INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

KS INVEST GMBH AND TLS INVEST GMBH
Claimants

and

KINGDOM OF SPAIN
Respondent

ICSID Case No. ARB/15/25

DECISION ON THE PROPOSAL TO DISQUALIFY PROFESSOR GARY BORN, ARBITRATOR

Issued by

Judge Bruno Simma
Sir Daniel Bethlehem QC

Assistant to the President of the Tribunal
Dr. Andreas Müller

Secretary of the Tribunal
Mr. Francisco D. Grob

Date of dispatch to the Parties: April 30, 2018

REPRESENTATION OF THE PARTIES

Representing KS Invest GmbH and TLS Invest GmbH:

Mr. Kenneth R. Fleuriet
Ms. Amy Roebuck Frey
Ms. Héloïse Hervé
King & Spalding
12, cours Albert Ier
75008 Paris
France
and
Mr. Jan K. Schaefer
King & Spalding
TaunusTurm
Taunustor 1
Frankfurt am Main 60310
Germany
and
Mr. Reginald R. Smith
Mr. Kevin D. Mohr
King & Spalding
1100 Louisiana, Suite 4000
Houston, TX 77002
USA
and
Mr. Christopher Smith
King & Spalding
1180 Peachtree St. NE
Atlanta, GA 30309
USA
and
Mr. Enrique Molina
King & Spalding
1185 Avenue of the Americas
New York, NY 10036
USA
and
Ms. Verónica Romaní Sancho
Mr. Fernando Igartua Arregui
Mr. Luis Gil Bueno
Ms. Inés Vázquez García
Ms. Cristina Matia Garay
Gomez-Acebo & Pombo
Castellana, 216
28046 Madrid
Spain

Representing Kingdom of Spain:

Mr. Diego Santacruz Descartin
Mr. Antolín Fernández Antuña
Ms. Mónica Moraleda Saceda
Mr. Javier Torres Gella
Ms. Amaia Rivas Kortazar
Ms. Elena Oñoro Sainz
Mr. Javier Castro
Mr. Roberto Fernández Castilla
Ms. Patricia Froehlingsdorf Nicolás
Mr. Álvaro Navas López
Ms. Ana Rodríguez Esquivias
Ms. Gloria de la Guardia limeres
Mr. Yago Fernández
Abogacía General del Estado
The Ministry of Justice of the
Government of Spain
Calle Ayala, 5
28001 Madrid
Spain

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I. INTRODUCTION

1. This decision rules on Respondent's proposal dated February 14, 2018, to disqualify Professor Gary Born as arbitrator in this case (the "**Disqualification Proposal**"). For the reasons set out in section VI below, the Disqualification Proposal is rejected.

II. THE DISPUTE

2. This case has been submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") under the Energy Charter Treaty which entered into force for the Kingdom of Spain and the Federal Republic of Germany 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**").

3. It concerns a dispute between two German investors and the Kingdom of Spain arising out of measures implemented by the government of Spain modifying the regulatory and economic regime of renewable energy projects.

III. THE PARTIES

4. The Claimants are KS Invest GmbH and TLS Invest GmbH, both limited liability companies organized under the laws of Germany (together, the "**Claimants**"). The Respondent is the Kingdom of Spain ("**Spain**" or the "**Respondent**"). The Claimants and the Respondent are collectively referred to as the "**Parties**".

IV. PROCEDURAL BACKGROUND

A. THE ARBITRATION PROCEEDING

5. On May 20, 2015, ICSID received a Request for Arbitration from the Claimants against Spain, which was registered by the Secretary-General of ICSID on June 16, 2015.

6. By communications received on August 3, 2015, the Parties informed the Centre of their agreement regarding the number and method for the Tribunal's constitution. Pursuant to this agreement, the Claimants appointed Prof. Gary Born, a US national, and the Respondent appointed Sir Daniel Bethlehem, a British national, as arbitrators.

7. On December 4, 2015, the Parties informed that they had agreed to appoint Judge Bruno Simma, a national of Austria and Germany, as President of the Tribunal.

8. On December 7, 2015, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**").

9. The Tribunal held a first session with the Parties on January 12, 2016, by teleconference.

10. Between April 2016 and April 2017, the Parties submitted their main pleadings, arguments and defenses. The Tribunal, in turn, issued five procedural orders concerning various matters of procedure.

11. A little less than a month before the scheduled hearing on jurisdiction and the merits, the Claimants informed the Tribunal and the Respondent, by a letter received on September 18, 2017, that they had executed an agreement to sell their investments in Spain to a third-party, the closing being expected for September 20, 2017.[1]

12. Following an exchange between the Parties, the Respondent requested that the Tribunal postponed the hearing to have sufficient time to examine the documents surrounding the sale of Claimants' investment, a postponement request to which the Claimants objected.

13. On October 18, 2017, the Tribunal decided to maintain the hearing dates, but to defer the examination of *quantum* issues to a later stage.

14. A hearing on Jurisdiction and Liability was thus held in Paris from October 23 to 27, 2017 (the "**Hearing**").

15. During the Hearing, the Tribunal informed the Parties that it had set aside June 20 to 23, 2018, for the examination of *quantum* experts, closing statements and any other outstanding matters. It also provided the Parties with procedural directions for the way forward, including an

[1] Sale and Purchase Agreement dated September 1, 2017 (Exhibit C-284).

invitation to agree on a document production calendar in relation to Claimants' sale of their investments in Spain.

16. Through an exchange of communications, the Parties agreed in early December 2018, on a calendar, which they later modified to run until March 9, 2018.

B. THE DISQUALIFICATION PROPOSAL

17. On February 14, 2018, the Respondent proposed the disqualification of Prof. Gary Born, pursuant to Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules. It also requested leave to submit excerpts of, and further comments relating to, the hearing transcripts of the case *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1), in which Prof. Born is also an arbitrator.

18. Upon receipt of the Disqualification Proposal, the Centre confirmed that, in accordance with ICSID Arbitration Rule 9(6), the proceeding was suspended until a decision was taken by the two unchallenged Members of the Tribunal, Judge Simma and Sir Daniel Bethlehem (the "**Unchallenged Arbitrators**"), as provided for in Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4).

19. On February 17, 2018, the two Unchallenged Arbitrators set a timetable for the Parties' submissions and Prof. Born's explanations. They also rejected Respondent's request for leave in respect of *Masdar v. Spain* (see paragraph 17 above), holding that it was not for the Tribunal to decide whether the Respondent should or should not submit a document in support of its Disqualification Proposal. As a general rule, no prior leave of the Tribunal is required provided that the applicable rules of procedure are otherwise met.

20. On February 23, 2018, the Unchallenged Arbitrators informed the Parties that, for the good administration of the proceedings, the dates of the Hearing scheduled for June 20 to 23, 2018, were vacated, a decision that was reached without prejudice to the outcome of the Disqualification Proposal. The Parties were also informed that the Tribunal would seek new hearing dates, in consultation with them, once the proceedings were resumed.

21. As scheduled, the Claimants filed their comments on the Disqualification Proposal on February 28, 2018 ("**Claimants' Reply Submission**"), and Prof. Born furnished his explanations on March 13, 2018 ("**Prof. Born's Explanations**"). On March 27, 2018, both Parties submitted additional observations on the Proposal ("**Respondent's Additional Observations**" and "**Claimants' Additional Comments**", respectively).

V. SUMMARY OF PARTIES' POSITIONS AND PROF. BORN'S EXPLANATIONS

A. RESPONDENT'S DISQUALIFICATION PROPOSAL AND FURTHER OBSERVATIONS

22. The Respondent alleges that Prof. Born manifestly lacks the qualities required by Article 14(1) of the ICSID Convention to serve as an arbitrator in this case and should therefore be disqualified pursuant to Article 57 of the ICSID Convention. The Respondent relies on three key facts to sustain this assertion:

    (a) Prof. Born's dissenting opinion in the PCA Case No. 2014-03, *Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, Mrs. Gisela Wirtgen, JSW Solar (zwei) GmbH & Co. KG v. The Czech Republic* ("***JSW Solar* case**"), dated October 11, 2017;

    (b) Prof. Born's questioning of counsel in a hearing in the case *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* case (ICSID Case No. ARB/14/1) ("***Masdar* case**"); and

    (c) Prof. Born's questioning of Mr. Carlos Montoya, a fact witness presented by Spain, during the Hearing in the present case (ICSID Case No. ARB/15/25).[2]

23. Spain contends that Prof. Born's dissenting Opinion in the *JSW Solar* case shows that he has reached an immutable and biased position on key issues at stake in this arbitration. These include the assessment of investors' expectations (which he does not seem to balance against any other consideration in his dissent); the legal effect of regulatory measures concerning renewable energy prices (which he views as unqualified commitments of stabilization) and the applicability and effects of EU Law (which he largely downplays if not to reinforce

[2] Disqualification Proposal, paras. 2 et seq.

investor's expectations).[3] To prove these points, Spain refers to several passages of Prof. Born's dissent, including the following which arguably summarizes his views and includes implicit references to Spain:

> 47. **In my view**, it is essential to appreciate this background, both regulatory and commercial. Put simply, the entire renewable energy sector in the Czech Republic (as in **a number of other states**) was **based in the commitment** of the state, **like the commitments of other states**, that the prices paid for electricity produced from renewable energy sources **would be maintained unchanged** (except for upward adjustments to reflect inflation) for a specified period of time, **regardless of market conditions or regulatory judgments**. In turn, this provided investors and lenders with the security that was otherwise absent in the renewable energy sector.[4]

24. In response to Prof. Born's explanations, Spain asserts that Prof. Born's subjective intentions are irrelevant to the resolution of the present challenge, which must be determined objectively. It also points out that Spain has not challenged Prof. Born because he sits as an arbitrator in other cases involving Spain or has decided against another State, but because he has prejudged issues relevant to the present case.[5]

25. Spain also argues that Prof. Born's interventions in the two cases mentioned above demonstrate that he is unable or otherwise unwilling to consider alternative viewpoints.[6] In the *Masdar* case, Prof. Born pressed Spain's counsel to concede the existence of what he considers a "guaranteed" electricity tariff;[7] in this case, on the other hand, Prof. Born went as far as to interrupt Mr. Montoya's cross-examination to convey his own views, requesting that Mr. Montoya refrain from providing explanations regarding the legal context of regulatory measures and address a single legal provision in isolation. He then made a disdainful comment to Mr. Montoya,[8] which shows a worrisome lack of respect if not outright bias against Spain.

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[3] Disqualification Proposal, paras. 5-14.

[4] Disqualification Proposal, para. 6 (Spain's own emphasis); see also *ibid.*, para 46. In the original of para. 47 of the dissent, it reads "… was based on the commitment …" instead of "… was based in the commitment …".

[5] Respondent's Additional Observations, paras. 3-9.

[6] *Ibid*., paras. 42-50.

[7] Disqualification Proposal, para. 35.

[8] See Hearing Transcript, Day 3, 25 October 2017, p. 206: "PROFESSOR BORN: I'm sorry, if you could just focus on my question. Isolate things. Mr. MONTOYA Here in the text, no, it doesn't show, I cannot find it. I haven't learnt it by heart. PROFESSOR BORN: Another couple of months!"

For a similar attitude of an arbitrator, although directed to counsel, the Chairman of the ICSID Administrative Council upheld a challenge in the *Burlington v. Ecuador* case.[9] None of this can be considered proper, let alone routine, questioning.

26. Spain contends that the cases cited by the Claimants to seek the dismissal of the challenge are of no avail because they are all inapposite. None of such cases involve statements made by an arbitrator about laws applicable in the relevant proceeding in which the challenge is brought. Here, by contrast, Prof. Born's dissent in the *JSW Solar* case concern laws that are applicable to the present dispute (e.g. EU law) and facts that are also very similar to those underlying this arbitration.

27. As for the applicable standard, Spain argues that the key question is whether the statements and attitude of Prof. Born give rise to an appearance that he has prejudged the issue from a reasonable third person's point of view. Any party to arbitration proceedings has a right to have its case heard by an impartial tribunal composed of open-minded arbitrators. That right is not complied with where a tribunal member has preconceived views on key questions of law or fact as a result of exposure to another case's file, as rightly noted by the two unchallenged arbitrators in the *Caratube v. Kazakhstan* case.[10]

[9] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, dated December 13, 2013, ("*Burlington*"), para. 65 and n. 77 (Disqualification Proposal, Annex 12).

[10] *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13), Decision on the Proposal for Disqualification of Mr. Bruno Boesch, rendered by the Unchallenged Arbitrators, dated March 20, 2014, ("*Caratube*"), paras. 90 and 91 (Disqualification Proposal, Annex 3).

B. CLAIMANTS' RESPONSE AND FURTHER OBSERVATIONS

28. According to the Claimants, Spain has not demonstrated any fact that calls into question the impartiality or independence of Prof. Born, much less that it does so "manifestly".[11]

29. Spain's key argument is that Prof. Born has prejudged certain issues of this case by issuing a dissenting opinion in another case. However, Prof. Born's dissent in the *JSW Solar* case does not demonstrate anything even close to prejudgment. Nor do the two sets of questions that Professor Born posed to Spain's counsel and Mr. Montoya, Spain's sole fact witness in the present case, demonstrate any manifest lack of independence, prejudgment of any issues, or a refusal to consider Spain's arguments. Prof. Born simply asked Spain's counsel in the *Masdar* case to confirm whether he had understood Spain's position correctly, whereas in the present case he asked Mr. Montoya to answer the specific question he had made instead of advocating his side's position.[12] That is all.

30. In any event, Spain's challenge must necessarily fail because the factual and legal issues addressed in Prof. Born's dissent are not the same as those at issue in this arbitration. The relevant treaties and evidentiary record are different; so are the disputed measures and presumably the parties' arguments.

31. On the issue of the applicable disqualification standard, Claimants stress that Spain must prove that Prof. Born "manifestly" lacks independence, a "heavy burden" that cannot be satisfied by mere speculation.[13] Arbitrator challenges based on alleged prejudgment of pending issues have been routinely rejected in treaty practice. Arbitrators have also uniformly rejected arbitrator challenges based solely on prior awards deciding legal issues presented in a subsequent case. It is not even clear whether a proven "prejudgment" of certain legal issues may constitute the basis for a finding that an arbitrator lacks independence (much less "manifestly" lacks independence, as required by ICSID's rules).[14] Evidence that an arbitrator

[11] Claimants' Additional Comments, para. 2.

[12] Claimants' Reply Submission, paras. 29 and 30.

[13] Claimants' Reply Submission, paras. 9-11; Claimants' Additional Comments, para. 2.

[14] Claimants' Reply Submission, para. 13.

holds genuine, good faith views regarding the legal consequences of a particular fact pattern is not demonstrative of an arbitrator being subject to improper influences or biased.

32. The only decision in the public domain on which Spain relies that reached a different result is *Caratube*.[15] Yet apart from being misguided, this authority is also inapposite in respect of Spain's challenge. Spain is not relying upon special knowledge only available to Prof. Born and not to the other arbitrators as a result of his service in the *JSW Solar* case. Rather, Spain argues that Prof. Born's dissent constitutes evidence that he has prejudged issues in this arbitration. Nothing further from reality.

33. The Claimants also note that Spain challenged Professor Born on precisely the same grounds as in the ICSID case of *Mathias Kruck and others v. Kingdom of Spain*, a challenge that was rejected by the two other arbitrators, Professors Vaughan Lowe QC and Zachary Douglas QC.[16]

C. PROF. BORN'S EXPLANATIONS

34. In his explanations, Prof. Born reiterates his continuous commitment to be both independent and impartial, and to examine the issues in this arbitration with an open mind based on the evidentiary record and submissions on file. He also disagrees with the stated grounds upon which Spain has sought to disqualify him.

35. Prof. Born considers that his dissenting opinion in the *JSW Solar* case does not reflect bias or indicate any inability to sit as an independent and impartial arbitrator in this case. Nothing in that opinion expresses any view about issues in the present case, which concerns a different treaty, different legislative measures and a different evidentiary record. Nor has the Czech Republic alleged that his dissenting opinion indicates a lack of independence or impartiality in the other cases involving that State in which he is sitting.

[15] See *Caratube*.

[16] See *Mathias Kruck and others v. Kingdom of Spain*, Decision on the Proposal to Disqualify Mr. Gary B. Born, March 16, 2018, ("*Mathias Kruck*") para. 54 (Claimants' Additional Comments Annex 20).

36. Paragraph 47 of his dissent, referred to in the Disqualification Proposal, simply contains general observations based on evidence submitted in the *JSW Solar* case. It does not resolve any of the claims or issues in that case. His generic reference to "other states" in that paragraph was not intended to make, and in fact did not make, any reference to Spain, much less prejudge any issue involving Spain in this case concerning the application of EU law or the positions adopted by the European Commission in relation to Spain or this arbitration. Prof. Born's discussion of the European Commission's stand in that case involved only a discrete issue of interpretation of Czech Constitutional law.

37. Similarly, the question that he put to Spain's counsel at the *Masdar* hearing was a typical question intended to clarify and understand the parties' respective cases, by no means unusual in arbitration proceedings. Spain did not object to the question then nor thereafter. His question to Spain's witness at the Hearing in the present case was likewise a typical question intended to understand and clarify the evidence and issues put forward. Also, no objections or concerns were raised then or thereafter.

VI. ANALYSIS

38. The Unchallenged Arbitrators have considered all submissions of the Parties, but refer to them only inasmuch as they are relevant for the present Decision.

A. LEGAL STANDARD

39. The Disqualification Proposal is made on the basis of Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules.

40. The relevant first sentence of Article 57 of the ICSID Convention reads as follows:

> A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.

41. Paragraph 1 of Article 14 of the ICSID Convention reads as follows:

> Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance,

> who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

42. It is generally accepted,[17] and both Parties are in agreement,[18] that pursuant to Article 14 of the ICSID Convention arbitrators must be both impartial and independent.

43. The Parties have made various submissions concerning the precise meaning to be given to the concepts of impartiality and independence in the context of the present arbitration and what standard of proof should be applied in this regard. Having considered these arguments, the Unchallenged Arbitrators are satisfied that they are not of material relevance to the Decision in the present case.

44. Furthermore, it is generally accepted,[19] as well as agreed upon by both Parties,[20] that the legal standard to be applied is an "objective standard based on a reasonable evaluation of the evidence by a third party".[21] Accordingly, neither is "the subjective belief of the party requesting the disqualification … enough to satisfy the requirements of the Convention"[22] nor are the personal views of the challenged arbitrator decisive in this regard.[23]

45. Hence, the legal standard to be applied for deciding on the disqualification of an arbitrator is, as has been stated in the *Mathias Kruck* Decision:

> whether it has been shown that there are any circumstances that would cause a reasonable third party to conclude that Mr Born cannot be relied upon to exercise independent judgment. Those circumstances could include, for example, evidence

[17] See the references in *Mathias Kruck*, para. 47 and n. 3 (Claimants' Additional Comments Annex 20).

[18] Disqualification Proposal, paras. 63 et seq. ; Claimants' Reply Submission, para. 13.

[19] *Burlington*, para. 66 ("Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias."), with further references in n. 80 (Disqualification Proposal Annex 12).

[20] Disqualification Proposal, paras. 67 et seq; Claimants' Reply Submission, para. 10; Respondent's Additional Observations, para. 7.

[21] Disqualification Proposal, para. 68; see also Claimants' Reply Submission, para. 10: "The Parties agree that the standard is objective and not subjective. Thus, one must analyze the evidence from the point of view of a reasonable third party, with knowledge of all the facts."

[22] *Burlington*, para. 67, with further references in n. 82 (Disqualification Proposal, Annex 12).

[23] Respondent's Additional Observations, para. 7.

> of partiality, or of a lack of independence from a party or some other interested person, or of a personal interest in some aspect of the subject-matter of the proceedings, or of an unwillingness on the part of the arbitrator 'to consider views that oppose his preconceptions, and remain open to persuasion'.[24]

B. APPLICATION OF THE STANDARD

46. In the Disqualification Proposal, the Respondent contends that Prof. Born's dissenting opinion in the *JSW Solar* case as well as his questioning of counsel in a hearing in the *Masdar* case and of a fact witness in the Hearing in the present case would indicate to a reasonable third party a degree of partiality implying that Prof. Born cannot be relied upon to exercise independent judgment.

47. As noted by the Claimants,[25] the Respondent challenged Prof. Born in contemporaneous, parallel proceedings on precisely the same grounds in the ICSID case of *Mathias Kruck*. The Decision in that case is before the Unchallenged Arbitrators in the present proceedings. The challenge to Prof. Born was rejected by the unchallenged arbitrators, Professors Vaughan Lowe QC and Zachary Douglas QC, in *Mathias Kruck, inter alia* on the following grounds:[26]

> 54. The Two Members have considered Mr Born's dissenting opinion in *Wirtgen* [i.e. *JSW Solar*] carefully, in general and with particular attention to the passages identified by Respondent as indicating Mr Born's lack of partiality. The dissenting opinion is tightly focused upon the specific detail of the situation in the Czech Republic and the specific content of Czech legislation and conduct of the Czech Government. It is a long and detailed dissent, with many references to the documentary record in the case and extensive quotations from that record. The dissenting opinion contains a very close and precise analysis, based firmly on the specific facts of the case before the *Wirtgen* tribunal. The Two Members do not consider that it lends any support to the suggestion that Mr Born would not be an impartial arbitrator in the present case.
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> 55. The Two Members have considered Mr Born's questioning of counsel and witnesses in the *Masdar* and *KS Invest* cases. Again, they have considered the transcripts from those case [sic] generally and with particular attention to the passages identified by Respondent as indicating Mr Born's lack of partiality and his disdain for Respondent's witnesses. Mr Born's questioning appears to them to

[24] *Mathias Kruck*, para. 52 (Claimants' Additional Comments Annex 20), citing from US Supreme Court, *Republican Party of Minnesota v. White*, 536 U.S. 765, 778 (2002) (Claimants' Reply Submission Annex 9).

[25] Claimants' Additional Comments, para. 7; see above paragraph 33.

[26] See *Mathias Kruck* (Claimants' Additional Comments Annex 20).

> be in each case an entirely reasonable attempt to clarify the points being presented to the tribunal concerned. It is commonly – perhaps invariably – the case that members of tribunals have in mind some legal or factual issues that they consider are likely to be important for the decision in the case, and which may have been left unclear in the written submissions on the record. In the Two Members' view, far from being objectionable, it is desirable that members of a tribunal put such issues as precisely as they can to counsel and witnesses and give them the opportunity to have a clear answer put on the record. The Two Members see nothing in Mr Born's questioning that goes beyond that perfectly proper process.
>
> 56. In sum, and taking the submissions of the two Parties as a whole, the Two Members are clearly of the view that there is no basis for the suggestion that Mr Born cannot be relied upon to exercise independent judgment, or is not impartial, or does not have a mind open to the arguments to be presented in this case, or has any bias against Respondent in this case. That finding disposes of the matter, whether the precise formulations of the standard and the burden of proof advanced by Respondent or by Claimants are preferred.[27]

48. The Unchallenged Arbitrators are content to adopt the reasoning in the *Mathias Kruck* case, which addresses circumstances that correspond in every material respect to those engaged by the present case. As in the *Mathias Kruck* case, the Unchallenged Arbitrators in the present case consider that Prof. Born, both in his dissenting opinion in the *JSW Solar* case and in his questioning of counsel in the *Masdar* case and in the Hearing in the present case, acted entirely properly, within the bounds of independence and impartiality required of an arbitrator. There is no basis to the suggestion that Prof. Born has either overstepped the boundaries of impartiality and independence in these proceedings to this point or that there are grounds for concluding that he cannot be relied upon to exercise fair and independent judgment going forward. The Unchallenged Arbitrators accordingly reject the Respondent's proposal to disqualify Prof. Born in the present proceedings.

VII. COSTS

49. The Claimants have requested to order the Respondent to bear all costs that arise of or in connection with its Disqualification Proposal (and the related potential vacation of the June 2018 hearing dates).[28] The Unchallenged Arbitrators determine that a decision on costs arising

[27] *Mathias Kruck*, paras. 54-56.

[28] Claimants' Reply Submission, para. 38; Claimants' Additional Comments, para. 17.

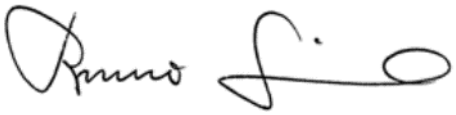
from this Proposal will be taken in due course. The Parties are invited to address this issue at the time they make their more general submissions on costs.

VIII. DECISION

50. For the reasons set forth above, the Unchallenged Arbitrators decide as follows:

(1) The Proposal to Disqualify Prof. Gary B. Born is rejected.

(2) A decision on the costs arising from the Proposal will be taken at a later stage.



Bruno Simma

Daniel Bethlehem