to an arbitration filed by its own nationals when the following requirements are met":

> (a) The claimant-investor is a juridical person;
>
> (b) The claimant-investor had the nationality of the respondent State at the time of giving consent in writing to ICSID arbitration; and
>
> (c) Before its dispute with the respondent State arose, the claimant-investor was controlled by Investors of another Contracting Party.[107]

64. Eskosol asserts that there is no dispute that requirements (a) and (b) are met in this case. Regarding the third requirement, it contends that Italy's argument that Eskosol was under Italian control from November 2013 through the time of consent is meritless for a number of reasons.[108]

65. First, Eskosol argues that this objection "cannot be deemed to be *manifestly* without legal merit, when assessment of [it] requires this Tribunal to delve into complex issues of local and international law."[109] Indeed, Eskosol argues that Italy's objection invites the Tribunal to evaluate (i) Italian bankruptcy law, and (ii) whether this law "causes Eskosol to lose its status as a 'foreign controlled' entity" under Article 26(7) of the ECT.[110]

66. Eskosol further argues as follows:

i. "the requisite agreement that Eskosol shall be treated as a national of another Contracting State on the basis of foreign control exists by virtue of Article 26(7) of the ECT";[111]

[106] Response, ¶ 23.
[107] Ibid., ¶ 27.
[108] Ibid., ¶¶ 28-29.
[109] Ibid., ¶ 30.
[110] Ibid., ¶ 30; Rejoinder, ¶¶ 69-73.
[111] Response, ¶ 25.

ii. ownership is a valid criterion to assess the existence of "foreign control";[112] and

iii. the relevant date to establish consent is the date when the dispute arose.[113]

67. Eskosol's arguments are summarized in turn below.

a. The agreement of the parties

68. Eskosol contends that "enabling provisions just like Article 26(7) of the ECT have been deemed by a plethora of international tribunals to constitute an 'agreement' as to foreign control within the meaning of Article 25(2)(b) of the ICSID Convention."[114] Eskosol relies on a series of decisions including *Levy v. Peru*, *Burimi v. Albania*, *Aguas del Tunari v. Bolivia*, *Wena v. Egypt* and *Teinver v. Argentina*.[115]

69. Eskosol notes that Article 26(7) expressly provides that when the claimant-investor satisfies its requirements, it shall be treated as a national of another Contracting State for the purposes of Article 25(2)(b) of the ICSID Convention.[116] Eskosol highlights that Article 26(7) of the ECT thus includes agreement as to *when* foreign control must exist to satisfy Article 25(2)(b) of the ICSID Convention.[117] Eskosol argues that this agreement should be given force, and that in arguing to the contrary – that the ICSID Convention imposes different or additional standards for when foreign control must be established – Italy essentially is seeking to rewrite a provision to which it freely agreed when ratifying the ECT.[118]

[112] Ibid., ¶¶ 44-49.
[113] Ibid., ¶¶ 31 and 34-43.
[114] Ibid., ¶ 33.
[115] Ibid., ¶ 33 and Rejoinder, ¶¶ 34-26 (citing *Levy v. Peru*, Exhibit CL-024, ¶ 172; *Burimi v. Albania*, Exhibit CL-025, ¶¶ 109-115; *Aguas del Tunari v. Peru*, Exhibit CL-026, ¶ 285; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Summary of Minutes of Session of the Tribunal on 25 May 1999, Decision on Jurisdiction, 25 May 1999, Exhibit CL-027, p. 888 (***Wena v. Egypt***); and *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, Exhibit CL-029, ¶ 225 (***Teinver v. Argentina***)).
[116] Rejoinder, ¶¶ 26 and 30; Response, ¶ 31.
[117] Rejoinder, ¶¶ 26 and 30.
[118] Response, ¶ 32.

b. The requirement of "foreign control"

70. Eskosol contends that whatever the date on which foreign control is assessed (as of when the dispute arose or at the time of consent), Eskosol would satisfy the requirement as a straightforward consequence of Blusun's continued majority shareholding,[119] because ownership is a valid criterion for demonstrating foreign control.[120] It argues that in the absence of a definition of "foreign control" in either Article 26(7) of the ECT or Article 25(2)(b) of the ICSID Convention, "the determination as to whether foreign control exists depends on the circumstances of each case."[121] Eskosol notes, however, that "it is clear from the *travaux préparatoires* that the ICSID Convention does not require a foreign entity to exert 'effective control' for 'foreign control' to be found."[122]

71. Eskosol rejects Italy's proposal to use "a test that focuses on the 'management' of the company in the ordinary business sense, when the company is in receivership."[123] It asserts that the "management" of a company's liquidation can hardly equate to the management of a company in regular operation.[124] In its view, "a receiver administers or manages the bankruptcy *estate* rather than the company itself," and "[a]s the company has ceased to trade, there is no management of the company as such."[125] Eskosol contends that "[w]hen all is about monetising assets, all that is relevant in the company is represented by the entitlement that the owners of the company have to receive what remains after debts are paid," and therefore "the only relevant criterion to determine control of the bankrupt company can be majority ownership."[126]

72. Eskosol asserts that "a bankruptcy order under Italian law does not affect a company's ownership. Blusun remains a majority shareholder of Eskosol, and shareholders in an S.p.A. continue to enjoy significant prerogatives," including "the right to bring an end to

[119] Ibid., ¶ 49.
[120] Ibid., ¶ 44.
[121] Ibid., ¶ 44.
[122] Rejoinder, ¶ 52 (citing *Autopista v. Venezuela*, Exhibit RL-008, ¶¶ 112-113).
[123] Response, ¶ 45.
[124] Ibid., ¶ 45; Rejoinder, ¶ 57.
[125] Rejoinder, ¶ 57.
[126] Ibid., ¶ 59.

Eskosol's bankruptcy proceedings by concluding an agreement with Eskosol's creditors and to oppose Eskosol commencing these proceedings."[127]

73. Eskosol also argues that shareholding is a reasonable criterion for assessing foreign control. According to Eskosol, Italy "widely accepts majority ownership as the sole criterion for determining control of a company for the purposes of Article 25(2)(b) of the ICSID Convention in its own investment treaty practice," including in the BITs concluded with Albania, Barbados, Indonesia, and Jamaica.[128] It notes that the tribunal in *Levy v. Peru* also concluded that majority shareholding satisfies the requirement of control under Article 25(2)(b).[129]

74. Moreover, Eskosol argues, allowing it to have access to ICSID arbitration "is perfectly consistent with Article 25(2)(b) of the ICSID Convention and Article 26(7) of the ECT."[130] To the contrary, it asserts, Italy's position regarding the interpretation of foreign control is inconsistent with the purpose of the ICSID Convention for the following reasons:

- the present dispute is not domestic in nature. The claim belongs to Eskosol as a company (and not to the receiver or the bankruptcy judge), Eskosol's cause of action arises precisely because of its foreign ownership and control,[131] and it would be "absurd for Eskosol's standing here to rise or fall depending on the nationality of officers (receiver and supervisory judge) appointed to oversee its bankruptcy";[132]

- the purpose of the ICSID Convention would be fulfilled by the Tribunal upholding jurisdiction. Italy already has received a significant investment because of Eskosol's project and should not be permitted to ignore the rights granted under Article 26(7) of

[127] Response, ¶ 46; see also Rejoinder, ¶¶ 59, 63-65 (citing Articles 124 and 36 of the Italian Bankruptcy Law).
[128] Response, ¶ 47; Rejoinder, ¶¶ 39 and 67 (citing Albania-Italy BIT, Exhibit CL-031, Article 8(2)(c); *Burimi v. Albania*, Exhibit CL-25, ¶ 114; Barbados-Italy BIT, Exhibit CL-032, Article 9(6); Indonesia-Italy BIT, Exhibit CL-033, Article 10(3); and Italy-Jamaica BIT, Exhibit CL-034, Article 9(7).)
[129] Response, ¶ 48; Rejoinder, ¶ 35 (citing *Levy v. Peru*, Exhibit CL-024, ¶ 171).
[130] Response, ¶ 50.
[131] Rejoinder, ¶ 43.
[132] Ibid., ¶ 50.

the ECT, which according to Eskosol are granted to it as a company, independently from the rights of its shareholders;[133] and

- it would be aberrant for Italy to be able to shut the door on Eskosol's claim on the basis of a bankruptcy that Eskosol alleges ultimately was caused by Italy.[134] Italy's theory that bankruptcy divests shareholders of control for purposes of ICSID jurisdiction would provide "a powerful incentive to cause and procure […] the bankruptcy of every local company that meets the requirements of Article 26(7) of the ECT before it commences an ICSID claim against it."[135] Moreover, even if certain qualifying shareholders in a local company could seek recovery under their own names for reduction in value of their shareholding, a rule that prohibits the local company from suing in its own name, on account of its bankruptcy, would enable Italy "to secure a windfall by not having to pay compensation to non-qualifying minority shareholders."[136]

75. Finally, Eskosol adds that to the extent Italy's position on the date and content of a foreign control test would result in Eskosol's having no remedy whatsoever under the ECT – "thus, depriving its *substantive* rights of all content" – then "Eskosol would seek to rely on the most-favoured-nation (MFN) clause contained in Article 10(7) of the ECT by reference to the Italy-Barbados BIT, in particular its Article 9(6)."[137] Article 9(6) of that BIT provides consent for ICSID access by local companies "in which before such a dispute arises the majority of shares [are] owned by nationals" of the other State.[138] Under this provision, Eskosol asserts, "it is plain that an Italian company under bankruptcy, but majority owned by Barbadian nationals at the time of consent to arbitration will be afforded access to ICSID and, in Italy's (apparent) view, access to the substantive protections in the BIT."[139]

[133] Ibid., ¶ 44.
[134] Ibid., ¶ 45.
[135] Ibid., ¶ 46.
[136] Ibid., ¶ 46.
[137] Ibid., ¶ 68.
[138] Ibid., note 59 (quoting Barbados-Italy BIT, Art. 9(6), Exhibit CL-032).
[139] Rejoinder, ¶ 68.

c. The date on which foreign control must be established

76. In any event, Eskosol contends, Italy's Rule 41(5) objection rests on a mistaken view of when foreign control must be established. In Eskosol's view, Italy's claim that this control must exist at the time of consent is meritless.[140] Rather, Eskosol asserts, the relevant date for determining whether an investor is under foreign control is the date when the dispute arose, because "Article 26(7) [of the ECT] expressly provides that the date on which such foreign control must exist is 'before a dispute … arises'."[141] It notes that there is no dispute that Eskosol was controlled by a Belgian entity, Blusun, before this dispute arose.

77. Eskosol disagrees with Italy's contention that jurisdiction would depend on a finding that the ECT's provision on the applicable date somehow supersedes the test under the ICSID Convention, because in fact, "there is nothing in ICSID Article 25 that needs to be superseded."[142] Article 25(2)(b) is silent on the meaning and date of "foreign control," and nothing in the ICSID Convention suggests that "foreign control" over a local company must exist at the time of consent.[143] In other words, according to Eskosol, the critical date to which Italy agreed in the ECT does not violate any mandatory provision providing otherwise in the ICSID Convention.[144]

78. Eskosol argues that the authorities on which Italy relies are inapplicable to this case.[145] In particular, it states that: "(1) None of the cases cited by Italy deals with the ECT and the agreement on foreign control in that specific treaty; and more importantly, (2) none of the cases concerned an objection raised by the respondent State based on the timing of foreign control."[146]

79. With respect to Italy's reliance on *SOABI v. Senegal*, for example, Eskosol asserts that it relates to an agreement that said nothing about the date when foreign control must exist. In Eskosol's view, "this decision does not state that foreign control must exist at the time

[140] Response, ¶¶ 34 *et seq*.
[141] Ibid., ¶ 31.
[142] Rejoinder, ¶ 29.
[143] Ibid., ¶ 29.
[144] Ibid., ¶¶ 41-42.
[145] Response, ¶ 35.
[146] Rejoinder, ¶ 31.

of consent to ICSID arbitration"; it "merely stands for the proposition that verification of the existence of an agreement on foreign control (which could have been concluded at an earlier time) should be conducted at the time of consent."[147]

80. Eskosol also rejects Italy's reliance on *Vacuum Salt v. Ghana*, on the following grounds: (a) the arbitration clause was embedded in a contract between a local company and the host State "and not a provision that is similar to Article 26(7) of the ECT";[148] (b) in that case there was no separate agreement on foreign control, and the only moment at which the tribunal could assess the existence of foreign control was when the parties concluded their agreement containing an ICSID clause;[149] and (c) the tribunal in *Aguas del Tunari v. Bolivia* "warned against the use of the tribunal's findings in *Vacuum Salt v. Ghana* to thwart the effects of an agreement on foreign control."[150]

81. Regarding *National Gas v. Egypt*, Eskosol asserts that the award "does not state that the critical date when foreign control must exist for purposes of Article 25(2)(b) is the date of consent to arbitration." Eskosol explains that the issue was never addressed because the local entity was majority owned by an Egyptian national before the dispute arose, which makes this case distinguishable from Eskosol's.[151]

82. As for Professor Schreuer's work, Eskosol argues that Italy's quotes are "highly selective" and that his views do not assist Italy. Eskosol quotes the relevant Schreuer passage in full as follows:

> [As compared to the first clause of Article 25(2)(b)] [t]he situation is less clear when it comes to the critical date for the foreign control. During the Convention's drafting, there was some concern about a change of control over the locally established company (History, Vol. II, pp. 287,445) but no definite solution was offered. The Convention's wording is not without

[147] Response, ¶ 36.
[148] Ibid., ¶ 38.
[149] Ibid., ¶ 39; Rejoinder, ¶ 32.
[150] Response, ¶ 40 (quoting *Aguas del Tunari v. Bolivia*, Exhibit CL-26, note 237: "In *Vacuum Salt Products Ltd. v. Republic of Ghana*, Award of February 16, 1994 … the tribunal noted that '[t]he reference in Article 25(2)(b) to "foreign control" necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so.' … *Yet, although there is an objective limit, a Tribunal must also remain flexible so as to accommodate the agreement of the parties as to the definition of 'foreign control*.')" (emphasis added by Eskosol).
[151] Response, ¶ 43 (citing *National Gas v. Egypt*, Exhibit RL-009, ¶ 7); Rejoinder, ¶ 32.

> ambiguity on this point. The words 'on that date' relate to 'the nationality of the Contracting State party to the dispute'. But they do not relate to the subsequent words dealing with foreign control. To express this meaning the words 'on that date' would have to be repeated after the words 'because of foreign control'. Therefore, a strictly grammatical interpretation leaves open the question at what time foreign control over the local company must have existed. On the other hand, the agreement to treat the local company as a national of another Contracting State must be 'because of foreign control'. Therefore, foreign control must have existed at the time of the agreement. Since the agreement to treat the local company as a national of another Contracting State is closely linked to consent between the parties […], the foreign control must have existed at the time of consent.[152]

83. Eskosol submits that this quote "is not on point" for the following reasons: (a) Prof. Schreuer was discussing the contents of Article 25(2)(b) as applied to arbitrations arising from agreements concluded between investors and host States, not in respect of investment treaties and certainly not the language of Article 26(7) of the ECT; (b) the passages omitted by Italy reveal that Professor Schreuer considered the meaning of Article 25(2)(b) to be far from clear; and (c) and Italy's reading of Professor Schreuer's conclusion is not supported by the text of Article 25(2)(b).[153]

84. In Eskosol's view, the *travaux préparatoires* of the ICSID Convention "make plain that States have significant leeway to determine whether to treat a national as a national of another Contracting State under Article 25(2)(b)," and once that determination is made, such as under Article 26(7) of the ECT, it is entitled to significant deference.[154] Eskosol relies for this proposition on analyses of the Convention's drafting history,[155] and on the reasoning of the tribunal in *Autopista v. Venezuela*.[156]

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[152] Response, ¶ 41 (quoting C. Schreuer *et al.*, *The ICSID Convention: A Commentary* (2d ed. 2009), Exhibit RL-17, p. 329) (emphasis omitted).
[153] Response, ¶ 42.
[154] Ibid., ¶ 42.
[155] Rejoinder, ¶ 23 (citing ICSID, *History of the ICSID Convention* (1968) Vol II-1, Exhibit CL-030, p. 580, ¶ 109) and ¶ 24 (quoting ICSID R65-11, "Memorandum from the General Counsel and Draft Report of the Executive Directors to accompany the Convention," in *History of the ICSID Convention* (1968) Vol II-2, Exhibit CL-046, pp. 957-958, ¶ 29: "Clause (b) of [Article 25(2)], which deals with juridical persons, is more flexible [than Article 25(2)(a)]. A juridical person which had the nationality of the State party to the dispute would be eligible to be a party to proceedings under the auspices of the [ICSID] Centre if that State had agreed to treat it as a national of another Contracting State because of foreign control.").
[156] Rejoinder, ¶ 25 (quoting *Autopista v. Venezuela*, Exhibit RL-008, ¶ 97: "In reliance on the consensual nature of the Convention, they [the drafters of ICSID] preferred giving the parties the greatest latitude to define these terms

3. The Tribunal's analysis

85. The Tribunal starts by observing that Article 25(1) of the ICSID Convention establishes jurisdiction over "any legal dispute arising directly out of an investment, between a Contracting State … and a *national of another Contracting State*, which the parties to the dispute consent in writing to submit to the Centre" (emphasis added). This principle of diversity of nationality is subject to a specific exception reflected in Article 25(2)(b), which includes within the definition of a foreign national "any juridical person which had the *nationality of the Contracting State party* to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and which, *because of foreign control, the parties have agreed should be treated as a national of another Contracting State* for the purposes of this Convention" (emphasis added).

86. For purposes of the first clause of Article 25(2)(b), it is undisputed that Eskosol is a juridical national of Italy. It is equally undisputed that Eskosol was so "on the date on which the parties consented to submit" this dispute to arbitration, namely on December 9, 2015, when Eskosol filed its Request invoking the general offer of arbitration Italy had provided through the ECT. The question presented by Italy's first objection therefore centers on the second clause of Article 25(2)(b), *i.e.*, whether Eskosol is eligible to avail itself of the exception created by that clause in order to proceed in this forum. At this stage of the proceedings, Italy must demonstrate that it is "manifest" that Eskosol may not do so, within the meaning of Arbitration Rule 41(5).

a. The agreement of the parties

87. The first step in this Article 25(2)(b) inquiry is to assess the nature and scope of the parties' agreement, to determine whether they intended and agreed to treat Eskosol as a national of another Contracting State for purposes of ICSID jurisdiction, and if so, whether such agreement was "because of foreign control." The Tribunal has no difficulty concluding that the requirement of such *subjective* intent and agreement is met in this case. Article 26(7) of the ECT sets forth two requirements, separated by the conjunctive "and," for a

themselves, provided that the criteria agreed upon by the parties are reasonable and not totally inconsistent with the purposes of the Convention.").

host State company to be treated as a qualified foreign national for purposes of Article 25(2)(b) of the ICSID Convention. Each of these requirements contains an express temporal condition, and those requirements notably differ. First, such company must have the host State nationality "*on the date of [its] consent in writing*" to ICSID (emphasis added), which Eskosol – an Italian company – clearly did. Second and independently, the company must be "controlled by" investors of another Contracting Party "*before a dispute between it and that Contracting Party arises*" (emphasis added). There is no dispute that prior to and at the time of the two State measures challenged in this case (the Romani Decree and the Fourth Energy Account, in March and May 2011 respectively), Eskosol was controlled for all relevant purposes by its 80% shareholder Blusun, a Belgian company. Italy agrees that Eskosol was under foreign control until at least December 2012.[157]

88. Nothing in Article 26(7) suggests an additional requirement, namely that the foreign control existing immediately before the dispute arises also must persist through the date of consent. Indeed, the fact that the Article supplies its own express temporal requirement for foreign control, which differs from the date-of-consent requirement for host State nationality, seems to preclude such a reading. Italy does not suggest otherwise.

89. Article 26(7) further reflects the clear subjective intention that satisfaction of its two separate requirements would be sufficient also to satisfy the requirements of Article 25(2)(b) of the ICSID Convention. The provision uses the mandatory word "shall," as in "[a]n Investor … which has [fulfilled the first requirement] and which [has fulfilled the second requirement], *shall* for the purpose of article 25(2)(b) of the ICSID Convention be treated as a 'national of another Contracting State'…" (emphasis added).

b. The additional objective requirements of Article 25(2)(b)

90. This is merely the start of the inquiry, however, because the test for Article 25(2)(b) of the ICSID Convention also has an *objective* component that is not necessarily satisfied merely because of the parties' subjective agreement. As other tribunals have found, parties do not have unlimited discretion to define as foreign-controlled an entity that objectively is not,

[157] Objection, ¶ 49.

or that objectively is controlled only by nationals of a non-Contracting State.[158] An ICSID tribunal therefore must undertake its own review of the facts regarding foreign control, to confirm that control indeed was exercised by a national of the Contracting State.[159] Given the importance of the parties' stated intentions as reflected in their agreement, however, a tribunal should not conclude that foreign control objectively is lacking unless there are unusual circumstances that preclude deference to their agreement to "treat[]" an entity as so controlled.[160] These circumstances would require a finding that the criteria agreed by the parties are simply unreasonable, or that application of such criteria would result in an outcome that contravenes the underlying purposes of the ICSID Convention.[161]

91. In this case, such an inquiry has two necessary components. The first is whether it would be inconsistent either with the text of Article 25(2)(b) or with the purposes of the ICSID Convention to accept jurisdiction based on foreign control connected *to the date a dispute arises* (the ECT test), rather than the date of consent to arbitration. The second is how the existence of foreign control should be evaluated for purposes of the ICSID Convention, and whether it would be inconsistent with the purposes of the ICSID Convention to accept jurisdiction over a claim filed by a local company *after its entry into bankruptcy proceedings* in the host State. For both of these inquiries, the Tribunal applies the standards

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[158] *Vacuum Salt v. Ghana,* RL-010, ¶ 36 ("[T]he parties' agreement to treat Claimant as a foreign national 'because of foreign control' does not *ipso jure* confer jurisdiction. The reference in Article 25(2)(b) to 'foreign control' necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so"); *Autopista v. Venezuela*, Exhibit RL-008, ¶ 104 (describing the existence of foreign control as a "requirement" separate from an agreement to treat a company as a national of another Contracting State for purposes of the ICSID Convention); *National Gas v. Egypt*, Exhibit RL-009, ¶ 131 ("despite its text as one uninterrupted sentence, Article 25(2)(b) of the ICSID Convention separately establishes a subjective test and an objective test"); see also "Memorandum from the General Counsel and Draft Report of the Executive Directors to accompany the Convention," in *History of the ICSID Convention* (1968) Vol II-2, Exhibit CL-046, ¶ 24 ("While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.").

[159] *Vacuum Salt v. Ghana,* RL-010, ¶ 36 ("it is the task of the Tribunal to determine whether or not the Convention limit has been exceeded."); *National Gas v. Egypt*, Exhibit RL-009, ¶ 133 ("The objective test … is not met simply by meeting the subjective test: these two tests are not the same.").

[160] *Vacuum Salt v. Ghana,* RL-010, ¶¶ 37-38 ("[T]he consent of the parties … is accorded considerable respect and is not lightly to be found to have been ineffective…. [T]he existence of consent ... raises a rebuttable presumption that the 'foreign control' criterion of the second clause of Article 25(2)(b) has been satisfied"); *National Gas v. Egypt*, Exhibit RL-009, ¶ 134 ("even as an objective test, the requirement of Article 25(2)(b) as to foreign control may take into account the express agreement of both the disputing parties and the Contracting Parties to the ICSID Convention").

[161] *Autopista v. Venezuela*, Exhibit RL-008, ¶ 97.

of Rule 41(5), to determine whether Italy has met its burden of showing that Eskosol's invocation of jurisdiction is "manifestly without legal merit."

c. The date on which foreign control must be established

92. For purposes of the first inquiry – whether the ICSID Convention mandates that foreign control still exist on the date of consent – it is necessary to begin with a textual analysis of Article 25(2)(b). As with all treaty provisions, this Article is to be interpreted and applied as instructed by Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**"), meaning "in good faith in accordance with the ordinary meaning" of its terms, "in their context and in the light of its object and purpose."[162] For ease of discussion, the provision is replicated in full below:

> "National of another Contracting State" means: …
>
> (b) any juridical person which had the nationality of the Contracting State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

93. The Tribunal agrees with Professor Schreuer that Article 25(2)(b)'s wording "is not without ambiguity" regarding the operative date for foreign control.[163]

94. Under what he calls "a strictly grammatical interpretation,"[164] it could be said that the phrase "*and which*" in the middle of the provision completely separates two requirements, the first addressing host State nationality and the second addressing foreign control. Under this approach, while there is a temporal element specified for the first requirement ("nationality … on the date on which the parties consented to submit such dispute"), there is no temporal element specified for the second requirement, simply a reference to the parties' agreement. This would suggest that the words "on that date" do not carry over to the second issue of foreign control, because "[t]o express this meaning the words 'on that

[162] Vienna Convention on the Law of Treaties, Exhibit CL-057.
[163] C. Schreuer *et al.*, *The ICSID Convention: A Commentary* (2d ed. 2009), Exhibit RL-017, p. 329.
[164] Ibid., p. 329.

date' would have to be repeated" in the second clause,[165] as in a hypothetical alternative phrasing "and which, because of foreign control *on that date*, the parties have agreed should be treated …." The absence of the repeated reference could be said to suggest no intention by the Convention's drafters to mandate foreign control as of the date of consent, instead leaving that temporal issue – like the definition of "foreign control" itself – to discussion between the parties.

95. However, the Tribunal considers that there is also a contrary argument to be made within the confines of a VCLT analysis, taking into account that treaty provisions also must be interpreted "in their context," which includes the words found in surrounding passages. Article 25(2)(b) operates as an exception to the general principle of diverse nationality established in Article 25(1), and it is well established that the time of consent is the critical juncture for assessing nationality, in order to establish a claimant's *bona fides* as a foreign investor. Consent to arbitration is also the critical juncture for precluding resort to "any other remedy" pursuant to the immediately following Article 26. The notion that a "foreign" element to the claimant must persist as of the date of consent – be it foreign nationality or foreign control, in the case of locally incorporated companies – could be said to be implicit from the context, as well as the overall object and purpose of the ICSID Convention. Recognizing that fact, it could be deemed sufficient from a drafting perspective that the date of consent was specified once in Article 25(2)(b), without the need that it be specified twice, to connote a requirement that foreign control still must exist as of the date of consent. If this interpretation were adopted, then the question would be whether such an implicit requirement is mandatory for purposes of the Convention, thereby precluding the parties from agreeing to any contrary date for demonstrating foreign control, such as appears to have been done in Article 26(7) ECT by its reference to the time before the dispute arises.

96. The Tribunal is aware that either interpretation of Article 25(2)(b) could have significant implications for cases involving facts different from this one. First, as Italy contends, an approach that permits the parties to agree to jurisdiction so long as there is foreign control

[165] Ibid., p. 329.

"before a dispute … arises" (the language in Article 26(7) of the ECT) could be stretched to imply *at any time before* the dispute; this arguably would enable a local company to invoke ICSID arbitration simply on the basis of some *historic* foreign ownership that had ceased to exist, such as by voluntary sale, well before the State measures that gave rise to the parties' dispute. Even if Article 26(7)'s "before" language were read implicitly to mean "*immediately* before" or "*as of the moment*" a dispute arises – a reading that Eskosol urges[166] – dispensing with a requirement that foreign control persist at least through the date of consent could have other consequences. Among other things, it could facilitate the buying or selling of ICSID claims, by recognizing that once a local company owned by a foreign investor has been affected by a State measure, that company would retain standing to sue the State at any time in the future, even after being sold to new owners who are host State nationals with no element of foreign control whatsoever.

97. At the same time, as Eskosol contends, an approach that bars a company from ICSID arbitration because it no longer is foreign-controlled on the date of its request for arbitration – even though it indisputably was foreign-controlled when the dispute arose – could be invoked by States to shield them from challenge for wrongdoing that directly precipitated the loss of control, such as nationalization or a forced sale to third parties. In such circumstances some shareholders still might be able to commence suit in their own names for the value of their lost investment in the local company, but others might not, so the loss of foreign control attributable to State action would become the proximate cause of an inability to collect full reparation for the consequences of the wrongful conduct.

98. The Tribunal accepts that some of the scenarios thus posited potentially could be addressed through other means, such as the abuse of right doctrine or the maxim that no party should be permitted to benefit from its own wrong. But the fact remains that all interpretations of arguably ambiguous treaty language have potential doctrinal consequences for future cases that should not be lightly ignored. This counsels for caution in interpreting arguably ambiguous treaty text, particularly where the issue presented appears (as it does here) to be one of first impression. At minimum, such exercises should not be attempted at the Rule

[166] Hearing Transcript, February 8, 2017, at 139:8-12.

41(5) stage, where briefing necessarily has been expedited and the parties have not had a full opportunity to present the potential ramifications of all interpretations. If anything is clear from the parties' briefing of the temporal issue regarding foreign control under the ICSID Convention, it is that the outcome of this theoretical debate is not "manifest," but rather is both novel and complex, and therefore is unsuitable for resolution on a Rule 41(5) application.

99. In this case, it would be particularly inappropriate for the Tribunal to reach out to resolve the temporal issue at this juncture, because the Tribunal has serious doubt whether Italy could demonstrate, in any event, a loss of foreign control in Eskosol even as of the date of consent. This issue is addressed separately below.

d. The alleged loss of foreign control through bankruptcy proceedings

100. Italy's Rule 41(5) objection depends not just on the legal proposition that the ICSID Convention requires foreign control to persist through the date of consent, even where the parties clearly agreed in the ECT that foreign control before the dispute should suffice for purposes of ICSID access. Separately, the success of the objection also depends on the proposition that Eskosol's entry into bankruptcy proceedings following the challenged State measures divested it of the uncontroverted foreign control it enjoyed prior to bankruptcy, by virtue of the Belgian nationality of its 80% shareholder Blusun. In other words, even assuming *arguendo* that Italy's interpretation of Article 25(2)(b) Convention were correct, the requirements of that article still would be satisfied *unless* the Tribunal also accepts Italy's proposition regarding the consequences of Eskosol's bankruptcy filing. But the Tribunal has serious doubts about this proposition, particularly (but not exclusively) within the confines of the "manifest" legal defect standard of Rule 41(5).

101. The term "foreign control" is not defined in the ICSID Convention, and tribunals have concluded that the absence of a definition represented a deliberate choice by the drafters. "In reliance on the consensual nature of the Convention, they preferred giving the parties the greatest latitude to define these terms themselves, provided that the criteria agreed upon by the parties are reasonable and not totally inconsistent with the purposes of the

Convention."[167] In this case, the ECT text does not define control for purposes of determining whether a local company is "controlled" by a foreign investors pursuant to Article 26(7), but the term "controlled" also was used in the definition of "Investment" in Article 1(6), which refers to "every kind of asset, owned or controlled directly or indirectly by an Investor…." The Tribunal considers it appropriate to construe the term consistently across these two provisions. The Tribunal therefore gives due weight to the "Understanding" adopted by the ECT parties with respect to Article 1(6).

102. According to this joint Understanding, "control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation." It is significant that in the non-exhaustive list of three "relevant factors" identified in the Understanding, the first listed is "financial interest, including equity interest, in the Investment." But at the same time, this is not the exclusive criterion for – and therefore not conclusive proof of – control for purposes of the ECT.[168] The Understanding also identifies as the second and third "relevant factors" the "ability to exercise substantial influence over the management and operation of the Investment" and the "ability to exercise substantial influence over the selection of members of the board of directors or any other managing body."[169]

103. With respect to the first identified factor ("financial interest, including equity interest"), there is no dispute that that even at the time of the Request for Arbitration, Blusun retained ownership of 80% of Eskosol's shares. As such, Blusun presumably retained a "financial interest" in any future value of Eskosol. While the bankruptcy filing indicates that Eskosol's liabilities exceeded its assets at that time, Eskosol alleges that the value of its

[167] *Autopista v. Venezuela,* Exhibit RL-008, ¶ 97; see also *Vacuum Salt v. Ghana,* RL-010, ¶ 37 (quoting Aron Broches for the proposition that "any stipulation … based on a reasonable criterion should be accepted" and jurisdiction should be declined "only if … to do so would permit parties to use the Convention for purposes for which it was clearly not intended").

[168] In that sense the ECT is different from the Concession Agreement at issue in *Autopista v. Venezuela*, which the tribunal found had adopted a majority shareholding test as the criterion to be applied to determine foreign control. The tribunal found no basis to import a different, "effective control" requirement into Article 25(2)(b) of the ICSID Convention, finding that "direct shareholding is certainly a reasonable test for control." *Autopista v. Venezuela*, Exhibit RL-008, ¶¶ 112, 117-121.

[169] Final Act of the European Energy Charter Conference, Section IV ("Understandings"), ¶ 3 ("With respect to Article 1(6)").

claims in this proceeding exceed the amount of its liabilities, so that if such claims were to succeed, Eskosol could have residual value to distribute to its shareholders.

104. As for the other factors identified in the ECT Understanding, Italy presents no argument to suggest that *prior* to the bankruptcy filing, Blusun did not exercise "substantial influence over the management and operation" of Eskosol, nor that it lacked the "ability to exercise substantial influence" over the selection of Eskosol's Board members or other managers, so as to fully satisfy the relevant ECT test for control. Rather, Italy's sole objection is that the bankruptcy filing itself *displaced* whatever mechanisms of control existed previously, so that from that date on, "control in fact" of Eskosol manifestly resided in the hands *only* of its receiver and the supervising bankruptcy court. This is said to follow from Italian law regarding the powers of a bankruptcy receiver and court. Of course, such powers remain in place only so long as the entity remains in bankruptcy; Italy does not appear to contest Eskosol's argument that its shareholders could choose to infuse additional capital into the company, or strike a direct payment deal of some sort with Eskosol's creditors, to enable it to satisfy its debts and return to operations.

105. Be that as it may, Italy contends that the mere status of *being in* bankruptcy proceedings is sufficient to divest an entity from foreign control for purposes of ICSID jurisdiction to entertain an ECT claim, even when the entity indisputably was both solvent and under foreign control *prior* to the State measures that it seeks to challenge. The ECT alone would not dictate this result, because (as previously noted) the ECT only seeks to confirm foreign control prior to the dispute. The proposition thus depends on a three-step analysis:

(a) importing the ECT's "control in fact" test into the ICSID Convention for purposes of satisfying the Convention's objective requirement of foreign control – or alternatively deeming such an actual control test to be mandatory under the ICSID Convention, so that it must be satisfied even if the parties had agreed to a more formalistic test such as majority ownership;

(b) applying that actual control test on a different date than the ECT itself would (the date of consent); and

(c) crediting Italian bankruptcy law as sufficient to override all presumptions of control that otherwise flow from majority shareholding, such that control of an entity in bankruptcy necessarily resides in the local receiver and local bankruptcy court.

106. The latter proposition, regarding the power of a bankruptcy filing to dictate the result of any control analysis, is a far-reaching assertion for which Italy provides no support other than by reference to its own domestic bankruptcy law. But foreign control for purposes of the ICSID Convention is an issue of international law, not domestic law. While the Convention's drafters may have been content largely to defer to the parties to reach their own agreements regarding the facts of control, such agreements must be consistent with the underlying purpose of the Convention, including the protection in appropriate cases of foreign investment. It would not be consistent with the underlying purposes of the Convention to render an otherwise qualified foreign-owned entity suddenly ineligible to access its protections, simply because the entity's liabilities eventually overtake its assets enough to justify (at least temporary) supervision of its activities to protect the rights of creditors. Among other things, this would mean that even in demonstrated cases where State conduct is partially or wholly responsible for the financial straits that led to the bankruptcy (as Eskosol alleges in this case), the State could avoid scrutiny of its acts by virtue of their own consequences, simply by invoking the predictable reality that local bankruptcy proceedings always will be supervised by local courts. But even in less dramatic situations, such as where the bankruptcy is attributable largely to factors other than State action, there still is no logic to divesting the entity of its otherwise applicable right to seek redress for grievances against the State – particularly when doing so might enable it to reverse its financial fortunes enough to emerge from bankruptcy. There is certainly nothing in the ICSID Convention to suggest that implementation of the foreign control requirement for jurisdiction was intended to depend on the financial fortunes or misfortunes of the local entity.

107. Nor is such an intent apparent or even implicit in the multi-faceted test in the ECT Understanding. The factors listed in the Understanding are each in a sense *structural*, deriving either from the distribution of company shares or from the distribution of powers

regarding management, operation, and selection of board members, which generally are reflected in a company's foundational documents. While the company's economic fortunes may wax and wane, and certain exigencies may require a resort to bankruptcy protection, there is no suggestion in the ECT Understanding that the possibility of financial misfortune was expected to outweigh a more structural analysis of control, and render an entity *ipso facto* locally controlled, simply because of the necessary supervision of a bankruptcy court.

108. For these reasons, the Tribunal is unconvinced by Italy's assertion regarding the second necessary component of its first Rule 41(5) objection, namely that Eskosol's bankruptcy filing manifestly deprived it of foreign control prior to filing its Request. This is so even if, for the sake of argument, such continuing foreign control were to be deemed objectively necessary to pursue ECT claims under the ICSID Convention. Italy's first Rule 41(5) objection is therefore denied. Italy of course retains the right to try to convince the Tribunal otherwise at a subsequent stage of this proceeding.

B. The Claimant as an Investor under the ECT and the ICSID Convention

1. Italy's position

109. Italy's second Rule 41(5) objection is that Eskosol "lacks the material qualities of an investor," because it was not the "actual investor" that "ma[de] the investment" in Italy as that term should be understood under Article 26 of the ECT and Article 25 of the ICSID Convention. Rather, Italy contends, Eskosol was merely the "*longa manus*" or instrumentality of the actual investor, which Italy contends was Blusun and its two shareholders, Messrs. Lecorcier and Stein.[170]

110. Italy argues that it is "undisputed" that Blusun invested in Italy by establishing two companies, SIB and Eskosol, the first as a vehicle to connect individual photovoltaic plants to the national electricity grid and the second as a holding company for the 12 SPVs.[171] Italy also contends that it is undisputed that Blusun was Eskosol's "sole controlling

[170] Objection, ¶¶ 10, 71, 75-76.
[171] Ibid., ¶ 72 and Reply, ¶ 14.

shareholder,"[172] that its management was left in the hands of a sole director (one of Blusun's two shareholders), and that it had only one employee.[173] Moreover, Italy asserts that even though Eskosol signed the EPC contract with Siemens in its own name, the potential beneficiaries of the FITs were the 12 SPVs, not Eskosol.[174] According to Italy, all of these facts "come from the exhibits submitted by the Claimant with the Request for Arbitration."[175]

111. On this basis, Italy contends that the Request should be dismissed for Eskosol's lack of the material qualities of an investor.[176] Italy argues that it is too "formalistic" and "over-simplistic" for Eskosol to posit that it qualifies as an investor in Italy solely by reference to its incorporation in that country.[177] It asserts that "[w]hereas the definition of 'investor' usually limits itself to address the issue of nationality, an investor is so only if it makes an investment under the terms of the relevant treaty and in line with its aim and purposes."[178] Italy clarifies that it does not contend that "since Blusun was a legitimate investor under the ECT and ICSID, then Eskosol could not also be one."[179] Rather, its position is that "from the facts as described in the Request for Arbitration, Eskosol appears to be no more than an instrumentality of Blusun (as well as SIB) to realize the investment in Italy."[180]

2. Eskosol's position

112. Eskosol states that it qualifies as an "Investor" under the definition set forth in Article 1(7) of the ECT, which refers to "a company … organized in accordance with the law" of a Contracting Party, and Eskosol is lawfully incorporated in Italy.[181] It notes that Italy does not contest that Eskosol satisfies the Article 1(7) definition, but instead appears to be arguing for an additional implicit requirement that an investor "make" an investment or be a "material" investor to secure ECT protection. According to Eskosol, there are no such

[172] Reply, ¶ 14.
[173] Objection, ¶ 73 (citing Ex. C-002, p. 16); Reply, ¶ 43.
[174] Objection, ¶ 74.
[175] Reply, ¶ 14.
[176] Objection, ¶ 76.
[177] Reply, ¶ 40.
[178] Ibid., ¶ 41.
[179] Ibid., ¶ 45.
[180] Ibid., ¶ 45.
[181] Response, ¶¶ 51-52.

requirements under the ECT, under which protection follows simply from direct or indirect ownership or control of "every kind of asset."[182] As for the ICSID Convention, Eskosol notes that it does not contain any definition of "investor," and that while Italy contends that Eskosol does not qualify, it "fails to cite any provisions of ICSID that would support its argument."[183]

113. In any event, Eskosol contends that it has made "numerous investments in Italy," as described in its Request. Italy has offered no evidence to demonstrate Eskosol's allegations to this effect are frivolous, and therefore the latter should be accepted for purposes of a Rule 41(5) objection.[184]

114. Moreover, Eskosol contends, Italy itself "relies on numerous assertions of fact, all of which are highly contested and incorrect."[185] For example, Eskosol deems incorrect Italy's contention that Eskosol was managed by a sole director (Mr. Lecorcier), and indicates that it was managed by a board of directors comprised of Messrs. Sisto, Stein, Scognamiglio and Lecorcier.[186] Eskosol also challenges Italy's assertion that Eskosol had no entitlement to the FITs received by the SPVs, because Eskosol owned 100% of the 12 local companies and the FITs "were to be channeled to Eskosol."[187]

115. Eskosol disputes that its rights of direct access to ICSID can be disregarded by labeling it as Blusun's "*longa manus.*" It notes that under Italian law, given its incorporation as an S.p.A., Eskosol is a distinct legal entity with personality separate from its shareholders. It also notes that Blusun was not the only shareholder of Eskosol, 20% of which was owned by Messrs. Sisto and Scognamiglio, who contributed money and significant expertise in Italy's banking and renewable energy sectors.[188] Eskosol complains that Italy provides no evidence to the effect that Eskosol is not independent from Blusun, but instead tries "to shift the burden of proof onto Claimant" by asserting in the Reply that "there is no ground

[182] Rejoinder, ¶¶ 91-92 (quoting Article 1(6) of the ECT and citing cases for the proposition that formal incorporation suffices for ECT protection).
[183] Response, ¶ 53.
[184] Ibid. ¶ 52 (referencing paragraph 82 of the Request); Rejoinder, ¶ 90.
[185] Response, ¶ 55.
[186] Ibid., ¶ 55; Rejoinder, ¶ 77.
[187] Response, ¶ 55.
[188] Ibid., ¶¶ 57-58; Rejoinder, ¶¶ 77 and 86-92.

to establish that only 100% controlled companies would act in full control of their controlling shareholder when bare facts prove to the contrary."[189]

116. Eskosol also rejects what in its view appears to be the underlying premise in Italy's argument, namely that if Blusun is permitted to prosecute ECT claims based on its investment in Eskosol, then Eskosol cannot also bring claims as an investor in Italy.[190] In its view, the fact "[t]hat Eskosol may qualify as both an 'Investment' and an 'Investor' under the ECT, does not deprive Eskosol of its own rights under the ECT."[191] Indeed, Eskosol asserts that:

> Article 26(7) of the ECT also refers to the locally incorporated company as 'an investor' that has the nationality of the Contracting Party party to the dispute on the date of consent, and it emphasizes that the dispute at issue is between the *locally incorporated company* and the Contracting State, and not between a foreign entity and the Contracting State.[192]

In Eskosol's view, these references highlight that locally incorporated companies themselves enjoy rights under the ECT, distinct from any rights enjoyed by their shareholders.[193]

117. Eskosol finally contends that this objection would require "a significant inquiry into factual issues" regarding Italian law and the circumstances of the *Blusun* case, which are not proper for resolution under Rule 41(5).[194]

3. The Tribunal's analysis

118. Italy's second objection is premised on the notion that even though (a) Eskosol meets the ECT's definition of an "Investor" in Article 1(7), and (b) is a local company alleged to be foreign controlled for purposes of Article 26(7) of the ECT (subject to Italy's first objection), the Tribunal nonetheless should decline to recognize Eskosol as a qualified investor under the ECT or the ICSID Convention, because it (c) allegedly lacks certain

[189] Rejoinder, ¶ 88; Reply, ¶ 44.
[190] Response, ¶ 59.
[191] Ibid., ¶ 59.
[192] Rejoinder, ¶ 82 (emphasis added by Eskosol).
[193] Ibid., ¶ 83.
[194] Response, ¶ 60.

"material qualities" as such an investor. Italy does not attempt to define what those "material qualities" are, but its references to the "actual investor" that "ma[de] the investment" and provided most of the financing suggest it may be advocating for an implicit source-of-capital requirement, in order for a claimant to be considered qualified to invoke investment protection.[195] Alternatively, Italy's emphasis on Eskosol's having only a single employee suggests it may be advocating for a requirement that a claimant have some threshold level of substance in operation, beyond mere legal form.[196] It is not clear whether Italy urges a "checklist" approach to such factors, or a more holistic analysis that takes a variety of issues into account for determining the "materiality" of an investor. Regardless of the answer, Italy cites no specific provisions of either the ECT or the ICSID Convention to support such an exercise. Instead, Italy appears to argue that they are implicit in the notion of being an "investor," which must be given some substantive – and not merely "formalistic" – content.[197]

119. The Tribunal recognizes that in the analogous context of the definition of an "investment," many tribunals have found the ICSID Convention to require some scrutiny of alleged investments to ensure that they actually have certain typical characteristics of such. There is not full consensus regarding the list of such characteristics, nor whether each (or only some) are required to constitute a valid investment. But the general notion that the word "investment" must be given *some* substantive content, and not constitute a mere label that can be applied at will to *any* form of economic activity, is broadly accepted.[198]

120. In the Tribunal's view, Italy's argument may be seen as advocating an extension of this notion from the definition of "investment" to the definition of "investor," such that a certain threshold of material characteristics should be deemed implicit and therefore appropriate for tribunal scrutiny. Whether this is so is an interesting question, but it clearly is not one that can or should be resolved at the Rule 41(5) stage of a case. Italy does not even contend that there is settled jurisprudence on the issue, such that a tribunal – even on an undisputed

[195] Objection, ¶¶ 72, 75; Reply, ¶¶ 41, 43.
[196] Objection, ¶ 73 (citing Ex. C-002, p. 16); Reply, ¶ 43.
[197] Reply, ¶ 40.
[198] See generally E. Gaillard and Y. Banifatemi, "The Long March Towards a *Jurisprudence Constante* on the Notion of Investment," Chapter 8, in M. Kinnear *et al.* (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2016).

factual record – could find a given entity to "manifestly" lack certain required "qualities" as a matter of law. Moreover, it appears that the factual record here is not undisputed, making the question even less appropriate for a Rule 41(5) decision. The objection is therefore denied.

C. Consent Under the ECT to Multiple Related Proceedings

1. Italy's position

121. Italy argues that the consent provided in the ECT did not extend to the initiation of a new arbitration proceeding involving what it describes as "perfect identity of object and cause" with the prior *Blusun* case.[199] In Italy's view, the consent in Article 26 of the ECT is subject to the limitation established in Article 26(3)(b)(i), which provides in relevant part as follows:

> The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under paragraph (2)(a) or (b).[200]

Paragraph (2)(a) refers to proceedings before "the courts or administrative tribunals of the Contracting Party party to the dispute," while paragraph (2)(b) refers to proceedings in accordance with a "previously agreed dispute settlement procedure." As Italy is one of the States listed in Annex 1D, it is entitled to invoke the limitation of consent set forth in Article 26(3)(b).

122. Italy argues that "the dispute" as referenced in Article 26(3)(b)(i) already has been submitted to arbitration in the *Blusun* case. In particular, it asserts (as developed further under Italy's fourth Rule 41(5) objection) that this case and the *Blusun* case concern the same measures by Italy taken in the same time span, are both based on Articles 10 and 13 of Part III of the ECT, and are both premised on the allegedly unexpected and unreasonable change of policy by the Italian Government which allegedly impacted the investors' right to benefit from FITs.[201]

[199] Objection, ¶¶ 11, 113.
[200] Ibid., ¶¶ 81-82 (citing ECT, Exhibit C-1, ¶ 26).
[201] Objection, ¶ 84.

123. In Italy's view,

> If Contracting Parties listed in Annex ID may refuse to consent to the submission of a dispute to international arbitration where the investor has previously submitted such dispute to another (national or international) dispute resolution forum, this should apply *a fortiori* when the investor has submitted the dispute to another international arbitration under the same dispute resolution forum (ICSID).[202]

124. In other words, Italy contends that Article 26(3)(b)(i) should be read as excluding consent to arbitration whenever the investor already has chosen a channel to present its dispute, either domestic or international, including prior resort to ICSID.[203] According to Italy, its interpretation is consistent with the canons of interpretation established by international law, as Article 26 of the ECT "needs to be read in the context of the treaty itself and in the light of its object and purpose."[204] Italy argues that its reading of Article 26 of the ECT is further confirmed by Article 26 of the ICSID Convention,[205] which provides that "consent of the parties" to ICSID arbitration "shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."[206]

125. Italy further argues that Blusun and Eskosol must be considered the same investor for the purposes of Article 26(3)(b)(i) of the ECT, even though they are two different legal entities. In its view,

> the *rationale* of the provision must be interpreted as meaning that two parallel proceedings cannot be started if their material consequence would be that the same dispute is taken twice under judgment for the same prejudice.[207]

126. Italy relies on the following passage of the *Libananco* award, which in its view demonstrates a rejection of the type of "strict" approach to Article 26(3)(b)(i) urged by Eskosol:

> There remains, however, a question as to how far the references in the text of Article 26(3)(b)(ii) to "the Investor" and "the dispute" themselves require

[202] Ibid., ¶ 85.
[203] Ibid., ¶¶ 86 and 92.
[204] Reply, ¶ 48.
[205] Objection, ¶ 87.
[206] ICSID Convention, Art. 26.
[207] Objection, ¶ 90.

> some form of identity between the claims in, say, domestic legal proceedings and in a potential arbitration. The issue is not (as indicated) one which the Tribunal has to decide. The Tribunal is in some doubt, however, as to whether the provisions of a multilateral Treaty of this kind should be construed with the same strict rigour that might be appropriate for the application of a national procedural rule, e.g. of *res judicata*. The justification for a more flexible interpretative approach, informed by the purpose the treaty rule is intended to serve, would be not simply the different nature of the legal instruments involved, but also the difference in the prospective effects: the application of a domestic rule of *res judicata* is there to prevent the re-litigation of an issue that has already been authoritatively determined; a treaty rule may serve the different purpose of preventing forum shopping. An approach as strict as the one the Claimant contends for here would make the operation of Article 26(3)(b) entirely dependent (so far as its relationship with domestic legal proceedings was concerned) on whether the national law in question permitted the litigation of a treaty dispute as such in the local courts or tribunals. But to make the issue turn in that way on the form in which the local legal action had been brought, rather than on the real substance of the underlying rights at issue would clearly run the risk of subverting what may have been the intention behind the treaty provision.[208]

127. Italy argues, further, that "[i]f forum shopping is prohibited in situations where the investor could in fact legitimately benefit of alternative channels of protection of its interests (based on different and equally applicable legal basis) this should *a fortiori* apply in a situation where the same substantial investor utilizes a very formal reading of a treaty to open two parallel proceedings in front of two different tribunals to request satisfaction for the same claimed prejudice."[209]

128. Finally, Italy contends that this objection is suitable for resolution under Rule 41(5). It contends that the *Blusun* award – and in particular the excerpts thereof which have been provided to the Tribunal – "contains all necessary information on the case for the present stage of the procedure"[210] and accordingly that "the Tribunal disposes of all relevant elements to judge on this objection."[211] In its view, "it clearly appears [from the *Blusun* award] that the two proceedings fully coincide to all extents."[212] Further, this objection

[208] Ibid., ¶ 92 (citing *Libananco Holdings Co Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, Exhibit RL-018, ¶ 548 (***Libananco v. Turkey***)).
[209] Objection, ¶ 93.
[210] Reply, ¶ 51.
[211] Ibid., ¶ 15.
[212] Ibid., ¶ 15.

"relate[s] to a legal defect and does not require any in-depth inquiry into the facts of the case,"[213] and therefore can be resolved at the Rule 41(5) stage.

2. Eskosol's position

129. Eskosol contends that "Italy is forced to argue for an expansive application of Article 26(3)(b)(i) of the ECT," because "[o]n its face, [this provision] does not apply where the two proceedings at issue are both before ICSID pursuant to a clause in an investment treaty."[214] Eskosol argues that neither of the two categories mentioned in Article 26(2)(a) and (b), and then cross-referenced in Article 26(3)(b)(i), includes arbitration under the ECT.[215] It notes that the option to submit the dispute to international arbitration is addressed separately in Article 26(4) of the ECT, and therefore is "specifically carved out of the ECT's fork-in-the-road provision."[216]

130. Eskosol argues that Italy's argument fails in any event for two reasons. First, the *Blusun* case "cannot be presumed to be the same dispute" as this one, because at this juncture neither the Tribunal nor Eskosol has access to the full record of those proceedings,[217] but simply to excerpts of the *Blusun* award selected by Italy for submission.

131. Second, Eskosol contends that it has not previously submitted its dispute to another tribunal, and that it cannot be deemed to be the same investor as Blusun. Eskosol argues that Italy itself concedes that Blusun and Eskosol are two distinct legal entities, and that Blusun is not the sole shareholder of Eskosol.[218] It further relies on investment law jurisprudence which, in its view, "recognizes the distinction between related legal entities." Specifically, Eskosol invokes the award in *CME v. Czech Republic*, the award on jurisdiction in *Champion Trading v. Egypt*, and the award in *Genin v. Estonia*.[219]

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[213] Ibid., ¶ 16.
[214] Response, ¶ 64.
[215] Rejoinder, ¶ 96.
[216] Ibid., ¶ 96.
[217] Response, ¶ 65.
[218] Ibid., ¶¶ 65-67; Rejoinder, ¶ 97.
[219] Response, ¶¶ 69-72 (quoting *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003, Exhibit CL-035, ¶ 432 (***CME v. Czech Republic***) ("The Tribunal is further of the view that the principle of *res judicata* does not apply …. The parties in the London Arbitration differ from the parties in this arbitration. Mr. Lauder is the controlling shareholder of CME Media Ltd, whereas in this arbitration a Dutch holding company being part of the CME Media Ltd Group is the Claimant."); *Champion Trading Company, Ameritrade*

132. Eskosol also argues that Italy's objection does not meet the high threshold of Rule 41(5). In its view, in order to reach a conclusion as to whether the present dispute and the present investor are the same as those in the *Blusun* case, the Tribunal would need to analyze complex factual and legal issues, as well as significant documentary evidence presented in the *Blusun* case but not available at this juncture in this proceeding.[220]

3. The Tribunal's analysis

133. Italy's third objection would require the Tribunal to find, under the Rule 41(5) standard, that at least three conclusions are each "manifest." *First*, the Tribunal would have to find it manifest as a matter of law that the ECT's "fork in the road" clause can be used to bar repeated ECT claims by the same "Investor" regarding the same "dispute," and not merely resort to the ECT after resort to local proceedings or "previously agreed" procedures other than ECT arbitration. *Second*, the Tribunal would have to find it manifest as a matter of fact – in other words, not capable of reasonable dispute – that Eskosol and Blusun constitute the same "Investor" for purposes of Article 26(3)(b)(i). *Finally*, the Tribunal also would have to find it "manifest" that the "dispute" here submitted is substantively the same one that Blusun submitted in the prior ECT case.

134. As to the first proposition, the Tribunal accepts that it could be abusive for a given investor to submit a given dispute over and over again under the ECT, essentially declining to recognize the preclusive effect of one ECT award. It is skeptical, however, that a fork-in-the-road clause is the appropriate doctrine to bar such abusive re-litigation; the appropriate doctrine would appear to be *res judicata*, addressed further below. That conclusion is supported by the very notion of a "fork" in a road, which implies the choice between two

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International, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Award on Jurisdiction, 21 October 2003, Exhibit CL-037, ¶ 3.4.3 (***Champion Trading v. Egypt***) ("The nationals and company concerned in the present dispute are the three individual Claimants and the two corporate Claimants, however not NCC. The Respondents have not shown any convincing reason why the Treaty should not be interpreted in good faith in accordance with the ordinary meaning expressed therein which excludes from ICSID arbitration only those disputes where the ICSID claimant is also the claimant in the national proceedings. The Arbitral Tribunal therefore rejects the defence of the Respondent that it does not have jurisdiction because of the claim brought by NCC before the Egyptian Conseil d'Etat."); and *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, Exhibit CL-038, ¶ 331 (***Genin v. Estonia***) ("The actions instituted by EIB in Estonia regarding the losses suffered by EIB due to the alleged misconduct of the Bank of Estonia in connection with the auction of the Koidu branch and regarding the revocation of the Bank's license certainly affected the interests of the Claimants, but this in itself did not make them parties to these proceedings.")) (emphasis omitted).

[220] Response, ¶ 75.

different paths, rather than repeat travels down the identical path. In the case of the ECT, it is also supported by the structure of Article 26(2), which distinguishes between ECT arbitration – addressed in subsection (c), which cross-references "the following paragraphs of this Article" – and alternative mechanisms for dispute resolution, addressed in subsections (a) and (b).

135. But even if Article 26(3)(b)(i) somehow could be read as providing a procedural mechanism to address re-litigation of a dispute already litigated under the ECT by the same "Investor," the Tribunal is unable to find that this is the situation here, because Blusun and Eskosol cannot be deemed (much less "manifestly") to be the same "Investor," as both Article 26(3)(b)(i) and Annex 1D on their face require.[221] The Tribunal incorporates by reference its detailed discussion of this issue below, in the context of Italy's fourth objection. The third objection is hereby denied.

D. *Lis Pendens, Res Judicata* and Collateral Estoppel

1. Italy's position

136. Italy's final Rule 41(5) objection is that public international law principles prohibit the prosecution of multiple claims in relation to the same prejudice, and preclude the opening of a new proceeding on a dispute that previously was submitted to another international arbitration tribunal (*lis pendens*)[222] or actually was decided by such a tribunal (*res judicata* or collateral estoppel).[223] According to Italy, these doctrines recognize that multiplicity of claims with respect to the same prejudice may lead to a number of shortcomings, including the risk of conflicting decisions and double recovery.[224] In its view, *lis pendens* has a close relationship with the *res judicata* effect of a judgment, and these principles "are usually treated under the same patterns."[225] In its Objections, Italy focused on *lis pendens* because

[221] Italy itself acknowledges this requirement, by arguing that Article 26(3)(a) "should be read to mean that a Contracting Party listed in Annex 1D does not give its unconditional consent anytime *the specific investor* requesting an arbitration has already undertaken another channel") (emphasis added) (Objection, ¶ 86).
[222] Objection, ¶ 13.
[223] Reply, ¶ 53.
[224] Objection, ¶¶ 96-97. Italy highlights the risk of double recovery by referring to the *Lauder* and *CME* cases; see *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award, 3 September 2001, Exhibit CL-036 (***Lauder v. Czech Republic***); and *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Award of 14 March 2003, Exhibit CL-035 (***CME v. Czech Republic***).
[225] Objection, ¶ 97.

the *Blusun* case still was pending, but in its Reply, Italy asserts that "once a final award is adopted, the relevant matters are rather covered by the principle of *res judicata*." Following the *Blusun* tribunal's issuance of its final award on 27 December 2016, Italy "base[s] its arguments … on such articulation of the general preclusion principles established by international law."[226]

137. Italy further contends that "there should be no dispute that [*res judicata*] is a rule of international law" and that it applies to this proceedings.[227] Its objection is therefore suitable for resolution at the Rule 41(5) stage, it contends, because the *Blusun* award sets forth its ruling on the legal challenges at issue, and the Tribunal can make a decision on the effect of such rulings under general principles of international law.[228] Specifically, the *Blusun* award recognized that the Romani Decree and the Fourth Energy Account "were legitimate under both articles 10 and 13 of the ECT, and that the reasons why the investment was not realized and Eskosol became insolvent are independent from any behavior by Italy."[229] Italy asserts that "going further in this procedure to re-discuss issues of jurisdiction and competence" already addressed in the *Blusun* case would impose additional efforts and costs on the parties "for a claim that is genuinely without legal merit."[230] In its view, the history of Rule 41(5) and its understanding in the context of ICSID procedures "go strongly against such disruptive result."[231]

a. The triple-identity test

138. Italy acknowledges that tribunals generally use the so-called "triple-identity test" to assess whether multiple proceedings have been opened on the same dispute.[232] It asserts that the sole issue at stake here is how the triple-identity test should be applied.[233] Italy suggests

[226] Reply, ¶ 53.
[227] Ibid., ¶ 54 (quoting *Waste Management, Inc. v. United Mexican states (II)*, ICSID Case No. ARB(AF)/00/3, Mexico's Preliminary Objection concerning the Previous Proceedings – Decision of the Tribunal, 26 June 2002, Exhibit RL-24, ¶ 39: "There is no doubt that *res judicata* is a principle of international law and even a general principle of law within the meaning of Article 38(1)(c) of the statute of the International Court of Justice."
[228] Reply, ¶¶ 15, 23.
[229] Ibid., ¶ 24.
[230] Ibid., ¶ 25.
[231] Ibid., ¶ 25.
[232] Objection, ¶ 103.
[233] Reply, ¶ 55.

that the Tribunal follow a "flexible" rather than a "strict" approach to the test, such as that followed by the *Libananco* tribunal, which in Italy's view adopted a "flexible approach ... informed by the purpose that the standard is intended to serve in light of the relevant treaty."[234]

139. Italy contends that, "in investment law *litispendence* may well relate to situations where a strict application of the triple identity test would deprive the rule of *effet utile*," and therefore its application should depart from the traditional application under domestic law.[235] Italy argues that "arbitral tribunals are … ready to recognize the specificity of arbitral proceedings, in particular in investment law, and to adopt a substantive approach."[236]

b. The identity of parties

140. Italy asserts that international law principles do not limit preclusion to circumstances of strict identity between parties, but "also recognize preclusion when a party is privy in the interests of another, to confirm that identity of parties is indeed a substantial rather than a formal standard."[237] Italy relies on the decision rendered in *Amco v. Indonesia*, where the tribunal held as follows:

> The foreign investor was Amco Asia [the parent company]; PT Amco [the subsidiary through with the investment was made] was but an instrumentality through which Amco Asia was to realize the investment. Now, the goal of the arbitration clause was to protect the investor. How could such protection be ensured, if Amco Asia would be refused the benefit of the clause? Moreover, the Tribunal did find PT Amco had this benefit, because of the foreign control under which it is placed: would it not be fully illogical to grant this protection to the controlled entity, but not to the controlling one?[238]

[234] Objection, ¶ 104; see also Reply, ¶ 77.
[235] Objection, ¶ 104.
[236] Ibid., ¶ 105.
[237] Ibid., ¶ 107.
[238] Reply, ¶ 74; *Amco Asia Corporation, Pan American Development Ltd. and P.t. Amco Indonesia v. Republic of Indonesia*, ICSID case No ARB/81/1, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports, Exhibit RL-011, p. 400 (***Amco v. Indonesia***).

141. Italy also cites the following passage from *Klöckner v. Cameroon*, where it notes the tribunal decided that it had jurisdiction over the majority shareholder even though it was not a party to the agreement containing consent:

> This Agreement, although formally signed by the Government and SOCAME [the subsidiary], was in fact negotiated between the Government and Klöckner […] Moreover, it is undeniable that it was manifestly concluded in the interest of Klöckner, at a time when Klöckner was SOCAME's majority shareholder. The Establishment Agreement reflected the contractual relationship between a foreign investor, acting through a local company, and the host country of this foreign investment.[239]

142. According to Italy, under the triple-identity test it is enough that either the parties themselves or their privies are the same. In support of this argument, Italy relies on *RSM v. Grenada*, where the tribunal recognized the concept of privity and upheld an objection under Rule 41(5) to an ICSID claim brought following a prior related proceeding.[240]

143. Italy contends that the claimants in the *Blusun* case and Eskosol in this case are so closely related that "they have to be deemed identical."[241] To the extent there is a dispute between the shareholders of Eskosol which resulted in the *Blusun* claimants initiating suit without consulting with the minority shareholders, that is "purely a domestic issue" which should not be transformed "into a disruption of the ICSID mechanisms, which generates an inherent conflict of jurisdiction between ICSID tribunals on exactly the same dispute."[242] The consequences of any dispute among shareholders should not be shifted to Italy, in its view, which in such circumstances could be "confronted with a concrete risk of double recovery."[243] Even though Italy's victory in the *Blusun* case now precludes a possibility

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[239] Reply, ¶ 76; *Klöckner v. Cameroon*, ICSID Case No ARB/81/2, Award, 21 October 1983, 2 ICSID Reports, Exhibit RL-012, p. 17 (***Klöckner v. Cameroon***). Italy also relies on *Martin v. Spain*, a case before the European Commission on Human Rights, in which the Commission held as follows:

> While it is true that formally the 23 individual applicants before the Commission are not the complainants who appealed before the ILO organs, access to those bodies being reserved for trade union organisations it is no less true that in the present case, unlike the case mentioned above the complaint was, in substance, submitted by the same complainants. On that basis the Commission concludes that in this case the parties were substantially the same. (Exhibit RL-026, p. 134).

[240] Reply, ¶ 81, citing *RSM Production Corp. and others v. Grenada*, ICSID Case No ARB/10/6, Award, 1 September 2010, Exhibit RL-004, ¶¶ 7.1.4 to 7.1.7 (***RSM v. Grenada***).
[241] Objection, ¶ 105.
[242] Ibid., ¶ 110.
[243] Ibid., ¶ 112.

of double recovery, Italy still is confronted with the additional burdens and costs of having to re-litigate the underlying issues.

144. Finally, Italy asserts also that Eskosol could have timely applied for leave to intervene as a non-disputing party in the *Blusun* case "to have its alleged rights protected in the appropriate forum."[244] It notes that, instead, Eskosol decided first to initiate this separate and parallel arbitration in December 2015, and only later (on June 21, 2016) to apply to intervene as a non-disputing party. By that time, according to Italy, the written proceedings and most of the evidentiary hearing in the *Blusun* case had been completed, and closing arguments would have been completed also but for an unexpected postponement due to the hospitalization of a tribunal member.[245] It was thus entirely foreseeable, and Eskosol's responsibility, that its application to intervene was rejected as untimely by the *Blusun* tribunal.

c. The identity of object and cause of action

145. In Italy's view, this case and the *Blusun* case "refer to the same dispute under all material tests."[246]

146. For purposes of a "triple identity" analysis, Italy defines the "object" as "the type of relief sought," and the "ground" or "cause of action" to mean "that the same legal arguments are relied upon."[247] It notes that "[m]any scholarly opinions and authorities refer to the risk that too restrictive criteria of identity of 'object' and 'ground' could lead to artificial 'claim splitting' to avoid the application of the *res judicata* effect of a prior award by seeking a different sort of relief or by raising new grounds in support of the same claim for relief."[248]

147. Italy contends that, in the instant case, the facts and cause of action are the same as those in the *Blusun* case. From its perspective, this can be ascertained on the face of the excerpts

[244] Ibid., ¶ 109.
[245] Ibid., ¶ 109.
[246] Ibid., ¶ 105.
[247] Reply, ¶ 56.
[248] Ibid., ¶ 57, citing G. Zarra, *Parallel Proceedings in Investment Arbitration*, Giappichelli 2016, Exhibit RL-023, pp. 139-147 (in particular the *Machado* case at p. 143). Italy also refers to *Glaziou v. France*, UN Human Rights Commission 452/1991, Decision of 18 July 1994, CCPR/C/51/D/452/1991, Exhibit RL-025, point 7.2.

provided from the *Blusun* award, where the *Blusun* tribunal decided on both the legitimacy of the Romani Decree and the Fourth Energy Account (at issue in this case too) and the lack of causation between these measures and the harm allegedly suffered by Blusun as a shareholder in Eskosol.[249] Italy stresses that the *Blusun* award (which it quotes extensively at paragraphs 62 to 72 of the Reply) bases its reasoning on a general discussion of the project and the way in which it was implemented, and not on the specificities or qualities of the particular investors who were claimants therein. Therefore, according to Italy, the result would have been the same if the claim before the *Blusun* tribunal had been brought by Eskosol.[250]

d. Collateral estoppel

148. Italy contends that the same factors would justify dismissal under the theory of collateral estoppel as an alternative to *res judicata*, because the issues to be decided in this case are the same as those already addressed in the *Blusun* case.[251] Italy notes that collateral estoppel was applied by the tribunal in *RSM v. Grenada*, where the tribunal held as follows:

> [A] finding concerning a right, question or fact may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal.
>
> It is also not disputed that the doctrine of collateral estoppel is now well established as a general principle of law applicable in the international courts and tribunals such as this one.[252]

149. Italy contends that the *Blusun* award "finally establishes that the contested measures were fully legitimate and that the insolvency of Eskosol as well as the failure of the project were not caused by Italy's behavior."[253]

[249] Objection, ¶ 105; Reply, ¶¶ 58-72.
[250] Reply, ¶ 71.
[251] Ibid., ¶ 84.
[252] Ibid., ¶ 85 (quoting *RSM v. Grenada*, Exhibit RL-004, ¶¶ 7.1.1 and 7.1.2).
[253] Reply, ¶ 84.

2. Eskosol's position

150. Eskosol asserts that Italy "fails to support its novel argument for why its international law objections would succeed were its treaty objections to fail."[254]

a. The triple-identity test

151. Eskosol argues that "the overwhelming majority of international law authorities agree that the principle of *res judicata* must be applied strictly."[255] It rejects Italy's view that a strict application of the triple identity test could permit an "artificial 'claim splitting'" or give rise to a risk of double recovery. First, it contends that "Eskosol and Blusun did not act in concert to split claims between the two proceedings. Rather, Blusun has apparently attempted to usurp Eskosol's claims and seek compensation for its direct losses,"[256] which Eskosol argues was improper. Second, Eskosol notes that there is no risk of double recovery in this case because Blusun's claims have been dismissed.[257]

b. The identity of parties

152. Eskosol argues that the triple-identity test is not satisfied because Blusun and Eskosol are not the same parties.[258]

153. Eskosol contends that legal authorities "overwhelmingly support the application of a strict interpretation of identity of parties, not a relaxed standard, and that the identity test does not extend to privies."[259] In support of its position, Eskosol relies on the decisions rendered in the cases *LESI-Dipenta v. Algeria* and *LESI and Astaldi v. Algeria*,[260] and on *CME v. Czech Republic*, where the tribunal held that a company and its shareholders must be

[254] Response, ¶ 76.
[255] Rejoinder, ¶ 101 (citing International Law Association, *Interim Report: "Res Judicata" and Arbitration* (2004), Exhibit CL-061, 14 and 26; and J. Baumgartner, *Treaty Shopping in International Investment Law* (1st edn., OUP 2016), Exhibit CL-062, 18).
[256] Rejoinder, ¶ 103.
[257] Ibid., ¶ 105.
[258] Response, ¶ 79.
[259] Rejoinder, ¶ 106.
[260] Ibid., ¶¶ 108-109 (citing *Consorzio Groupement L.E.S.I. – DIPENTA v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/03/08, Decision on Jurisdiction, 10 January 2015, Exhibit CL-065, ¶ 39(ii) (***LESI-Dipenta v. Algeria***); and L.E.S.I. S.p.A. et ASTALDI S.p.A. v. *République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, Exhibit CL-066, ¶ 56 (***LESI and Astaldi v. Algeria***)).

considered distinct entities for purposes of investment treaty arbitration.[261] Eskosol also relies on the views of Dr. Hanno Wehland to the effect that:

> If the assertion of a claim by a shareholder would prevent a company from exercising the claims it may have itself, this would indirectly affect the interests of other shareholders. Such an approach could thus hardly be reconciled with the principle '*res inter alios judicata aliis neque nocet neque prodest*.'[262]

154. In this case, Eskosol asserts: (1) its suit does not risk causing detriment to Blusun or its minority shareholders; (2) it seeks to vindicate its own rights and claims, and seeks redress for its unique losses; and (3) under Italian law, only Eskosol (not its shareholders) can directly exercise the rights of Eskosol as a company.[263]

155. Eskosol rejects Italy's reliance on other case law.[264] It asserts that neither *Amco v. Indonesia* nor *Klöckner v. Cameroon* address *res judicata*.[265] Regarding *Libananco v. Turkey*, Eskosol argues that the tribunal "did not apply or endorse a flexible approach to *res judicata*."[266] Rather, it explains, the tribunal's *obiter dicta* concerned application of Article 26(3) of the ECT, and more specifically to what extent the terms "Investor" and "dispute" require identity between claims. Eskosol mentions that "while the tribunal … favored a somewhat flexible approach in interpreting the ECT, it accepted that, where applicable, such as in the case of a fork-in-the-road clause or the *res judicata* principle, legal personality should not be ignored."[267]

156. Regarding Italy's privity arguments, Eskosol notes that "legal jurisdictions have varying notions of how strictly the identity of parties requirement should be construed," and the

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[261] Rejoinder, ¶ 110 (citing *CME v. Czech Republic*, Exhibit CL-35, ¶ 432).
[262] Rejoinder, ¶ 111 (citing H. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (OUP 2013), Exhibit CL-040, pp. 201-202, ¶¶ 6.117-6.118).
[263] Rejoinder, ¶ 113.
[264] Rejoinder, ¶¶ 114-118.
[265] Ibid., ¶¶ 114-115 (citing *Amco v. Indonesia*, Exhibit CL-069, ¶¶ 18, 23-24 and 31; and *Klöckner v. Cameroon*, Exhibit CL-070, pp. 14-15).
[266] Rejoinder, ¶ 116.
[267] Ibid., ¶ 116 (citing *Libananco v. Turkey*, Exhibit RL-018, ¶¶ 537-538). Regarding the *Martin v. Spain* case Italy cites, Eskosol argues that, in that case, the Commission held there was identity of parties because: (1) there was complete overlap between the 23 individual applicants before the Commission and the trade union branches before the ILO, and (2) the individual applicants had acted through the union branches in the first proceedings (Rejoinder, ¶¶ 117-118).

concept of "privity" is primarily one from the common law, "not a concept of public international law, the law governing the dispute pursuant to Article 26(6) of the ECT."[268] Eskosol further argues that Italy "makes no attempt to elaborate on the circumstances in which privity would be found."[269] In its view, there is no valid basis to deprive Eskosol of its right to be heard on the basis of common law principles of privity. Eskosol argues that it cannot be deemed to be substantially the same as the *Blusun* claimants, nor did those claimants effectively present and protect Eskosol's interests in the prior arbitration.[270] To the contrary, Eskosol avers that: (1) the *Blusun* claimants failed to consult with Eskosol in the decision to bring the first arbitration; (2) they failed to communicate with Eskosol during the course of the proceedings; (3) they refused even to consider a consolidation of the two claims; (4) they did not represent the significant interests of Eskosol, which includes the interests of its minority shareholders and creditors and not just the interests of Blusun; and (5) they had no intention of sharing any proceeds with Eskosol to make it whole.[271]

157. Eskosol also asserts that *RSM v. Grenada* does not assist Italy because the facts were different from the ones in these proceedings. It explains that in that case, RSM first sued on its own behalf and then brought a second claim together with all of its shareholders; the tribunal held that the shareholders were bound by the results of the first case, as they owned 100% of RSM and had approved RSM's decision to bring both arbitrations.[272]

158. Eskosol acknowledges that it did submit an application in the *Blusun* case pursuant to Rule 37(2) of the ICSID Arbitration Rules. It explains that the application was intended to ensure that the *Blusun* tribunal "was appraised of Eskosol's own proceedings against Italy" and that "Blusun was not seeking to recover damages that only Eskosol was entitled to recover."[273] At the hearing, Eskosol further explained that before filing its Rule 37(2) application in the *Blusun* case, it first tried to achieve a consolidation of this case with that one so its interests could be directly represented as a party rather than a non-party, but once

[268] Rejoinder, ¶ 119.
[269] Ibid., ¶ 120.
[270] Ibid., ¶ 122.
[271] Ibid., ¶ 122.
[272] Ibid., ¶ 123 (citing *RSM v. Grenada*, Exhibit RL-004, ¶ 7.1.6).
[273] Response, ¶ 81.

consolidation was refused, it filed the Rule 37(2) application in *Blusun* to ensure that the *Blusun* tribunal was aware of the disparate interests between Blusun and Eskosol as well as Eskosol's initiation of a separate arbitration in its own name.[274]

c. The identity of object and cause of action

159. Eskosol contends that Italy has failed "to show that there is identity of object and/or cause of action" between this case and the *Blusun* case, or to provide enough information for the Tribunal to make such a determination without engaging in a difficult analysis of the law and facts at issue."[275]

160. In Eskosol's view, it should not have to rely on Italy's characterization of the *Blusun* award. It notes that: (1) it has no access to the record of the *Blusun* case; (2) it cannot know whether the excerpts of the *Blusun* award submitted by Italy actually illustrate in detail the pleadings and all the legal reasoning and factual submissions; (3) the excerpts provided by Italy do not contain the operative section of the award, "which is essential because *res judicata* effect attaches only to the *dispositif* of an award";[276] and (4) even if the Tribunal had access to the *dispositif*, without the factual section and the parties' positions "it is impossible to know whether the reasons contained in the excerpted parts of the award actually formed the foundations for the operative part of the *Blusun* award."[277]

161. Eskosol rejects Italy's definition of "object" as "the same *type*" of relief sought. It contends that for the object to be identical, for purposes of a *res judicata* analysis, it has to be "the same claim or relief."[278] Comparing the relief sought in the *Blusun* case (as it can be deduced from the excerpts of the *Blusun* award submitted by Italy) and the relief sought in the Request, Eskosol contends that the "relief sought is plainly not identical."[279] In its view,

[274] Hearing Transcript, February 8, 2017, at 107:12-108:2.
[275] Rejoinder, ¶ 124.
[276] Ibid., ¶¶ 125-126.
[277] Ibid., ¶ 126.
[278] Ibid., ¶ 128 (emphasis added by Eskosol). In support of this proposition, the Claimant refers to International Law Association, Final Report on Res Judicata and Arbitration, Arbitration International, Vol. 25, No. 1 (2006), Exhibit CL-080, ¶ 42; H. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (OUP 2013), Exhibit CL-040, pp. 201-202, ¶¶ 6.117-6.118; and *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 7 June 2008, Exhibit CL-078, ¶ 130.
[279] Rejoinder, ¶ 131.

the excerpts suggests that Blusun sought recovery for lost "capital gains" benefits it could have secured by selling its shareholding in Eskosol, while Eskosol's claims arise directly out of the losses that it suffered as the operating company.[280] Eskosol also emphasizes that it is bringing an umbrella clause claim under the ECT, which Blusun apparently did not assert.[281]

162. Eskosol also rejects Italy's definition of "cause of action" as meaning, for purposes of the triple-identity test, "that the same legal arguments are relied upon." In its view, the term "cause of action" "may be construed broadly as all facts and circumstances arising from a single event and relying on the same evidence which are necessary to give rise to a right to relief."[282] On this basis, it contends that "cause of action can only be ascertained with reference to a tribunal's reasoning and factual findings."[283] Yet even on the basis of the excerpts produced by Italy, Eskosol disagrees with some of the factual findings apparently made by the *Blusun* tribunal, which in its view likely were attributable to the evidence in the record in the *Blusun* case. It argues Eskosol would likely present different evidence and arguments in this case. On this basis, Eskosol contends that Italy has failed to show identity of cause of action for purposes of a triple identity analysis.[284]

d. Collateral estoppel

163. Finally, Eskosol argues that "judicial acceptance of the concept [of collateral estoppel] is not universal,"[285] and that even if it does apply in international arbitration, the doctrine of collateral estoppel has no application in this case.

164. Following the criteria in *RSM v. Grenada*, Eskosol argues that "to collaterally estop a claimant from disputing questions of law or fact raised and decided in a previous arbitration, a respondent must show: (1) that the question of law or fact was distinctly put

[280] Ibid., ¶ 131.
[281] Ibid., ¶¶ 132-133 (referencing paragraph 311 of the *Blusun* Award excerpted by Italy).
[282] Rejoinder, ¶ 135 (quoting International Law Association, Final Report on Res Judicata and Arbitration, Arbitration International, Vol. 25, No. 1 (2006), Exhibit CL-080, ¶ 43, footnote 18).
[283] Rejoinder, ¶ 135 (quoting the dissenting opinion of Judge Anzilotti in the *Chorzow Factory* case, Exhibit CL-077, p. 24); see also *CME v. Czech Republic*, Exhibit CL-035, ¶ 432.
[284] Rejoinder, ¶ 137.
[285] Ibid., ¶ 140.

at issue in the arbitration; (2) that a competent tribunal decided the question of law or fact; (3) that the question of law or fact was necessary to resolving a claim before the tribunal; (4) that the same parties (or their privies) were party to the previous arbitration; and (5) that application of collateral estoppel would not lead to an inequitable result."[286]

165. In Eskosol's view, one can only speculate as to the first three elements because Italy has not provided a full copy of the *Blusun* award.[287] As to the fourth and fifth elements, Eskosol argues that they "are plainly not met,"[288] because Blusun and Eskosol are distinct parties with separate interests, Eskosol did not participate in the prior arbitration, and it would be inequitable to bind Eskosol to the result of that arbitration in these circumstances.[289]

3. The Tribunal's analysis

166. The ECT authorizes a variety of entities to proceed as qualified "Investor[s]" under its terms. This includes *foreign* investors like Blusun, bringing suit relating to investments that they "own[] or control[] directly or indirectly," including "a company or business enterprise, or shares, stock or other forms of equity participation in a company or business enterprise."[290] But it also includes *local companies* like Eskosol, which are expressly permitted to bring claims in their own name provided that they meet the foreign control requirements of Article 26(7). Italy itself admits that in principle, both Blusun and Eskosol could be legitimate investors under the ECT.[291] A shareholder's claim for its reflective loss through an entity in which it holds shares cannot be equated automatically to that entity's claim for its direct losses.

167. The Tribunal accepts that notwithstanding this fact, there may be certain circumstances in which a foreign shareholder and the local company in which it holds shares have such identical interests that it would be abusive to permit arbitration of a given dispute by one after the other already has concluded an arbitration over the same dispute. This might well

[286] Ibid., ¶ 143.
[287] Ibid., ¶ 144.
[288] Ibid., ¶ 145.
[289] Ibid., ¶ 145.
[290] Articles 26(1) and 1(6)(b) of the ECT, Exhibit C-1.
[291] Reply, ¶ 45 (stating that it does not contend that "since Blusun was a legitimate investor under the ECT and ICSID, then Eskosol could not also be one").

be the case, for example, where the local company is wholly owned by the foreign shareholder. In *RSM v. Grenada*, the corporate claimant RSM sued first, and then after losing the case it sued a second time, on this occasion joined by the three shareholders who collectively owned 100% of RSM. The tribunal found – on a Rule 41(5) application – that because the three shareholders had entire control over RSM, they effectively had acted in concert with it and had their interests represented in the first proceeding, and therefore could not proceed with the second one.[292] In the Tribunal's view, the same conclusion would be equally logical in the reverse situation, if a first case were brought by the 100% shareholders of a local company and thereafter a second case was attempted by the local company that they wholly owned.

168. However, this is not such a case. It is undisputed that Blusun owns only 80% of Eskosol. It is also apparent from the case caption in the *Blusun* case that the *Blusun* claimants did not join Eskosol itself as a formal party to the proceedings, as controlling shareholders often have the power to do by following the corporate formalities necessary to obtain approval to sue on a company's behalf. To the contrary, both in the *Blusun* case and in this one, Eskosol has argued that the *Blusun* claimants had no authority to represent Eskosol's interests, proceeded without taking the required legal steps to act on Eskosol's behalf, and had no intention (if victorious) of channeling compensation through Eskosol so that its minority shareholders, as well as its creditors in bankruptcy, could share in the proceeds.[293] For its part, Italy claims reluctance to share the *Blusun* award with Eskosol, on the grounds that so doing might be considered a breach of its confidentiality obligations to the *Blusun* claimants. At the very least, this suggests Italy has some doubts that Eskosol and Blusun must properly be considered the same party.

169. In these circumstances, the Tribunal would have difficulty concluding – and certainly cannot find it "manifest" – that Blusun and Eskosol effectively were the same party, so as to preclude the later from attempting any claim after the former already has done so.

[292] *RSM v. Grenada*, Exhibit RL-004, ¶¶ 7.1.5-7.1.6.
[293] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Application Under ICSID Arbitration Rule 37(2) of June 21, 2016, Exhibit R-003, ¶¶ 1, 17, 36; see also Rejoinder, ¶ 122.

170. Obviously, there could be both efficiency and fairness reasons to prefer that all shareholders of an entity affected by a challenged State measure could be heard in a single forum at a single time, together with the entity that they collectively own. The Tribunal is not unsympathetic to Italy's circumstances, having to face claims now that are closely related to those it already successfully vanquished in a prior proceeding.[294] But the fact remains that neither the ICSID system as presently designed, nor the ECT itself, incorporate clear avenues (much less a requirement) for joinder in a single proceeding of all stakeholders potentially affected by the outcome. Absent such a system – which States have the power to create if they so wish – it would not be appropriate for tribunals to preclude arbitration by qualified investors, simply because *other* qualified investors may have proceeded before them without their participation. The possibility that domestic legal systems may afford potential remedies – for example, claims by minority shareholders or bankruptcy receivers against majority shareholders who take unauthorized actions in contravention of domestic law[295] – is not sufficient basis for precluding qualified investors from exercising their fundamental right to access the ICSID system.

171. For these reasons, the Tribunal rejects the Rule 41(5) objection premised on the identity of parties between the *Blusun* case and this one, whether presented under the *res judicata* doctrine or the similar doctrine of collateral estoppel. Because it is far from manifest that the parties were identical, the Tribunal need not proceed to the further steps in a preclusion analysis, involving identity of object and identity of cause.

172. Of course, Italy is free later in this case to argue, if it so wishes, that the conclusions of the *Blusun* tribunal were persuasive and should be followed by this Tribunal, exercising its independent judgment. However, Italy may not make such arguments based on selective excerpts from the *Blusun* award. To the extent it wishes to rely on that award for any purpose in this case, it is ordered to produce the award in full. The Tribunal notes Italy's

[294] Had Italy instead not prevailed in the prior proceeding, but been ordered to pay compensation to the *Blusun* claimants, the Tribunal of course would have to be vigilant to prevent double recovery from Italy for the same loss. Because of the outcome of the *Blusun* case, however, that situation does not arise here.
[295] Objection, ¶ 110.

acknowledgment during the Hearing that such an order would allow it to produce the *Blusun* award, notwithstanding the obligations of confidentiality applicable in that case.[296]

VI. DISPOSITIF

173. For the reasons set out above, the Tribunal:

(1) Denies Italy's application for dismissal of Eskosol's claims on the grounds that they are "manifestly without legal merit," pursuant to Rule 41(5) of the Arbitration Rules;

(2) Orders Italy, to the extent and at such time as it wishes to rely on the *Blusun* award for any purpose in this case, to produce such award in full;

(3) Defers ruling on allocation of the costs of the Rule 41(5) application, to be considered together with the allocation of further costs of this arbitration at a subsequent stage of proceedings.

[296] Hearing Transcript, February 8, 2017, 134:5-6.

[Signed]

Guido Santiago Tawil
Arbitrator

Date:

[Signed]

Brigitte Stern
Arbitrator

Date:

[Signed]

Jean Kalicki
President of the Tribunal

Date: