

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mainstream Renewable Power Ltd and others

v.

Federal Republic of Germany

(ICSID Case No. ARB/21/26)

PROCEDURAL ORDER NO. 10

Members of the Tribunal

Ms. Wendy Miles KC, President of the Tribunal

Mr. Antolín Fernández Antuña, Arbitrator

Dr. Charles Poncet, M.C.L., Arbitrator

Secretary of the Tribunal

Ms. Martina Polasek

24 August 2023

I. RELEVANT PROCEDURAL BACKGROUND

1. Pursuant to the agreed procedural calendar, on 4 August 2023, the Respondent filed its Rejoinder on the Merits (“**Rejoinder**”) together with supporting documentation, including the Witness Statement of [REDACTED] dated 5 July 2023 (“[REDACTED] Statement”), the Witness Statement of [REDACTED] dated 12 July 2023 (“[REDACTED] Statement”), and the Witness Statement of [REDACTED] dated 3 August 2023 (“[REDACTED] Statement”), (together, the “**New Witness Evidence**”).
2. By letter of 14 August 2023, the Claimants wrote to the Tribunal asserting that the New Witness Evidence “*was submitted belatedly with the Rejoinder in circumstances where it could and should have been submitted with the Respondent’s Counter-Memorial dated 26 August 2022 (‘Counter-Memorial’)*”. The Claimants requested that the Tribunal order: (i) that “*the New Witness Evidence shall not form part of the record in the Arbitration*”, and (ii) that the Respondent “*re-submit its Rejoinder without reference to the New Witness Evidence by no later than 31 August 2023*” (the “**Application**”).
3. Upon invitation from the Tribunal, by letter of 15 August 2023, the Respondent made brief observations on the Application. According to the Respondent, it submitted the New Witness Evidence on time and as early as possible. The substance of the New Witness Evidence is warranted by the Claimants’ new and extended arguments in their Reply. Moreover, the Respondent submits that as the Claimants will have the opportunity to cross-examine the witnesses and address the witness statements at the Hearing, there is no procedural unfairness or inequality.
4. On 16 August 2023, the Tribunal held a pre-hearing organizational conference with the Parties by video conference (“**PHC**”). During the PHC, the Parties, *inter alia*, made further oral submissions concerning the Application.
5. On 17 August 2023, the Tribunal issued Procedural Order No. 9 (“**PO 9**”) concerning the organization of the upcoming hearing. In PO 9, the Tribunal, *inter alia*, ruled at paragraphs 47 and 48 that:

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47. *After reviewing the Parties' written observations and hearing their submissions at the PHC, the Tribunal dismisses the Claimants' request to exclude the witness statements of the three new witnesses submitted by the Respondent with its Rejoinder on the Merits on 4 August 2023, i.e. the Witness Statements of [REDACTED] and [REDACTED]. The Tribunal's reasoning will follow separately in Procedural Order No. 10. The weight, if any, to be afforded to the testimony of these witnesses will remain a matter for the final award.*

48. *In light of the above-mentioned witness statements, the Claimants are allowed to introduce new documentary evidence that is strictly responsive to the new evidence raised in the mentioned witness statements **by Wednesday 13 September 2023** (any translations as needed are to be submitted by that same date).*

6. This Order sets out the Tribunal's analysis of and decision on the Application.

II. THE PARTIES' SUBMISSIONS

A. THE CLAIMANTS' APPLICATION

7. The Claimants' Application was made on the grounds that the Respondent's New Witness Evidence was submitted belatedly with the Rejoinder in circumstances where it could and should have been submitted with the Respondent's Counter-Memorial dated 26 August 2022 ("**Counter-Memorial**"), which the Claimants argue "*has only been introduced with the Rejoinder in order to deny the Claimants the opportunity to respond to it in their Reply dated 5 May 2023*".

8. According to the Claimants, if the Tribunal were to permit the New Witness Evidence:

- a. the Claimants would have no opportunity to submit responsive evidence;
- b. there would be a departure from the principle of equality of arms between the Parties;
and
- c. the Claimants would suffer a significant degree of procedural unfairness.

9. Consequently, the Claimants request that the Tribunal order that: (i) the New Witness Evidence be excluded from the record; and (ii) the Respondent re-submit its Rejoinder without reference to the New Witness Evidence by no later than 31 August 2023.

10. The Claimants set out in table format illustrative examples as to when the Respondent's submitted arguments previously had been raised, including:
- a. for ██████████, the New Witness Evidence relating to:
 - i. the allegedly “rudimentary” nature of the legal, regulatory and political framework applicable to offshore wind in Germany at around the time of the Claimants' investments in Germany (██████████ Statement, paragraphs 18–39), was relevant to the Counter-Memorial (at paragraphs 221–246);
 - ii. the development of section 17 (2a) of the Energy Industry Act 2006 (or the “*Energiewirtschaftsgesetz*”, “**EnWG**) (██████████ Statement, paragraphs 37–38), was relevant to the Counter-Memorial submissions regarding the individual grid connection right for developers of offshore wind farms under section 17 (2a) EnWG (see Counter-Memorial, paragraphs 275 *et seq.*);
 - iii. the commissioning of the Alpha Ventus wind farm (██████████ Statement, paragraphs 40–44), was relevant to the Counter-Memorial submissions on the commissioning of Alpha Ventus and what this meant for market entry to Germany on a commercial scale (Counter-Memorial, paragraphs 213 *et seq.*);
 - iv. the Respondent's alleged motivations for the 2014 amendment to the Renewable Energy Sources Act (or the “*Erneuerbare Energien-Gesetz*”, “**EEG**”), and switch to a tender-based process (██████████ Statement, paragraphs 62–80), was relevant to the Counter-Memorial submissions on the transition from fixed feed-in tariffs to a tendering system as announced by the EEG 2014 (Counter-Memorial, paragraphs 298 *et seq.*);
 - b. for ██████████, the New Witness Evidence relating to:
 - i. the EEG progress reports and their impact on the parties' arguments in the Arbitration (██████████ Statement, paragraphs 9–11), was relevant to the Counter-

- Memorial reference to the EEG progress reports (see, for example, Counter-Memorial, paragraphs 650 and 664);
- ii. the development of offshore wind in Germany from 2000 (█████ Statement, paragraphs 14 *et seq.*), was relevant to the Counter-Memorial chronological history of the development of offshore wind in Germany (Counter-Memorial, paragraphs 213 *et seq.*);
 - iii. the allegedly “rudimentary” state of the offshore wind industry in Germany in 2008 (█████ Statement, paragraphs 38 *et seq.*), was relevant to the Counter-Memorial section seeking to argue that the German offshore wind energy sector was “*still in an extremely premature status*” at the time of the Claimants’ investments in 2008 (Counter-Memorial, paragraphs 212 *et seq.*);
 - iv. alleged practical problems with achieving grid connections under section 17 (2a) EnWG (█████ Statement, paragraphs 44 and 50), was relevant to the Counter-Memorial submissions regarding the individual grid connection right for developers of offshore wind farms under section 17 (2a) EnWG (see Counter-Memorial, paragraphs 275 *et seq.*);
 - v. the alleged spatial planning development process in the German North Sea in 2008 (█████ Statement, paragraphs 47–49), was relevant to the Counter-Memorial submissions about the alleged spatial development process in 2008 (Counter-Memorial, paragraphs 339–350); and
- c. for ██████████, the New Witness Evidence relating to calculation of the tax treatment of any damages to be awarded to Mainstream (█████ Statement, paragraphs 8–13) was relevant to the Counter-Memorial submissions about the tax treatment of any damages to be awarded to Mainstream (Counter-Memorial, paragraphs 918–919).
11. On that basis, the Claimants submit that the New Witness Evidence seeks “*to advance arguments which were first advanced in the Counter-Memorial*”; these arguments should have been advanced in the Counter-Memorial “*in order that the Claimants would have*

been able to avail themselves of the opportunity to submit responsive evidence”. The Claimants accuse the Respondent of seeking “to withhold any witness evidence allegedly supporting the arguments until the Rejoinder”, submitting that this “apparent manoeuvre should not be tolerated, because it would cause significant procedural unfairness as between the parties.”

12. The Claimants further submit that if the Respondent were permitted to advance the New Witness Statement “*at this late stage ... the Claimants are denied the opportunity to submit responsive evidence*”, which “*is not and cannot be a fair way of conducting the hearing and resolving the dispute between the Parties*”.
13. The Claimants rely on Article 4(6) of the IBA Rules on the Taking of Evidence in International Arbitration to submit that “*second round witness statements, including statements from persons not previously named as witnesses, should be limited only to: (a) matters contained in another party’s witness statements, expert reports or other submissions that have not been previously presented in the arbitration; or (b) new factual developments that could not have been addressed in a previous witness statement*”. According to the Claimants, the New Witness Evidence does neither.
14. By way of relief the Claimants seek orders that that: “*(a) the New Witness Evidence shall not form part of the record in the Arbitration; and (b) the Respondent must re-submit its Rejoinder without reference to the New Witness Evidence by no later than 31 August 2023.*”

B. THE RESPONDENT’S RESPONSE

15. In response to the Tribunal’s 15 August 2023 invitation, the Respondent submitted its brief written observations on the Claimants’ Application that same day (in advance of the PHC scheduled for 16 August 2023). It registered its protest against the short deadline of “*less than half a day*”, complaining that it was “*not afforded sufficient time to respond to Claimants’ Application*” and could “*only provide initial comments, reserving all rights to supplement and amend its observations in the further course of this proceeding.*” The Tribunal afforded the Respondent further time for oral submissions in the course of the

PHC and invited the Respondent to confirm whether or not it sought to make further written submissions thereafter, which it confirmed it did not.

16. In response to the Claimants' Application, the Respondent submits that:
- a. it timely submitted the New Witness Evidence on 4 August 2023, *i.e.* within the deadline set forth for the Respondent's Rejoinder on the Merits and Reply on Jurisdiction in the Procedural Timetable and in accordance with Procedural Order No. 1;
 - b. it strongly opposes any "*assertion that the witness evidence 'appears' to have been introduced with the Rejoinder to deny Claimants a response in their Reply dated 5 May 2023*", which "*is not the case*";
 - c. the New Witness Evidence was submitted "*as early as possible*" and was "*warranted by Claimants' new and extended factual assertions and legal arguments in the Reply*";
 - d. it is "*not true that Claimants are denied a response to the witness statements*";
 - e. the Claimants would "*have ample opportunity to cross-examine the witnesses, and address the witness statements during the Hearing as well as in the Post-Hearing Briefs*" and therefore there is "*no procedural unfairness or inequality to Claimants' disadvantage*";
 - f. there is no legal basis to exclude the New Witness Evidence, which was submitted in accordance with Section 17 of Procedural Order No. 1 and the Procedural Timetable;
 - g. there is no rule in Procedural Order No. 1 (or in international arbitration) that:
 - i. limits a party's right to file witness statements to the first round of pleadings; or
 - ii. prohibits a party from filing new witness statements together with a rejoinder;
 - h. such limitation would "*violate Respondent's right to be heard and to fully present its case*";

- i. the Claimants filed new expert evidence with their Reply, *i.e.* the [REDACTED] Expert Report;
- j. the New Witness Evidence was not deliberately held back until the Rejoinder, but instead is “*warranted by Claimants’ new and extended factual assertions and legal arguments in the Reply and submitted as early as possible in this proceeding*”, as follows:
 - i. in their Reply, the Claimants submitted new arguments not previously mentioned in their Memorial (*e.g.* the Offshore Strategy 2002, which was addressed by the [REDACTED] Statements);
 - ii. “*some other topics included in the witness statements may have been partly addressed by Respondent in the Counter-Memorial*”, but the Claimants “*considerably expanded on their arguments in the Reply which warranted the submission of these witness statements*” (the Reply being twice the length of the Memorial), including (among other things) regarding:
 1. offshore expansion targets;
 2. the EEG subsidy regime (feed-in tariffs);
 3. the Respondent’s alleged motivation for regulatory reforms;
 4. problems regarding grid connection and the reasons for these problems;
 5. foreseeability of changes to the regulatory and political framework, including the EEG revisions and the introduction of the Offshore Wind Energy Act;
- k. the Respondent filed the New Witness Evidence “*as early as possible in the proceedings*”, taking into account “*that compared to what is usual in investor-State arbitration, Claimants pressed for extremely short filing deadlines*”, where “[n]ormally, for an investor-State arbitration several months of filing deadlines are customary”;

17. the Claimants are not denied a response to the New Witness Evidence because:
- i. as a matter of course one party (usually the respondent) files the last pleading before the hearing;
 - ii. “[t]here is nothing inequal or unfair about this”;
 - iii. “Claimants will have ample opportunity to address the witness statements during the Hearing, particularly during cross examination”;
 - iv. the Claimants have six weeks to prepare;
 - v. “the general topics addressed in the witness statements should not come unexpected or surprising for Claimants” as the Claimants addressed them in their Reply;
 - vi. “Claimants have not argued that their ability to present new witness evidence themselves had been hindered in any way”; and
 - vii. “Claimants’ ability to fully present their case is not impaired”.
18. According to the Respondent, there is no “*departure from the principle of equality of arms*” to the disadvantage of Claimants and they suffer no “*procedural unfairness*”. Rather, the Respondent would suffer if the New Witness Evidence were excluded.
19. During the PHC, the Parties reiterated their written submissions and the Claimants, in particular, indicated that they may seek to submit additional documentary evidence in response to the New Witness Evidence but likely not new witness testimony. In response to the Tribunal’s query as to whether the Claimants sought to delay the Hearing on procedural fairness grounds, the Claimants confirmed that they did not.

III. THE TRIBUNAL’S ANALYSIS

20. Having carefully considered the positions of the Parties and their written and oral arguments concerning the Claimant’s Application, the Tribunal denies the relief sought.

21. The Tribunal considers that the New Witness Evidence was submitted in accordance with the Procedural Timetable and the procedure stipulated in Procedural Order No. 1.
22. As to the sequencing of the Parties' evidence, it is a feature of that schedule that the Respondent's responsive evidence was submitted in the final written pleading prior to the Hearing. This aspect of the schedule was known to both Parties from the outset of the proceedings and neither raised previously any procedural fairness concerns as to the sequencing. As to the timing of that final submission, the Claimant did object to the Respondent's request to extend the Procedural Timetable by four months in September 2022, and in response to that objection the Tribunal extended only by four weeks. The Tribunal does not consider that this timing is a basis for complaint now.
23. As to the content of the New Witness Evidence, the addition of three entirely new witnesses at the reply stage of pleadings is somewhat unusual. Moreover, aspects of their evidence appear to relate to matters that were at least alluded to in the Claimants' first round of pleadings. However, in light of the Claimants much expanded second round pleadings, the Tribunal does not consider this to be an inappropriate or unreasonable response by the Respondent.
24. In any event, to the extent that the New Witness Evidence raises new matters to which the Claimants seek to respond:
 - a. Procedural Order No. 1 makes provision for the admission of Additional Evidence, outside the Procedural Timetable;
 - b. paragraph 48 of Procedural Order No. 9 makes further and specific provision for the Claimants to submit new documentary evidence in response to the New Witness Evidence;
 - c. the Claimants will have an opportunity to cross-examine the relevant witnesses at the Hearing and, to that end, the Tribunal has ensured in Procedural Order No. 9 that they have the requested 27 hours to do so; and

d. if the Claimants seek to adduce additional evidence-in-chief during the Hearing, the Tribunal will consider such application accordingly.

25. For the aforementioned reasons, the Tribunal considers that its decision to decline the Claimant's Application will not prejudice either Party.

IV. DECISION

26. On the basis of the above considerations, the Tribunal:

- a. denies the Claimant's Application that the New Witness Evidence shall not form part of the record in the Arbitration;
- b. denies the Claimant's Application that the Respondent re-submit its Rejoinder without reference to the New Witness Evidence; and
- c. reserves costs.

On behalf of the Tribunal,

[signed]

Ms. Wendy Miles KC
President of the Tribunal
Date: 24 August 2023