INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

RWE AG and RWE Eemshaven Holding II BV

v.

Kingdom of the Netherlands

(ICSID Case No. ARB/21/4)

DECISION ON THE CLAIMANTS' REQUEST FOR PROVISIONAL MEASURES

Members of the Tribunal
Ms. Lucy Reed, President of the Tribunal
Mr. James Boykin, Arbitrator
Mr. Toby Landau QC, Arbitrator

Secretary of the Tribunal
Dr. Jonathan Chevry

Assistant to the Tribunal
Ms. Lindsay Gastrell

16 August 2022

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I. INTRODUCTION

1. This Decision addresses the Request for Provisional Measures submitted by RWE AG and RWE Eemshaven Holding II BV (together, the ***Claimants*** or ***RWE***) on 29 April 2022, in which the Claimants ask the Tribunal to direct the Kingdom of the Netherlands (the ***Respondent*** or the ***Netherlands***) to withdraw or suspend proceedings against RWE AG before the Higher Regional Court of Cologne (the ***Request***). The Netherlands opposes the Request.

II. BACKGROUND

2. On 20 January 2021, RWE filed its Request for Arbitration with the ICSID Secretariat pursuant to Article 26 of the Energy Charter Treaty (the ***ECT***) and Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ***ICSID Convention***). The Secretary-General of ICSID registered the Request for Arbitration on 2 February 2021.

3. On 26 February 2021, the second Claimant, RWE Eemshaven Holding II BV, commenced proceedings against the Netherlands before the District Court of The Hague (the ***Dutch Proceedings***), seeking monetary compensation in relation to its investment in the Eemshaven plant, which is also at issue in this arbitration.[1]

4. In May 2021, the Netherlands commenced proceedings against the first Claimant, RWE AG, before the Higher Regional Court of Cologne (the ***Cologne Court*** and the ***German Proceedings***), seeking a declaration pursuant to Section 1032(2) of the German Code of Civil Procedure (the ***ZPO***), which provides that:[2]

> *Until the arbitral tribunal has been formed, a petition may be filed with the court*[] *to have it determine the admissibility or inadmissibility of arbitration proceedings.*

5. In the German Proceedings, the Netherlands argues that there is no agreement to arbitrate between RWE AG and the Netherlands under Article 26 of the ECT, because arbitration

[1] **R-2**, Writ of Summons, 26 February 2021.
[2] English translation of the German Federal Ministry of Justice, available at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html. *See* Memorial, n 292.

clauses in investment protection agreements between Member States of the European Union (the ***EU***) are incompatible with EU law, as confirmed by the Court of Justice of the European Union (the ***CJEU***) in its judgment in *Achmea B.V. v. The Slovak Republic* (***Achmea***).[3]

6. By letter of 17 May 2021, the Dutch Minister of Economic Affairs and Climate Policy informed the Lower House of the Dutch Parliament of the commencement of the German Proceedings, explaining that:[4]

> *The initiation of proceedings before the German court is in line with the Netherlands' position that intra-EU investment arbitration is contrary to EU law. These proceedings will be conducted in parallel with the ISDS proceedings. This means that, until that time, the ICSID arbitration proceedings will continue. This will involve challenging both the jurisdiction of the tribunal and the substance of the dispute. These procedures in Germany are primarily aimed at averting the arbitration. If it proves impossible to avert the proceedings, a defence on the merits will then be put forward.*

7. On 21 May 2021, the Netherlands informed the ICSID Secretariat of the German Proceedings, stating that it was seeking to:[5]

> *obtain a decision from the courts in RWE's home jurisdiction on the validity of an arbitration agreement which RWE alleges exists between it and the Netherlands by virtue of Article 26 of the Energy Charter Treaty, and that is said to be the basis for these proceedings before ICSID.*

8. The Netherlands noted that it would "continue to diligently take part in the present proceedings before ICSID while the proceedings in Germany are pending."[6]

9. RWE responded on 27 May 2021 and asserted that the action of the Netherlands "is in grave breach of Article 26 ICSID Convention."[7]

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[3] *See* **C-117**, Petition by the Netherlands to the Cologne Court, 10 May 2021; **RL-3**, *Slovak Republic v Achmea B.V.*, CJEU, Case C-284/16, ECLI:EU:C:2018:158, Judgment dated 6 March 2018.
[4] **C-113**, Letter from Minister Bastiaan vant Wout to the Lower House, 17 May 2021.
[5] Letter from the Respondent to ICSID, 21 May 2021.
[6] Letter from the Respondent to ICSID, 21 May 2021.
[7] Letter from the Claimant to ICSID, 27 May 2021.

10. The Tribunal was constituted on 2 June 2021 and held the first session with the Parties on 30 August 2021. On 15 October 2021, the Tribunal issued Procedural Order No 1.

11. On 18 December 2021, in accordance with the Procedural Timetable in Procedural Order No 1, RWE filed its Memorial. The Memorial included a claim relating to the German Proceedings and a request that the Tribunal:[8]

> *(C) (1.) DECLARE that the Kingdom of the Netherlands has violated the ICSID Convention by initiating the German court proceedings currently pending under docket number 19 Sch 15/21 before the Higher Regional Court of Cologne;*
>
> *(2.) ORDER the Kingdom of the Netherlands to withdraw its petition currently pending under docket number 19 Sch 15/21 before the Higher Regional Court of Cologne; and*
>
> *(3.) ORDER the Kingdom of the Netherlands to compensate Claimants for their damages suffered as a result of this violation, in particular Claimants' litigation costs including but not limited to attorneys and experts fees.*

12. On 14 January 2022, the Netherlands notified the Tribunal that it intends to raise an intra-EU objection in this arbitration.

13. On 28 January 2022, RWE filed a Request for Bifurcation, asking the Tribunal to bifurcate this arbitration and resolve the following two issues in an expedited initial phase: (a) the Netherlands' intra-EU objection; and (b) RWE's "ancillary claim" that the German Proceedings violate the ICSID Convention. RWE's main argument in favor of bifurcation was that the German Proceedings are designed to undermine the integrity of the arbitration and prevent RWE from pursuing claims at ICSID. According to RWE, bifurcation was necessary to preserve its "right to have the jurisdiction of this Tribunal determined authoritatively by this Tribunal, and only by this Tribunal."[9]

14. The Netherlands filed its response to the Request for Bifurcation on 11 February 2022.

15. Neither side requested a hearing on RWE's Request for Bifurcation.

[8] Memorial, para 689(2).
[9] Request for Bifurcation, para 27.

16. On 24 February 2022, the Tribunal denied RWE's Request for Bifurcation in Procedural Order No 2 (***PO2***). In doing so, the Tribunal noted certain statements made by the Netherlands in its response to the Request for Bifurcation, which the Tribunal understood "as assurances that it will not take any steps to interfere with the Tribunal's *kompetenz-kompetenz*."[10]

17. By letter of 2 March 2022, RWE commented on PO2, expressing its view that the Netherlands' statements upon which the Tribunal relied were "incorrect both as a matter of Respondent's conduct in the German Proceedings and under German law." RWE added:

> *The situation in relation to the German Proceedings continues to develop. Claimants therefore reserve all rights, including to further comment on the Tribunal's decision in Procedural Order No. 2 and to file further applications in relation to the matters covered therein.*

18. RWE filed the Request on 29 April 2022.

19. By letter of 3 May 2022, the Netherlands asserted that the Request was "an inadmissible attempt to re-litigate issues that have previously been decided [in PO2], without new facts or circumstances present." The Netherlands requested the Tribunal to dismiss the Request as inadmissible or, in the alternative, grant the Netherlands six weeks to file its response to the Request.

20. After receiving RWE's response to the Netherlands' letter of 3 May 2022, the Tribunal issued Procedural Order No 3, in which it: (a) found the Request admissible; and (b) set a schedule for briefing on the Request.

21. In accordance with that schedule, the Netherlands filed its Response to Request for Provisional Measures (the ***Response***) on 31 May 2022; the Claimants filed their Reply Relating to their Request for Provisional Measures (the ***Reply***) on 7 June 2022; and the Netherlands filed its Rejoinder on the Request for Provisional Measures (the ***Rejoinder***) on 14 June 2022.

22. The German Proceedings have progressed in parallel with this arbitration. Among other submissions, on 20 January 2022, RWE AG asked the Cologne Court to suspend the

[10] PO2, paras 48-49.

German Proceedings pending the Tribunal's decision on its jurisdiction.[11] The Netherlands opposed this request, stating that the Cologne Court's decision:[12]

> *does not depend on the decision of the ICSID Arbitral Tribunal or even on the application of the ICSID Convention. The* [court] *can decide the relevant question in this proceeding, whether the arbitral proceedings are admissible on the basis of an effective arbitration agreement, exclusively on the basis of Union law and German law. The applicability of the ICSID Convention depends on the effectiveness of the offer to arbitrate in Art. 26.*

23. The Cologne Court invited further and final comments by 18 March 2022, which both Parties submitted, and indicated that it would deliberate in June 2022.[13] RWE AG has requested an oral hearing, but the court is not required to hold such a hearing. Thus, after deliberating, the court could potentially rule on the Netherland's petition.[14]

24. On 23 February 2022, RWE requested the Netherlands to provide a written confirmation that "it will not seek any injunctive or similar relief on the basis of a potential decision in the German Proceedings and refrain from taking any other action on that basis to restrict any of the Claimants in their ability to pursue the ICSID arbitration."[15] The Netherlands declined to provide the requested assurance, stating instead that: "subject to any jurisdictional objections and the above-mentioned obligations, the Netherlands has no intention to preclude the RWE Claimants from continuing to participate in the [ICSID] arbitration."[16]

25. On 11 July 2022, the Tribunal requested an update on the German Proceedings from the Parties. On the same date, counsel for the Claimants reported informally that the Cologne Court was expected to deliberate on 14 July 2022.

[11] **C-128**, RWE AG's suspension application in the German Proceedings, 20 January 2022.
[12] **C-129**, Respondent's opposition to RWE AG's suspension application in the German Proceedings, 31 January 2022, para 8.
[13] **C-123**, Letter from the Cologne Court to the parties of the German Proceedings, 11 April 2022.
[14] Request, para 22.
[15] **C-130**, Claimants' letter concerning the German Proceedings, 23 February 2022, p 2.
[16] **C-131**, Respondent's answer to Claimants' letter of 23 February 2022 concerning the German Proceedings, 22 March 2022.

26. Counsel for both Parties provided updates on 22 July 2022. On the Claimants' behalf, counsel reported:[17]

> *We have followed up on this request with the judge-rapporteur of the responsible Senate via telephone on 19 July 2022. During the call, she was not able to specify a date for a decision. She merely informed us that she expects the Senate to deliberate on her draft in mid-August and that a decision still in the month of August would be possible, subject to the deliberations of the Senate.*
>
> *No further information has been received by the Court to date, neither orally nor in writing.*
>
> *Given that no further submissions and no oral hearing are planned, to the best of Claimants' knowledge a decision could thus be rendered at any time after mid-August without prior notice to the Parties.*

On the Respondent's behalf, counsel reported:[18]

> *The information given in the Higher Regional Court's notification in April 2022, that it would likely deliberate in June, is the latest written information that the Parties have received in this regard. The Parties have not received official notice that such deliberation has indeed taken place or when a decision is to be expected. …*
>
> *A call to the Higher Regional Court on Monday, 13 July 2022, confirmed that no decision has been taken yet.*
>
> *In its notification dated April 2022, the Higher Regional Court had also advised the Parties to file any last submissions by 18 March 2022. This still is the current status. …*
>
> *Considering the average decision making process by German courts, a decision by the Higher Regional Court in the third quarter of 2022 seems likely.*

III. THE PARTIES' REQUEST FOR RELIEF

A. THE CLAIMANTS' REQUEST FOR RELIEF

27. RWE requests that the Tribunal:[19]

[17] Email from the Claimants' counsel to the Tribunal, through ICSID, 22 July 2022.
[18] Email from the Respondent's counsel to the Tribunal, through ICSID, 22 July 2022.
[19] Request, para 135; Reply, para 57.

1. (i) Order Respondent to withdraw the German Proceedings pending before the Higher Regional Court of Cologne (Oberlandesgericht Köln) under Gase no. 19 SchR 15/21 immediately or otherwise cause them to be discontinued;

alternatively,

(ii) Order Respondent to immediately after the Tribunal's decision agree to a suspension of the German Proceedings pending before the Higher Regional Court of Cologne (Oberlandesgericht Köln) under case no. 19 SchR 15/21 until the Tribunal has rendered its award, and to communicate such agreement also immediately to the Cologne Court;

2. Order Respondent, in any case, to refrain from taking any steps outside of this arbitration to prevent Claimants from further pursuing their case at ICSID, and in particular not to initiate any further judicial proceedings (including interim measures) against any of the Claimants aimed at preventing them from continuing this arbitration, either before or after any decision in the German Proceedings;

3. Order Respondent to pay the full costs associated with this request; and

4. Provide such other relief as the Tribunal may deem appropriate.

B. THE RESPONDENT'S REQUEST FOR RELIEF

28. The Netherlands requests that the Tribunal:[20]

(a) REJECT the Request; and

(b) ORDER Claimants to bear the costs incurred in connection with the Request.

IV. SUMMARY OF THE PARTIES' POSITIONS ON THE REQUEST

A. THE CLAIMANTS' POSITION

29. RWE submits that "provisional measures are urgently needed to protect the exclusivity of ICSID arbitration, the Tribunal's exclusive *Kompetenz-Kompetenz*, Claimants' substantive rights and this arbitration's procedural integrity."[21]

[20] Response, para 110; Rejoinder, para 35.
[21] Request, para 3.

30. As detailed below, RWE argues that the Tribunal has broad authority to order provisional measures, and that the Request meets all relevant requirements.

1. Applicable Standards

31. RWE considers that the Tribunal has broad authority under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1) to order provisional measures, stating that "ICSID tribunals have consistently exercised this power to enjoin participation in parallel domestic proceedings in order to protect the exclusivity of ICSID arbitration" and their kompetenz-kompetenz.[22] As found by the tribunal in *Tokios Tokelés*:[23]

> *Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative.*

32. As to the applicable legal standard, RWE states that tribunals have considered the following criteria in deciding whether to grant provisional measures: (a) whether the tribunal has *prima facie* jurisdiction over the parties' dispute; (b) whether the applicant has established a *prima facie* case on the merits; (c) the urgency and necessity of the measures requested; and (d) their proportionality.[24]

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[22] Request, para 61, *citing* **CL-151**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005, para 7; **CL-152**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, para 127; **CL-153**, *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Order on Application for the Grant of Provisional Measures, 24 November 2014, para 68; **CL-154**, *Maritime International Nominees Establishment ("MINE") v. Republic of Guinea*, ICSID Case No. ARB/84/4, Award, 6 January 1988, para 41; **CL-155**, *Millicom International Operations B.V. and Sentel GSM S.A. v. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application for Provisional Measures, 9 December 2009, paras 40-51; **CL-134**, *Perenco Ecuador Ltd. v. Ecuador*, ISCID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, para. 64; **CL-156**, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2, 16 October 2002, para 30.

[23] **CL-151**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005, para 7.

[24] Request, para 107, *citing* **CL-168**, *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Respondent's Application for Provisional Measures, 12 May 2016, para 78; **CL-169**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, para 45.

2. Relevant Factual Circumstances

33. The Request targets the German Proceedings, which in RWE's view pose a serious threat to this arbitration. RWE considers that the German Proceedings are part of a larger strategy "to end this arbitration by stopping Claimants from pursuing it" and thus present a "danger to this arbitration [that] is not merely theoretical."[25]

34. According to RWE, this danger is inherent in proceedings under Section 1032(2) of the German ZPO, which "presupposes that an arbitral tribunal's *Kompetenz-Kompetenz* is limited by and subject to state court intervention and supervision."[26] The Netherlands has challenged the admissibility of this ICSID arbitration on the basis that the arbitration agreement in the ECT is invalid. If the Cologne Court (or the Federal Court of Justice, on appeal) decides that this arbitration is inadmissible, that decision would be binding under German law on the parties to the German Proceedings, and its effect would not be limited to EU law.[27]

35. Although RWE does not consider that a German court judgment can bind the Tribunal acting under international law, RWE sees that a "second option is possible: Respondent could – and very likely will – try to prevent Claimant RWE AG from further pursuing its case in this arbitration."[28] In RWE's view, the specific risk is that the Cologne Court decision could form the basis of anti-arbitration injunction, forcing RWE to withdraw this case.[29] The judgment might also be used in third states to block enforcement of a future award. This is part of the "playbook" proposed by Mr Tim Maxian Rusche of the European Commission, who has argued that the basis for an anti-arbitration injunction would be that "the investor commits a tort by violating a final determination of a court."[30]

36. Given the nature of the German Proceedings, RWE sees no basis for the representations which the Netherlands has made to the Tribunal and which the Tribunal relied upon in PO2.[31] In particular, RWE rejects the Netherlands' position that the German Proceedings

[25] Request, § II (Heading) and para 32; Reply, para 46.
[26] Request, para 18.
[27] Request, para 43; Reply, para 6.
[28] Request, para 33.
[29] Request, paras 37, 97.
[30] Request, para 39, *quoting* **C-125**, Maxian Rusche, IPRax 2021, 494, pp 501-502.
[31] Request, paras 23-31, *citing* PO2, para 48.

will result only in a declaratory judgment that concerns EU law only.[32] To the contrary, the whole purpose of a petition under section 1032(2) of the German ZPO is a ruling that a tribunal lacks jurisdiction to hear a certain matter, and the effect of that ruling is not limited to EU law. This is clear, says RWE, from the relief the Netherlands has requested from the Cologne Court: a declaration that this arbitration is "inadmissible," meaning that the Tribunal lacks jurisdiction.[33] Further, in opposing RWE's request for suspension of the court proceedings, the Netherlands' counsel told the Cologne Court that, "[i]f anything, the ICSID Arbitral Tribunal would be required to suspend its proceedings, as its jurisdiction depends on the existence of an effective arbitration agreement."[34]

37. In these circumstances, RWE considers that the Tribunal's intervention is needed because the Netherlands has refused to agree to suspend the German Proceedings, and the Cologne Court so far has not ruled on RWE's suspension request.[35]

3. Whether Provisional Measures are Warranted

38. RWE submits that the requested measures are necessary to protect four related rights.

39. First, RWE argues that the German Proceedings threaten the exclusivity of ICSID arbitration.[36] The Netherlands has expressly asked the Cologne Court to rule on the Tribunal's jurisdiction, which is a matter that falls exclusively to this Tribunal under Article 26 of the ICSID Convention. Although there are numerous examples of domestic courts observing the exclusivity guaranteed by Article 26, "neither Respondent nor the Cologne Court have so far acted in line with the ICSID Convention."[37]

40. Second, RWE argues that the requested measures are necessary to protect the Tribunal's *kompetenz-kompetenz* under Article 41 of the ICSID Convention, which provides that "[a]ny objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be

[32] Request, paras 35-27; Reply, para 65.
[33] Reply, para 5.
[34] Request, para 51, *quoting* **C-129**, Respondent's opposition to RWE AG's suspension application in the German Proceedings, 31 January 2022, para 12.
[35] Request, paras 44-57.
[36] Request, paras 66-74; Reply, paras 23-43.
[37] Request, para 72.

considered by the Tribunal."[38] In RWE's view, because German arbitration law does not recognize exclusive *kompetenz-kompetenz*, any petition under section 1032(2) of the German ZPO in relation to an ICSID arbitration infringes upon the ICSID tribunal's exclusive competence.

41. RWE challenges the Netherlands' position that Article 41 does not apply where a tribunal's jurisdiction is contested. Otherwise, says RWE, exclusivity would cease to have any meaningful application.[39] According to RWE, "ICSID tribunals have consistently deployed provisional measures to protect their *Kompetenz-Kompetenz* from collateral attack in another forum."[40] As stated by the tribunal in *Perenco v Ecuador*, "once putatively vested with jurisdiction to hear a claim (subject to resolving any objections thereto definitively), an ICSID tribunal has the duty to protect its jurisdiction to resolve the dispute that has been put before it."[41]

42. Third, RWE argues that the German Proceedings threaten the procedural integrity of this arbitration.[42] In the words of the *Quiborax v Bolivia* tribunal, there is "no doubt that [an ICSID tribunal] has the power to grant provisional measures to preserve the procedural integrity of the ICSID proceedings."[43] As discussed above, RWE sees the German Proceedings as "anti-arbitration" proceedings that could form the basis for the Netherlands to apply for an anti-arbitration injunction in the German courts, following the "playbook" of Mr Maxian Rusche. RWE considers this threat to procedural integrity more serious than that leading to the provisional measures ordered in *Quiborax* and *Nova v Romania*.[44]

43. Fourth, RWE argues that the requested measures are necessary to protect its right to access arbitration under Article 26 of the ECT. As recognized by several ICSID tribunals, an

[38] Request, paras 75-91, *quoting* ICSID Convention, Article 41 (*RWE's emphasis*).
[39] Reply, paras 24-30, *citing* **CL-148**, Expert Opinion by Professor Schreuer in the German Proceedings, 7 July 2021, p 4.
[40] Request, para 79.
[41] **CL-134**, *Perenco Ecuador Ltd. v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, para 64. See para 61 ("Unless and until the Tribunal rules that it has no jurisdiction to entertain this dispute, if its jurisdiction is hereafter challenged, or the Tribunal delivers a final award on the merits, none of the parties may resort to the domestic courts of Ecuador to enforce or resist any claim or right which forms part of the subject matter of this arbitration").
[42] Request, paras 92-98.
[43] **CL-152**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, para 141.
[44] Request, para 98.

investor's right to arbitration is a key protection offered by investment treaties. RWE contends that the Netherlands' initiation of the German Proceedings puts that right in jeopardy.[45]

44. Turning to the criteria for granting a request for provisional measures, RWE asserts that all the relevant requirements are met.

45. To begin, RWE says that it has set out a *prima facie* case on both jurisdiction and the merits, as demonstrated by the absence of any application by the Netherlands under ICSID Arbitration Rule 41(5).[46]

46. RWE then argues that the requested measures are urgent and, indeed, *inherently* urgent, because the procedural integrity of the proceedings and the Tribunal's jurisdiction are at issue. RWE cites commentary that in the case of a threat to the tribunal's jurisdiction, "the harm is inherent, and hence indisputable."[47] According to RWE, this urgency is exacerbated by the status of the German Proceedings, with the Cologne Court's indication of deliberations in the near future, as a "decision by the Court, and a subsequent request for an injunction, can be presumed to be rendered shortly thereafter."[48]

47. As an element of urgency, RWE contends that the relief it requests is necessary ahead of a decision by the Cologne Court. Otherwise, "[i]f Respondent were allowed to continue the German Proceedings, Claimants might have to discontinue these proceedings, erasing the possibility to remedy any harm caused by an award altogether."[49] Moreover, RWE asserts that, because the Tribunal's power to order provisional measures is limited to the Parties, once the Cologne Court renders its decision, "the Tribunal will not be in a position anymore to fashion appropriate relief in relation to such a German court decision."[50]

48. Finally, RWE argues that the risk of allowing the Netherlands to pursue the German Proceedings outweighs any burden on the Netherlands of discontinuing them, at least

[45] Request, paras 99-106.
[46] Request, paras 109-110.
[47] Request, para 112, *quoting* **CL-136**: Charles N. Brower and Ronald E.M. Goodman, Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings, 6(2) ICSID Review 431 (1991) 461.
[48] Request, para 115.
[49] Request, para 118.
[50] Request, para 120.

temporarily. In fact, RWE states that an order granting the Request "would simply require Respondent to comply with its ICSID Convention obligations, something which cannot be viewed as burdensome given that it freely agreed to the terms of the Convention."[51] Nothing in the Tribunal's order would prevent the Netherlands from filing whatever objections it might wish under EU law at any enforcement stage.[52]

49. RWE does not accept that granting the Request would force the Netherlands to violate its obligations under the EU Treaties, on the basis of *PL Holdings v Poland*.[53] In that case, the CJEU held that EU Member States are required to challenge the validity of an arbitration clause that is inconsistent with EU law before the arbitral tribunal or a competent court of a Member State. However, RWE argues that EU Member State courts are *not* competent with respect to ICSID proceedings, as confirmed by the CJEU and the recent *Kammergericht* decision in *Germany v Mainstream Renewables*.[54] Thus, RWE asserts that the Netherlands' petition before the Cologne Court is not mandated by the EU Treaties, and any contrary view expressed by the European Commission acting in its executive capacity is irrelevant.[55]

50. RWE also denies that the Tribunal will be deprived of useful guidance on EU law if the German Proceedings are suspended. Any judgment of the Cologne Court would likely be subject to appeal and not become binding for a year or more. Thus, according to RWE, the legal value of a Cologne Court judgment would be "extremely limited, while the risk of an injunction on the basis of or irrespective of a first instance decision remains."[56]

51. To support the Request, RWE cites a number of cases, including *Ipek v Turkey* and *SGS v Pakistan*.[57] RWE also notes that in the parallel case of *Uniper v Netherlands*, the tribunal

[51] Request, para 123.
[52] Request, para 124.
[53] **CL-150**, ECJ, C-109/20, Judgment of 26 October 2021 (*Republiken Polen v. PL Holdings Sàrl*), 26 October 2021.
[54] Reply, paras 52-54, *citing* **CL-174**, ECJ, C-638/19 P, Judgment of 25 January 2022, ECLI:EU:C:2022:50 (*Commission v. European Food SA and others*), para 142; **C-133**, Lisa Bohmer, "Revealed: Berlin Court dismisses Germany's request for antiarbitration declaration directed at ICSID case," International Arbitration Reporter (24 May 2022).
[55] Reply, para 55.
[56] Reply, para 12.
[57] Request, paras 126-134, *citing* **CL-172**, *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 5 Claimant's Request for Provisional Measures, 19 September 2019; **CL-0156**, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2, 16 October 2002.

"strongly recommend[ed] that the Respondent take no further steps that could aggravate the dispute or deter, restrain or preclude any of the Claimants from continuing to participate fully and freely in this Arbitration."[58] Although the *Uniper* tribunal stopped short of ordering the Netherlands to withdraw similar proceedings before the German courts, RWE considers that the Request in this case should be granted in full.

B. THE RESPONDENT'S POSITION

52. The Netherlands' position is that "[t]he German Proceedings do not violate the ICSID Convention, and the requirements that necessitate the exceptional step of an urgent intervention in the form of a provisional measure are not present."[59]

1. Applicable Standards

53. The Netherlands highlights that under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39, a request for provisional measures must establish existing rights of the applicant that require protection.[60] Then, even where such rights are established, provisional measures may be recommended only where there are circumstances that "require" such measures be taken before the final award.[61] Therefore, according to the Netherlands, ICSID "[t]ribunals are expected to exercise rigorous caution and restraint in granting provisional measures," and the applicant has the burden of proving the existence of exceptional circumstances warranting such an intervention.[62]

54. Regarding the applicable legal criteria, the Netherlands states that RWE must prove that the requested measures are necessary and urgent to avoid actual and imminent harm, and that the measures do not impose a disproportionate burden on the Netherlands.[63]

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[58] Request, para 128, *quoting* **CL-173**, *Uniper SE and others v. The Netherlands*, ICSID Case No. ARB/21/22, Decision on the Claimants' Request for Provisional Measures (without reasons), 17 February 2022, p. 2.
[59] Response, para 2.
[60] Response, para 37, *citing* **CL-161**, *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7: Decision on Claimant's Request for Provisional Measures dated 29 March 2017, para 232.
[61] Response, para 96, *quoting* ICSID Convention, Article 47 and ICSID Arbitration Rule 39.
[62] Response, para 97, *citing* **RL-24**, *Emilio Augustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 dated 28 October 1999, para 10.
[63] Response, para 97, *citing* **RL-26**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on provisional measures, 17 August 2007, para 59.

55. As discussed below, the Netherlands' view is that none of these criteria is fulfilled in the circumstances of this case.

2. Relevant Factual Circumstances

56. The Netherlands argues that it was obligated under EU law to initiate the German Proceedings.[64] As set out by the Netherlands, in its judgment concerning an intra-EU BIT arbitration in *Achmea*, confirmed in *Komstroy* in connection with an ECT arbitration,[65] the CJEU held that EU Member States are under an obligation not to submit a dispute concerning the interpretation or application of EU law to any method of settlement other than those provided for in the EU Treaties. The Netherlands further relies upon *PL Holdings v Poland*, in which the CJEU held that when a dispute is submitted to arbitration on the basis of an agreement that is contrary to EU law, EU Member States "are required to challenge, before that arbitration body or before the court with jurisdiction, the validity of the arbitration."[66] The European Commission has taken the same view, announcing that the Netherlands' EU law obligations "include challenging, before the court with jurisdiction (in casu, the German Courts), the validity of the arbitration clause."[67] The European Commission further indicated that if the Netherlands were to "cease the German proceedings, the Commission could open a procedure pursuant to the [EU] Treaties in order to assess the compatibility of such an action with EU law."[68]

57. According to the Netherlands, the question before the Cologne Court is one of interpretation and application of EU law only, which cannot concern the Tribunal's competence under the ICSID Convention or the ECT. This is clear, says the Netherlands, from its statements to the court. For example, the Netherlands has submitted that "the question before this Court … is not one of the ICSID Convention, but rather one of EU and

[64] Rejoinder, paras 24-32.
[65] **CL-12**, ECJ, Judgment of 2 September 2021, *Komstroy*, ECLIEUC2021655, 02 September 2021, para. 42.
[66] Rejoinder, para 25, *quoting* **CL-150**, ECJ, C-109/20, Judgment of 26 October 2021 (*Republiken Polen v. PL Holdings Sàrl*), 26 October 2021, para 52.
[67] Rejoinder, para 27, *quoting* **R-12**, Letter from the European Commission to the Netherlands, 4 March 2022, para 11. See also **R-13**, Letter from the European Commission to the Netherlands, 22 September 2021, para 12 (recognizing that the Netherlands's application under Article 1032(2) of the German ZPO was made "in order to comply with its obligations under Articles 19(1) TEU, 267 and 344 TFEU and the principles of mutual trust and autonomy of [European] Union law").
[68] Rejoinder, para 28, *quoting* **R-12**, Letter from the European Commission to the Netherlands, 4 March 2022, Para 13.

German law,"[69] and that the court can decide "exclusively on the basis of Union law and German law."[70] Thus, while the Cologne Court will provide clarity on the EU law question, it will not rule on the Tribunal's competence under the ICSID Convention or the ECT.

58. The Netherlands further contends that, as a matter of German law, the German Proceedings do not impinge on the Tribunal's competence to decide its own jurisdiction or its ability to issue an award. Rather, Article 1032 of the German ZPO is designed to co-exist with the *kompetenz-kompetenz* of arbitral tribunals. Article 1032(3) expressly provides that when a court action is brought under Article 1032, "arbitral proceedings may nevertheless be commenced or continued, and an arbitral award may be made, while the issue is pending before the court," and nothing in the ZPO prevents a tribunal from deciding on its own jurisdiction after the court renders its judgment.[71]

59. The Netherlands stresses that the relief it seeks in the German Proceedings is only declaratory in nature.[72] The German Proceedings are not injunctive proceedings and will not interfere with RWE's ability to participate in this arbitration. The Netherlands points out its confirmation to RWE on 22 March 2022 that it "has no intention to preclude the RWE Claimants from continuing to participate in the arbitration."[73] The Netherlands also reaffirms that it will continue to participate in the ICSID proceedings while the German Proceedings are pending, and adds that "it will continue to do so once those proceedings have been concluded, regardless of their outcome."[74] According to the Netherlands, all it intends to do with the Cologne Court judgment is to brief the Tribunal on whether EU law permits or precludes intra-EU investor-State arbitration in this case.[75]

60. In similar vein, the Netherlands states that it is acting in good faith to comply with its obligations under the ICSID Convention and will continue to do so regardless of what the

[69] Response, para 28, *quoting* **R-6**, The Netherlands' submission to the German Court, 29 September 2021, para 5.
[70] Response, para 28, *quoting* **C-129**, Respondent's opposition to RWE AG's suspension application in the German Proceedings, 31 January 2022.
[71] Response, para 58, *quoting* Article 1032(3) ZPO.
[72] Response, paras 30-36.
[73] Response, para 34, *quoting* **C-131**, Respondent's answer to Claimants' letter of 23 February 2022 concerning the German Proceedings, 22 March 2022.
[74] Response, para 33.
[75] Response, para 35.

German courts may decide. According to the Netherlands, the Tribunal recognized this approach as "credible and reasonable" in PO2, and no new facts or circumstances have arisen since to require any urgent intervention or a reversal of the Tribunal's earlier findings.[76]

61. Finally, the Netherlands points out that the Claimant RWE Eemshaven Holding II BV itself has initiated parallel court proceedings in the Netherlands, seeking declaratory and monetary relief in relation to the same events at issue in this arbitration. As discussed below, the Netherlands considers that RWE's conduct further undermines the Request.

3. Whether Provisional Measures are Warranted

62. Applying the legal standard for provisional measures, the Netherlands first contends that RWE has failed to identify any right in need of protection by provisional measures.[77] In the Netherlands' view, the German Proceedings do not violate any of RWE's rights and are entirely consistent with Articles 41 and 26 of the ICSID Convention.

63. Regarding Article 41, the Netherlands accepts that this provision grants the Tribunal the authority to decide on its own competence, but states that "it does not provide that the Tribunal has the *exclusive* authority to decide on all matters that may be relevant to its decision on competence."[78] As stated by Professor Schreuer: "Under certain circumstances, a domestic court's decision may be preliminary to an issue of jurisdiction to be decided by an ICSID tribunal."[79] Thus, the tribunal in *SPP v Egypt* chose to stay the arbitration pending a decision by the French courts on the preliminary question of whether another method of dispute resolution – ICC arbitration – had been agreed.[80] As noted above, the Netherlands' view is that the Tribunal retains the authority to decide on its own competence regardless of the outcome of the German Proceedings. The Netherlands

[76] Response, para 35, *quoting* PO2, para 51.
[77] Response, para 37.
[78] Response, para 49.
[79] Response, para 51, *quoting* **RL-2**, Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair. The ICSID Convention: A Commentary (2nd ed.), Cambridge: Cambridge University Press, 1 January 2009, p 522.
[80] Response, paras 49-50, *citing* **RL-13**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Preliminary Objections to Jurisdiction, 27 November 1985, paras 79-86.

concludes that "the relationship between Article 1032(2) ZPO and Article 41 ICSID Convention is one of coexistence, not conflict."[81]

64. The Netherlands also denies that the German Proceedings violate the exclusive remedies clause in Article 26 of the ICSID Convention. According to the Netherlands, Article 26 does not apply to the German Proceedings because, among other things: (a) exclusivity applies only if there is consent to ICSID arbitration; (b) exclusivity cannot apply to the interpretation and application of rights and obligations of EU Member States under the EU Treaties; and (c) the issue of interpretation and application of the EU Treaties that is before the German courts is not before the Tribunal.[82] In any event, the Netherlands argues that by commencing the Dutch Proceedings, RWE has "consent[ed] to derogate from ICSID exclusivity as far as proceedings before the Parties' domestic courts are concerned," and waived any right to exclusivity by pursuing its claim for monetary compensation in both fora.[83]

65. The Netherlands also denies RWE's allegations that the German Proceedings affect the integrity of this arbitration or deprive RWE of an alleged general right of access to arbitration under the ECT.[84]

66. Turning to the criteria for provisional measures, the Netherlands offers several arguments as to why the requested measures are neither necessary nor urgent. First, the Netherlands says RWE has failed to explain how the German Proceedings would prevent participation in this arbitration, instead resorting only to unsupported inferences about hypothetical follow-on proceedings for an anti-arbitration injunction.[85] This is not a valid basis for provisional measures, as confirmed by the tribunal in *Occidental v Ecuador*, which stated that "[p]rovisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions."[86]

[81] Response, § 3.2 (heading).
[82] Response, paras 59-86.
[83] Response, paras 67-74.
[84] Response, paras 87-95.
[85] Response, para 103; Rejoinder, paras 18-19.
[86] Response, para 103, *quoting* **RL-26**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on provisional measures dated 17 August 2007, para 89.

67. Second, the Netherlands asserts that RWE's own conduct confirms the lack of necessity and urgency. RWE has been aware of the German Proceedings since May 2021, and yet took no steps to seek a stay of the German Proceedings until December 2021 and then waited almost a year to request provisional measures from the Tribunal. In the Netherlands' view, RWE would have acted promptly if it were concerned about actual and imminent harm necessitating urgent relief.[87]

68. Third, the Netherlands notes that RWE has asserted an additional claim in its Memorial seeking declaratory and monetary relief for purported breaches of the ICSID Convention arising out of the German Proceedings. For the Netherlands, this shows that RWE believes any alleged harm *can* be addressed in a final award, and that the Request is therefore not urgent.[88]

69. The Netherlands also sees the requested measures as disproportionate, with the negative impact of granting the measures far outweighing that of denying the Request. The Netherlands contends that if the Request were granted, the Tribunal would lose the benefit of a competent court's guidance on EU law and thus assume the role of interpreting the EU Treaties, which fall outside of its jurisdiction.[89] For its part, the Netherlands contends that it would be deprived of its right as an EU Member State to access EU courts to resolve an issue of interpretation of EU law, and would also be required to violate its obligations under the EU Treaties and could become the subject of infringement proceedings under EU law.[90] According to the Netherlands, this would be extraordinary, as "[t]here is, understandably, no precedent for an ICSID tribunal using its power to recommend provisional measures that would call on a State to breach its obligations under another treaty."[91]

70. In contrast, says the Netherlands, RWE has failed to identify any harm it would suffer from the German Proceedings. Instead, the German Proceedings will result in a declaratory

[87] Response, para 104; Rejoinder, para 22.
[88] Response, para 105.
[89] Rejoinder, para 33.
[90] Rejoinder, paras 24-32.
[91] Response, para 9.

judgment from the first Claimant's home jurisdiction that merely affirms obligations that have always existed under the EU Treaties.[92]

V. THE TRIBUNAL'S ANALYSIS

71. Before proceeding to its analysis of the Parties' positions, the Tribunal emphasizes that the purpose of this Decision is to determine whether the provisional measures requested by RWE are warranted in this case. The Tribunal makes no decision at this stage on the underlying jurisdictional issues or any question of the merits. Further, the Tribunal's analysis is necessarily based on the Tribunal's understanding of the record as it presently stands and should not be understood to preempt any later or different finding of fact or conclusion of law.

A. APPLICABLE STANDARDS

72. As a preliminary matter, the Tribunal confirms its discretionary authority under Article 47 of the ICSID Convention and the corresponding ICSID Arbitration Rule 39(1) to recommend provisional measures.

73. Article 47 provides:

> *Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.*

Arbitration Rule 39(1) provides:

> *At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.*

[92] Response, para 107; Rejoinder, para 34.

74. The ECT is silent on provisional measures and there is no suggestion of any other agreement between the Parties limiting the Tribunal's authority to recommend provisional measures.

75. In this case, the rights identified by the Claimants for preservation are their rights to pursue this ICSID arbitration as the exclusive forum for the dispute under Article 26 of the ICSID Convention; the Tribunal's exclusive *kompetenz-kompetenz* under Article 41 of the ICSID Convention; and the integrity of this arbitration, including RWE's right to full participation in this arbitration. As asserted by the Netherlands, citing *Maffezini v Spain*, the Claimants must establish the circumstances warranting the provisional measures they request to protect these rights.[93]

76. The Parties recognize that, in exercising its discretionary authority to recommend provisional measures under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1), the Tribunal is to consider the following criteria: (a) whether the Tribunal has *prima facie* jurisdiction over the Parties' dispute; (b) whether the Claimants have established a *prima facie* case on the merits; (c) the urgency and necessity of the measures requested; and (d) the proportionality of those measures.[94]

B. ANALYSIS OF THE CLAIMANTS' REQUEST

77. Starting with the important first criterion of the test for provisional measures, the Tribunal is readily satisfied of its *prima facie* jurisdiction over the Parties' dispute. The Claimants have a *prima facie* right to pursue arbitration under the ICSID Convention and the ECT, which have been ratified by both Germany and the Netherlands. The Netherlands has provided advance notification of its intention to raise an intra-EU jurisdictional objection, for decision by the Tribunal. Although the Tribunal in no way prejudges the outcome of this objection, it sees no facially obvious defect that would deprive it of *prima facie* jurisdiction to proceed with the provisional measures analysis.

[93] **RL-24**, *Emilio Augustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 dated 28 October 1999, para 10.
[94] Among other authorities, **CL-168**, *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Respondent's Application for Provisional Measures, 12 May 2016, para 78.

78. In related vein, the Tribunal is also readily satisfied that the second criterion of the test for provisional measures is met. RWE has set out *prima facie* claims on the merits for violation of the ECT in its Memorial, which – should the Tribunal find that it has jurisdiction – RWE will have to prove against the Netherlands' defenses.

79. As an introduction to the remaining criteria in the test for provisional measures – urgency and necessity and proportionality – the Tribunal wishes to record its appreciation of the difficulty of the decision before it.

80. On the one hand, the Tribunal has substantial sympathy for RWE's argument that the Netherlands' German Proceedings are part of a strategy to end this arbitration and thus present a "danger to this arbitration [that] is not merely theoretical."[95] On the other hand, the Tribunal appreciates the Netherlands' concern with its obligations under the Treaty for the Functioning of the European Union as an EU Member State.

81. Turning first to RWE's position, the Tribunal recognizes the danger inherent in proceedings under Section 1032(2) of the German ZPO in connection with an ICSID arbitration, given the a-national nature of ICSID proceedings under the ICSID Convention. If the Cologne Court, or the Federal Court of Justice on appeal, should decide that the Parties' arbitration agreement arising under the ECT is invalid and this arbitration is inadmissible, it follows that the judgment would be binding under German law on the parties – RWE AG and the Netherlands – and that the effect would not necessarily be limited to EU law. RWE AG emphasizes that it would then face the follow-on risk that the judgment could be used to obtain an anti-arbitration injunction forcing it to withdraw from this arbitration and/or to block enforcement of a final award in this arbitration. It is difficult to ignore the prediction of the European Commission's Mr Maxian Rusche that the basis for such an anti-arbitration injunction would be that "the investor commits a tort by violating a final determination of a court."[96] To repeat RWE's words, the Tribunal can appreciate that these risks posed by the application of Section 1032(2) of the German ZPO are not "merely theoretical."

[95] Request, § II (Heading) and para 32; Reply, para 46.
[96] **C-125**, Maxian Rusche, IPRax 2021, 494, pp 501-502.

82. Nor would the impact on this Tribunal be "merely theoretical." The relief expressly requested in the German Proceedings is, after all, a declaration that this arbitration is inadmissible. Even the issuance of, in the Respondent's description, "only" a declaratory judgment focused on EU law in the *Achmea/Komstroy* vein, would pose some level of clear threat to the Tribunal's exclusive competence to determine its own jurisdiction under Articles 26 and 41 of the ICSID Convention and, if followed by anti-arbitration injunction proceedings as RWE predicts, to RWE's right of access to ICSID arbitration under Article 26 of the ECT and to the integrity of a-national ICSID proceedings.

83. At the same time, however, the Tribunal must appreciate the responsibilities and pressures facing the Netherlands as the sovereign Party to this arbitration. The Tribunal is reluctant to second-guess the Netherlands' position, relying on the CJEU's decision in *PL Holdings v Poland*, that it was obligated under EU law to initiate the German Proceedings to challenge the validity of an arbitration that is potentially contrary to EU law.[97] In this regard, the Tribunal notes the indication of the European Commission that if the Netherlands were to "cease the German proceedings, the Commission could open a procedure pursuant to the [EU] Treaties in order to assess the compatibility of such an action with EU law."[98]

84. Nor is the Tribunal prepared to second-guess the Netherlands' submissions to the Cologne Court that "the question before [the court] … is not one of the ICSID Convention, but rather one of EU and German law,"[99] or its representations in this case that the Cologne Court will not rule on the Tribunal's competence under the ICSID Convention or the ECT.

85. Finally, the Tribunal must accept for now the Netherlands' confirmation to RWE on 22 March 2022 that it "has no intention to preclude the RWE Claimants from continuing to participate in the arbitration"[100] and its reaffirmation that it will continue to participate in this arbitration not only while the German Proceedings are pending but also "once those

[97] **CL-150**, ECJ, C-109/20, Judgment of 26 October 2021 (*Republiken Polen v. PL Holdings Sàrl*), 26 October 2021, para 52.
[98] **R-12**, Letter from the European Commission to the Netherlands, 4 March 2022, para 13.
[99] **R-6**, The Netherlands' submission to the German Court, 29 September 2021, para 5.
[100] **C-131**, Respondent's answer to Claimants' letter of 23 February 2022 concerning the German Proceedings, 22 March 2022.

proceedings have been concluded, regardless of their outcome."[101] Having said that, the Tribunal cannot be unaware that, to the extent the Netherlands insists that all it intends to do with the Cologne Court judgment, when issued, is to brief the Tribunal on whether EU law permits or precludes intra-EU investor-State arbitration in this case,[102] the Netherlands' position following a Cologne Court judgment that this arbitration is inadmissible likely will be to challenge the Tribunal's jurisdiction.

86. On balance, despite the statement of Mr Maxian Rusche quoted by RWE and the representation made by Netherlands' counsel to the Cologne Court that, "[i]f anything, the ICSID Arbitral Tribunal would be required to suspend its proceedings, as its jurisdiction depends on the existence of an effective arbitration agreement,"[103] the Tribunal will continue to rely on the Netherlands' assurances that an "inadmissibility" decision in the German Proceedings will be limited to a declaratory judgment that is itself limited to EU law. The Tribunal repeats and emphasizes its understanding as set out in PO2 in February 2022 that such positive statements of the Netherlands are "assurances that it will not take any steps to interfere with the Tribunal's *kompetenz-kompetenz*."[104] The Tribunal also notes the similar positive representations of the Netherlands that were recited and relied upon by the tribunal in the ICSID case of *Uniper v Netherlands* in its decision addressing the claimant's request for provisional measures:[105]

> *In response to these arguments and to questions from the Tribunal, the Respondent's representatives made a number of representations to the Tribunal during the Hearing on Provisional Measures. In particular, the Respondent made the following representations:*
>
> - *That the Kingdom of the Netherlands intends to comply with all of its obligations under international law, including the ICSID Convention and the ECT;*
> - *That it is under an obligation to question the validity of the arbitration agreement contained in Article 26 of the ECT before an*

[101] Response, para 33.
[102] Response, para 35.
[103] **C-129**, Respondent's opposition to RWE AG's suspension application in the German Proceedings, 31 January 2022, para 12.
[104] PO2, paras 48-49.
[105] **CL-173**, *Uniper SE and others. v. The Netherlands*, ICSID Case No. ARB/21/22, Procedural Order No. 2: Decision on the Claimants' Request for Provisional Measures (with reasons) dated 9 May 2022, para 93 (footnotes omitted).

EU court, as this is mandatory and required by the Respondent's EU law obligations stemming from Article 344 of the TFEU, the Treaties more generally, the jurisprudence of the CJEU and the direct obligations imposed by the European Commission;

- *That in the German Proceedings,*

    i. *It seeks only a declaration as to EU law, as required by its understanding of its EU Treaty obligations;*

    ii. *It does not seek determinations under the ICSID Convention; and*

    iii. *As noted above, it has expressly advised the German Court of this position, specifically stating to the German Court that the Court "is not called upon to decide a question of the ICSID Convention, but to clarify a question of EU law and German law";*

- *That the ECT is a source of international law and identifies the body competent to determine jurisdiction under that treaty;*

- *That this Tribunal is the body competent to determine its own jurisdiction under the ICSID Convention and that it may take into consideration the forthcoming judgment of the German Court and judgments of the CJEU;*

- *That it will not argue before any forum that any decision that might be rendered by the German Court constitutes anything other than a declaration under EU law; and*

- *That the declaration if granted, in and of itself, will not have any effect on any of the Claimants' ability to continue participating in the ICSID proceedings, as there is neither a concept of contempt of court under German law, nor is the Respondent seeking any injunctive or similar relief.*

87. Most important to the decision at hand, the discussion above is self-evidently and necessarily speculative. The Cologne Court has not yet ruled on the Netherlands' action or RWE's suspension request; an anti-arbitration injunction application following a suspension order remains a possibility; and the outcome of the likely appellate process cannot be predicted. As the Claimants themselves point out, in the context of describing the limited "legal or informative value of a Cologne decision" to explain the Netherlands' intra-EU objection in this arbitration, the Cologne Court decision "will not immediately

become binding" and the likely appeal by the loser to the Federal Supreme Court may take a year or longer.[106]

88. In light of the present uncertainties, and particularly in light of the Netherlands' many affirmative statements, the Tribunal cannot find at the present time that the German Proceedings infringe on its exclusive authority to determine its own competence under the ICSID Convention, the Claimants' substantive rights, or the procedural integrity of this arbitration.

89. This means that, even accepting that the Claimants could make a case for a proportionate burden of the provisional measures if granted, the Claimants have not demonstrated that the measures are either urgent or necessary at the present time. As stated by the tribunal in *Occidental v Ecuador*, "[p]rovisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions."[107]

90. Accordingly, under the present circumstances, the Tribunal has determined, with some hesitation, not to grant RWE's request for an order that the Netherlands withdraw or suspend the German Proceedings immediately.

91. However, the Tribunal well recognizes that these present circumstances may change in the near future. In particular, if, in the wake of a judgment in the German Proceedings finding this ICSID arbitration "inadmissible" by operation of Section 1032(2) of the German ZPO, RWE faces an anti-arbitration injunction application or a serious threat of such an application, the Tribunal would entertain a renewed request for provisional measures on an expedited basis. The Tribunal would have to decide whether, under the specific situation presented at such a time, to recommend provisional measures to preserve RWE's rights to pursue this ICSID arbitration and the Tribunal's exclusive right to determine its jurisdiction under the ICSID Convention. To this end, the Tribunal recommends that the Netherlands not aggravate this dispute by seeking – contrary to its stated intentions[108] – to restrain the

[106] Reply, para 12.
[107] **RL-26**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on provisional measures dated 17 August 2007, para 89.
[108] Response, para 34; **C-131**, Respondent's answer to Claimants' letter of 23 February 2022 concerning the German Proceedings, 22 March 2022.

Claimants from participating fully in this arbitration, whether by injunctive relief in the German courts or any other action, either before or after any decision in the current German Proceedings, without first providing sufficient notice to the Claimants of its intention to do so such as to allow a renewed application for provisional measures to this Tribunal.

92. The Tribunal concludes by noting one thing that is certain at the present time: the CJEU has now ruled in *Komstroy* that intra-EU arbitration under Article 26 of the ECT is incompatible with EU law. The Netherlands will have a full opportunity to brief the Tribunal on this issue when asserting its intra-EU jurisdictional objection. There would seem to be no further purpose, therefore, to the continuation of the German Proceedings. The Tribunal joins the *Uniper v Netherlands* tribunal in strongly recommending that the Netherlands reconsider whether its pursuit of the German Proceedings remains necessary or appropriate.

VI. ORDER

93. For the reasons stated above, the Tribunal **DECIDES** and **ORDERS** as follows:

(A) The Claimants' Request for Provisional Measures ordering the Respondent immediately to withdraw or discontinue the German Proceedings or, alternatively, to suspend the German Proceedings pending the Tribunal's award in this arbitration, is **denied** at this time;

(B) The Tribunal **recommends** that the Respondent not aggravate this dispute by seeking to restrain the Claimants from participating fully in this arbitration, whether by injunctive relief in the German courts or any other action, either before or after any decision in the current German Proceedings, without first providing sufficient notice to the Claimants of its intention to do so such as to allow a renewed application for provisional measures to this Tribunal;

(C) The Tribunal **recommends** that the Respondent reconsider the necessity and appropriateness of continuing the proceedings before the Cologne Court, as the Parties do not dispute that the Court of Justice of the European Union has

determined that Article 26 of the Energy Charter Treaty should be interpreted so as not to apply to intra-EU disputes;

(D) The Tribunal **recommends** that the Respondent communicate this Decision to the Higher Regional Court of Cologne; and

(E) The issue of costs is **reserved** to a later stage of the arbitration.

For the Tribunal

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Lucy Reed
President of the Tribunal

Date: 16 August 2022