

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)

PROCEDURAL ORDER NO. 1

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

15 October 2021

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Introduction

The first session of the Tribunal was held on August 30, 2021, at 8:30 a.m. E.T., by videoconference. The session was adjourned at 10:30 a.m. E.T.

An audio recording of the session was made and deposited in the archives of ICSID. The recording was distributed to the Members of the Tribunal and the parties.

Participating in the conference were:

Members of the Tribunal:

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

Assistant of the Tribunal

Ms. Lindsay Gastrell

ICSID Secretariat:

Dr. Jonathan Chevry, Secretary of the Tribunal

Participating on behalf of the Claimants:

Counsel

Dr. Richard Happ, Luther Rechtsanwaltsgesellschaft mbH
Mr. Tim Rauschnig, Luther Rechtsanwaltsgesellschaft mbH
Ms. Luca Thönes, Luther Rechtsanwaltsgesellschaft mbH
[REDACTED], Luther Rechtsanwaltsgesellschaft mbH
[REDACTED], Luther Rechtsanwaltsgesellschaft mbH
[REDACTED], Luther Rechtsanwaltsgesellschaft mbH

Party's Representatives

[REDACTED], RWE AG
[REDACTED], RWE Eemshaven Holding II BV
[REDACTED], RWE Eemshaven Holding II BV
[REDACTED], RWE Eemshaven Holding II BV

Participating on behalf of the Respondent:

Counsel

Mr. Albert Marsman, De Brauw Blackstone Westbroek
Mr. Bommel van der Bend, De Brauw Blackstone Westbroek
Mr. Abdel Zirar, De Brauw Blackstone Westbroek
Mr. Alessio Gracis, De Brauw Blackstone Westbroek
Mr. Johan den Breems, De Brauw Blackstone Westbroek
Iulia-Georgiana Croitoru, De Brauw Blackstone Westbroek
Joyce Man, De Brauw Blackstone Westbroek

Party's Representatives

Ms. Dorieke Overduin, Ministry of Economic Affairs and Climate

Mr. Rene Lefeber, Ministry of Foreign Affairs

The Tribunal and the parties considered the following:

- The Draft Procedural Order circulated by the Tribunal Secretary on 23 June 2021; and
- The parties' comments on the Draft Procedural Order received on 13 August 2021, indicating the items on which they agreed and their respective positions regarding the items on which they did not agree.

Following the session, the Tribunal now issues the present Order:

Order

Pursuant to ICSID Arbitration Rules 19 and 20, this first Procedural Order sets out the Procedural Rules that govern this arbitration. The Procedural Calendar is attached as Annex B.

1. Applicable Arbitration Rules
Convention Article 44

- 1.1. These proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006.

2. Constitution of the Tribunal and Tribunal Members' Declarations
Arbitration Rule 6

- 2.1. The Tribunal was constituted on 2 June 2021 in accordance with the ICSID Convention and the ICSID Arbitration Rules. The parties confirmed that the Tribunal was properly constituted and that no party has any objection to the appointment of any Member of the Tribunal.
- 2.2. The Members of the Tribunal timely submitted their signed declarations in accordance with ICSID Arbitration Rule 6(2). Copies of these declarations were distributed to the parties by the ICSID Secretariat on June 2, 2021.
- 2.3. The Members of the Tribunal confirmed that they have sufficient availability during the next 24 months to dedicate to this case.

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3. Fees and Expenses of Tribunal Members
Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees
 - 3.1. The fees and expenses of each Tribunal Member shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.
 - 3.2. Under the current Schedule of Fees, each Tribunal Member receives:
 - 3.2.1. US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or *pro rata*; and
 - 3.2.2. subsistence allowances, reimbursement of travel, and other expenses pursuant to ICSID Administrative and Financial Regulation 14.
 - 3.3. Each Tribunal Member shall submit his/her claims for fees and expenses to the ICSID Secretariat on a quarterly basis.
 - 3.4. Non-refundable expenses incurred in connection with a hearing as a result of a postponement or cancellation of the hearing shall be reimbursed.
4. Presence and Quorum
Arbitration Rules 14(2) and 20(1)(a)
 - 4.1. The presence of all Members of the Tribunal constitutes a quorum for its sittings, including by any appropriate means of communication.
5. Rulings of the Tribunal
Convention Article 48(1); Arbitration Rules 16, 19 and 20
 - 5.1. Decisions of the Tribunal shall be taken by a majority of the Members of the Tribunal.
 - 5.2. ICSID Arbitration Rule 16(2) applies to decisions taken by correspondence.
 - 5.3. The Tribunal will draft all rulings, including the award, within a reasonable time period. If a ruling has not been issued within three months after the final submission on a particular matter, the Tribunal will provide the parties with status updates every three months.
 - 5.4. The President is authorized to issue Procedural Orders on behalf of the Tribunal.

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- 5.5. The Tribunal's rulings on procedural matters may be communicated to the parties by the Tribunal Secretary electronically in the form of a letter or email.
- 5.6. Any ruling of the Tribunal, including the certified copy of the award, will be dispatched electronically to the parties.

6. Power to Fix Time Limits
Arbitration Rule 26(1)

- 6.1. The President may fix and extend time limits for the completion of the various steps in the proceeding.
- 6.2. In exercising this power, the President shall consult with the other Members of the Tribunal. If the matter is urgent, the President may fix or extend time limits without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.
- 6.3. The parties may also agree to short extensions of time limits, provided that: (i) they inform the Tribunal prior to the scheduled deadline; and (ii) the agreed extension does not affect any hearing date or materially affect other steps in the Procedural Calendar.
- 6.4. If one side experiences difficulty with any time limit, it should consult the other side immediately to explore whether the parties can agree on a modification of the Procedural Calendar. If such consultation is not possible in the circumstances, or if the parties cannot reach agreement, the relevant party may apply to the Tribunal for an extension of time.

7. Secretary of the Tribunal
Administrative and Financial Regulation 25

- 7.1. The Tribunal Secretary is Dr. Jonathan Chevry, Legal Counsel, ICSID, or such other person as ICSID may notify to the Tribunal and the parties from time to time.
- 7.2. To send copies of communications by email, mail, and courier/parcel deliveries to the ICSID Secretariat, the contact details are:

Dr. Jonathan Chevry
ICSID
MSN C3-300
1818 H Street, N.W.
Washington, D.C. 20433
USA
Tel.: + 1 (202) 473-2812

Fax: + 1 (202) 522-2615
Email: jchevry@worldbank.org
Paralegal name: Maria-Rosa Rinne
Paralegal email: mrinne@worldbank.org

7.3. For local messenger deliveries, the contact details are:

Dr. Jonathan Chevry
ICSID
1225 Connecticut Ave. N.W.
(World Bank C Building)
3rd Floor
Washington, D.C. 20036
USA
Tel. +1 (202) 458-1534

8. Assistant to the Tribunal

- 8.1. By letter of June 23, 2021, the Tribunal explained to the parties that it considered that it would benefit the overall cost and time efficiency of the proceedings if the Tribunal had an assistant. The Tribunal proposed that Ms. Lindsay Gastrell of Arbitration Chambers be appointed as assistant to the Tribunal. Ms. Gastrell's *curriculum vitae* was distributed to the parties.
- 8.2. The Tribunal further explained that the assistant would: (i) undertake only such specific tasks as are assigned to her by the Tribunal, such as researching specific issues of law; organizing the case documents; attending meetings, hearings and deliberations; drafting summaries of submissions and evidence; and preparing preliminary drafts of non-substantive sections of decisions and awards; and (ii) be subject to the same confidentiality obligations as the Members of the Tribunal and sign a declaration to that effect. The Tribunal also indicated it will not delegate to Ms. Gastrell any of the duties and obligations incumbent on the Members of the Tribunal as arbitrators, or that would overlap with the duties of ICSID counsel.
- 8.3. The parties approved the appointment of Ms. Gastrell as assistant to the Tribunal by letters and emails of June 29, 2021. It was also agreed that she would receive: (i) US\$250 for each hour of work performed in connection with the case or *pro rata*; (ii) a flat rate of US\$2000 per day of hearing; and (iii) reimbursements of reasonable expenses related to the hearings, in accordance with Administrative and Financial Regulation 14 and the ICSID Memorandum on the Fees and Expenses.

9. Representation of the Parties
Arbitration Rule 18

- 9.1. Each party shall be represented by its counsel (below) and may designate additional agents, counsel, or advocates by notifying the Tribunal and the Tribunal Secretary promptly of such designation.

For the Claimants:

Dr. Richard Happ
Mr. Tim Rauschnig
Luther Rechtsanwaltsgesellschaft mbH
Gänsemarkt 45
20354 Hamburg
Germany
Tel.: +49 40 18067 12766 or
+49 40 18067 15999

Emails:

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sebastian.wuschka@luther-lawfirm.com
luca.thoenes@luther-lawfirm.com

For the Respondent:

Dr. René Lefeber, Legal Adviser
Ministry of Foreign Affairs
Rijnstraat 8
2515 XP Den Haag
The Netherlands

Email: [REDACTED]

and

Ms. Dorieke Overduin, LL.M.
Ministry of Economic Affairs and Climate
Bezuidenhoutseweg 73
2594 AC Den Haag
The Netherlands

Email: [REDACTED]

and

Mr. Albert Marsman
Mr. Bommel van der Bend
Mr. Abdel Khalek Zirar
Mr. Alessio Gracis
Mr. Johan den Breems
Ms. Iulia-Georgiana Croitoru
Ms. Joyce Man

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Claude Debussylaan 80
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- 9.2. A party shall not appoint a person to be a representative or an expert in this arbitration when a relationship exists between that person and a member of the Tribunal that would create a conflict of interest. The Tribunal may, on application from any party, or of its own motion and in consultation with the parties, exclude any additional or alternative representative, or any expert, from the arbitration, if the Tribunal concludes that such exclusion is necessary to protect or preserve the integrity of the arbitration. If the Tribunal excludes any expert or representative from the arbitration, a party will be allowed to appoint alternative representatives or experts.
10. Apportionment of Costs and Advance Payments to ICSID
Convention Article 61(2); Administrative and Financial Regulation 14; Arbitration Rule 28
- 10.1. The parties shall cover the direct costs of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to the allocation of costs.
- 10.2. By letter of 3 June 2021 ICSID requested that each party pay US\$ 175,000 to cover the initial costs of the proceeding. ICSID received the Claimants' payment on 29 June 2021 and the Respondent's payment on July 9, 2021.
- 10.3. ICSID shall request further advances as needed. Such requests shall be accompanied by a detailed interim statement of account.
11. Place of Proceeding
Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3)
- 11.1. The place of the proceeding shall be Washington, D.C., the seat of the Centre.
- 11.2. The Tribunal may decide to hold the hearing in another location if agreed by the parties.
- 11.3. If appropriate in light of health or other circumstances, the Tribunal may decide to conduct the hearing either partially or entirely virtually after consulting with the parties.

11.4. The Tribunal members may deliberate at any place and by any appropriate means it considers convenient.

12. Procedural Language, Translation and Interpretation

Administrative and Financial Regulation 30(3) and (4); Arbitration Rules 20(1)(b) and 22

12.1. English is the procedural language of the arbitration.

12.2. Documents filed in any other language must be accompanied by a translation into English.

12.3. If the document is lengthy (i.e. more than five pages) and relevant only in part, it is sufficient to translate only relevant parts, provided that the Tribunal may require a fuller or a complete translation at the request of any party or on its own initiative.

12.4. Translations need not be certified unless there is a dispute as to the content of a translation provided and the party disputing the translation specifically requests a certified version.

12.5. Documents exchanged between the parties in a language other than English under § 16 below (Production of Documents) need not be translated.

12.6. The testimony of a witness called for examination during the hearing who prefers to give evidence other than in the English language shall be interpreted, simultaneously if possible. ICSID will consult the parties on the identity of the interpreters prior to their engagement.

12.7. The parties will notify the Tribunal, as soon as possible, and no later than at the pre-hearing organizational meeting (see § 20 below), which witnesses or experts require interpretation.

12.8. The costs of the interpreter(s) will be paid from the advance payments made by the parties, without prejudice to the decision of the Tribunal as to which party shall ultimately bear those costs.

13. Routing of Communications

Administrative and Financial Regulation 24

13.1. The ICSID Secretariat shall be the channel of written communications between the parties and the Tribunal.

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- 13.2. Each party's written communications shall be transmitted by email or other electronic means to the opposing party and to the Tribunal Secretary, who shall send them to the Tribunal.
- 13.3. Electronic versions of communications ordered by the Tribunal to be filed simultaneously shall be transmitted to the Tribunal Secretary only, who shall send them to the opposing party and the Tribunal.
- 13.4. The Tribunal Secretary shall not be copied on direct communications between the parties when such communications are not intended to be transmitted to the Tribunal.
14. Number of Copies and Method of Filing of Parties' Pleadings
Administrative and Financial Regulation 30; Arbitration Rules 20(1)(d) and 23
- 14.1. The parties shall:
- 14.1.1. by the relevant filing date, submit by email to the Tribunal Secretary and the opposing party an electronic file of the pleading with witness statements, expert reports and an index of all the supporting documentation attached to the pleading (the "electronic filing");¹
- 14.1.2. within three working days following the electronic filing, upload the pleading, with all the supporting documentation and updated index to the file sharing platform that will be created by ICSID for purposes of this case; and
- 14.1.3. within three working days following the electronic filing:
- 14.1.4. Courier to the opposing party at the address(es) indicated at § 9.1 above and to each Member of the Tribunal at the addresses indicated at § 14.5 below one USB drive with a full copy of the entire submission, including the pleading, the witness statements, expert reports, factual exhibits, and legal authorities. The parties may either provide the pleading in "e-memorial" form, hyperlinked to the supporting documents, or provide a cumulative index hyperlinked to all of the supporting documentation submitted by the relevant party to date;
- 14.1.5. Courier to Ms. Reed, Mr. Boykin and Mr. Landau QC, one (1) hard copy of the submission,² including the witness statements and expert reports (but excluding factual exhibits and legal authorities) at the addresses indicated at § 14.5 below.

¹ Please note that the World Bank server does not accept emails larger than 25 MB.

² The format of the hard copy submissions shall be double-sided bundles, in A5 for Mr. Boykin, and in A4 for Ms. Reed and Mr. Landau QC.

- 14.2. Electronic files of pleadings, witness statements, expert reports and, to the extent feasible, factual exhibits and legal authorities shall be text searchable (i.e., OCR unlocked PDF or Word). Any Excel files submitted by the parties must be exhibited in their native Excel format, except where such native Excel file (i) was not prepared for the purposes of the arbitration and (ii) is no longer available.
- 14.3. All pleadings shall be accompanied by a cumulative index listing all the supporting documentation that the party has submitted up to the date of the pleading. The index shall indicate the document number and the pleading with which it was submitted. (Please follow the naming conventions contained in Annex A).
- 14.4. At the conclusion of the written phase of the proceeding, on a date to be determined by the Tribunal, or at any other time the Tribunal or the Secretariat so requests, the parties shall arrange the preparation of an electronic copy of the entire case file (including pleadings, witness statements, expert reports, factual exhibits, legal authorities and Tribunal decisions and orders to date) with a consolidated hyperlinked index of all documents. Subject to modalities to be agreed at the pre-hearing organizational session, this could be in the form of an electronic bundle prepared by a hearing service provider.

- 14.5. The addresses of the Tribunal Members are as follows:

Ms. Lucy Reed	Mr. James H. Boykin	Mr. Toby Thomas Landau QC
Arbitration Chambers	Hughes Hubbard & Reed LLP	Duxton Hill Chambers
c/o 252 7 th Avenue #15J	1775 I Street, N.W., 5th Floor	(Singapore Group Practice)
New York, NY 10001	Washington, DC 20006-2401	19 Duxton Hill
United States of America	United States of America	Singapore 089602
		Singapore

- 14.6. The official date of receipt of a pleading or communication shall be the day on which the electronic file is sent to the Tribunal Secretary by email.
- 14.7. A filing shall be deemed timely if sent by a party by 6 p.m., Paris time, on the relevant date.

15. Number and Sequence of Pleadings
Arbitration Rules 20(1)(c), 20(1)(e), 29 and 31

- 15.1. The written procedure will consist of the pleadings indicated in the Procedural Calendar in Annex B, to be filed within the time limits set therein.

16. Production of Documents

Convention Article 43(a); Arbitration Rules 24 and 33-36

- 16.1. The International Bar Association Rules on the Taking of Evidence in International Arbitration (2020) (the “IBA Rules”) shall guide, but not bind, the Tribunal and the parties regarding document production in this case.
- 16.2. By the deadline to be set in the Procedural Calendar, each side may serve a request for production of documents on the other side. The request is to comply with the rules set forth in Article 3 of the IBA Rules and must be made in the form of the Schedule attached in Annex C (using rows rather than columns), in both Word and PDF format.
- 16.3. Upon receipt of the Schedule, the other side is to: (i) indicate clearly the requests or portion of requests with respect to which it agrees to produce responsive documents; and (ii) provide reasoned objections for any refusal to produce responsive documents in the appropriate row on the Schedule. By the deadline to be set in the Procedural Calendar, the parties are to exchange their objections.
- 16.4. Upon receipt of the objections, the requesting side may provide a reply in the appropriate row on the Schedule.
- 16.5. Throughout this process, counsel are to confer and work constructively to resolve any disputes over production. If there are disputes that the parties cannot resolve amicably, the parties may submit those disputes to the Tribunal by filing their completed Schedules, in both Word and PDF format, by the deadline set in the Procedural Calendar.
- 16.6. Correspondence and documents exchanged in the course of this process are not to be copied to the Tribunal, the Administrative Secretary or the Assistant to the Tribunal.
- 16.7. The Procedural Calendar provides a deadline for the Parties’ production of uncontested documents and documents ordered by the Tribunal.
- 16.8. No document exchanged between the parties in the document production phase will be considered to be on the record unless and until it is filed as an exhibit with a submission.
- 16.9. Responsive documents containing privileged information are to be produced with the privileged information redacted. A party may withhold the production of a document based on an assertion of privilege only if the privileged information cannot be adequately protected through redaction. If a party withholds or redacts responsive documents on the basis of privilege, that party must produce to the other side a Privilege Log in the form set out in Annex D containing the following information about the document: (i) the document type, by title or email subject

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line, as applicable; (ii) the date of creation; (iii) the sender(s) and recipient(s); (iv) the subject matter; (v) the scope of information withheld; and (vi) the privilege claimed and a brief explanation of the reason the document is being withheld.

- 16.10. The Privilege Log is to be provided to the other side by the deadline for production to be set in the Procedural Calendar.
- 16.11. The parties will not be permitted to submit additional document requests after the deadlines in the Procedural Calendar, save under justified circumstances at the discretion of the Tribunal upon a reasoned written request, followed by observations from the other party, without prejudice to the Tribunal's power to call upon the parties to produce documents at any stage of the proceeding pursuant to Arbitration Rule 34(2).
- 16.12. If a party fails to comply with an order to produce a document or specific category of documents, the Tribunal may draw the inferences it deems appropriate, taking into consideration all relevant circumstances.

17. Submission of Documents

Convention Article 44; Administrative and Financial Regulation 30; Arbitration Rule 24

- 17.1. The Memorial and Counter-Memorial shall be accompanied by the documentary evidence relied upon by the parties, including witness statements, factual exhibits, expert reports and legal authorities. Further documentary evidence may be submitted with the Reply and Rejoinder only insofar as the relevance of the additional evidence has arisen as a result of the other side's preceding submission or the documents produced during the document production phase.
- 17.2. With each factual allegation, whenever possible, the parties are to identify the evidence adduced in support of that allegation (with a specific page or paragraph reference). With each legal argument, whenever possible, the parties are to identify the legal authority adduced in support of that argument (with a specific page or paragraph reference).
- 17.3. No document will be considered to be on the record unless:
- 17.3.1. it is filed as an exhibit to a written submission indicated in the Procedural Calendar, a witness statement or expert report;
- 17.3.2. the parties have agreed to submit it into the record and filed it with the Tribunal; or
- 17.3.3. the Tribunal has admitted it into the record, upon the application of a party or on its own motion.
- 17.4. Unless a party has requested and obtained prior leave from the Tribunal, it may not

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file: (i) submissions other than those indicated in the Procedural Calendar; (ii) documentary or testimonial evidence that does not accompany a submission indicated in the Procedural Calendar; or (iii) documentary or testimonial evidence not explicitly relied on in its submissions.

17.4.1. Should a party request leave to file additional or responsive documents, that party may not annex the documents that it seeks to file to its request.

17.4.2. The Tribunal will not grant leave to file additional or responsive documents unless it determines that exceptional circumstances exist based on a reasoned written request by one party followed by observations from the other party.

17.4.3. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other party is afforded sufficient opportunity to make its observations concerning such a document.

17.5. The Tribunal may call upon the parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2).

17.6. The documents shall be submitted in the following form:

17.6.1. The number of each Exhibit containing a document produced by the Claimants shall be preceded by the letter “C-” for factual exhibits and “CL-” for legal exhibits containing authorities etc. The number for each Exhibit containing a document produced by the Respondent shall be preceded by the letter “R-” for factual exhibits and “RL-” for legal exhibits containing authorities etc.

17.6.2. Exhibits and legal authorities shall be numbered consecutively throughout these proceedings, commencing with “C-0001” and “R-0001,” and “CL-001” and “RL-001” respectively. The number of the factual exhibit or legal authority shall appear on the first page of the document, and shall be incorporated into the file name in accordance with § 17.6.4.

17.6.3. A party may produce several documents relating to the same subject matter within one Exhibit, numbering each page of such Exhibit separately and consecutively.

17.6.4. Electronic files and the accompanying indexes shall follow the naming conventions contained in Annex A.

17.7. Copies of documentary evidence shall be assumed to be authentic unless specifically objected to by a party, in which case the Tribunal will determine whether authentication is necessary.

- 17.8. The parties shall file all documents only once by submitting them with their pleadings. Documents need not be resubmitted with witness statements even if referred to in such statements.
- 17.9. Demonstrative exhibits (such as PowerPoint slides, charts, tabulations, etc.) may be used at any hearing, provided they contain no new evidence. Each party shall number its demonstrative exhibits consecutively, and indicate on each demonstrative exhibit the number of the document(s) from which it is derived. The party submitting such exhibits shall provide them in electronic and, if requested, hard copy to the other party, the Tribunal Members, the Tribunal Secretary, the court reporter(s) and interpreter(s) at the hearing at a time to be decided at the pre-hearing organizational meeting.
18. Witness Statements and Expert Reports
Convention Article 43(a); Arbitration Rule 24
- 18.1. If a Party wishes to adduce evidence by witnesses or experts, it shall submit written witness statements and expert reports.
- 18.2. Witness statements and expert reports shall be filed together with the parties' pleadings. Witness statements and expert reports submitted with the Reply and Rejoinder must respond to the other party's preceding submission.
- 18.3. Neither party shall be permitted to submit any testimony that has not been filed with the written submissions, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other party. As an example, exceptional circumstances exist if new facts arise after a witness statement or expert report has been signed.
- 18.4. Each witness statement and expert report shall contain the elements set out in Articles 4(5) and 5(2), respectively, of the IBA Rules.
- 18.5. The Tribunal may, if it deems it appropriate, order the party-appointed experts of like discipline to meet and confer (on a without prejudice basis) on their reports. The purpose is for the experts to attempt to agree on those issues prompting different opinions in their expert reports, or to narrow their differences, and then record in writing for the benefit of the parties and the Tribunal the issues on which they reached agreement or narrowed their differences. The Tribunal shall ensure that each party is afforded sufficient opportunity to make its observations concerning any written product jointly issued by the experts.

19. Examination of Witnesses and Experts

Arbitration Rules 35 and 36

- 19.1. By the deadline indicated in the Procedural Calendar, each side must notify the other side and the Tribunal of the names the witnesses and experts presented by the other side to be cross-examined at the hearing.
- 19.2. By the date set out in Annex B, at the reasoned request of a party or on its own initiative, the Tribunal may direct that a witness or expert not otherwise called by the parties attend the hearing for examination.
- 19.3. A party's waiver of its right to cross-examine a witness or expert does not imply acceptance of the content of that witness' or expert's written testimony. When a party has waived its right to cross-examine a witness or expert, or has limited the cross-examination to only part of the relevant witness statement or expert report, the Tribunal will exercise its discretion in weighing the evidence of that witness or expert.
- 19.4. Each side is responsible for summoning to the hearing those of its witnesses and experts whom the other side has called for cross-examination or whom the Tribunal has directed to appear. Each side is to bear the costs of its witnesses' and experts' appearance at the hearing, subject to the Tribunal's later allocation of costs.
- 19.5. In exceptional circumstances, the Tribunal may allow a witness or expert to appear and be examined by videoconference and in such cases will issue appropriate directions.
- 19.6. If a witness or expert called for cross-examination ultimately is unable to attend the hearing in person or by videoconference for any reason, the Tribunal will hear the parties on this issue and decide what weight should be given to the written testimony of said witness or expert, if any, taking into account all relevant circumstances.
- 19.7. Subject to further discussion at the pre-hearing organizational meeting, the procedure for examining witnesses will be as follows:
 - 19.7.1. The side that has presented the witness may conduct a brief direct examination to confirm the witness statement, with any corrections, and to ask introductory questions, including about matters that have arisen after that witness' written statement was signed. As a general rule, direct examination is not to exceed ten minutes.
 - 19.7.2. The opposing side may then cross-examine the witness about relevant facts within the witness' knowledge, not necessarily limited to facts addressed in the witness statement.

- 19.7.3. The side that has presented the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination or questions posed by the Tribunal.
- 19.7.4. The Tribunal may examine the witness at any time, either before, during or after examination by one of the parties.
- 19.8. The procedure for examining experts will be the same, except that, subject to further discussion at the pre-hearing organizational meeting, the Tribunal may invite experts to make a presentation lasting no longer than 30 minutes before the start of their cross-examination, to summarize their methodology and conclusions. The Tribunal may also order two or more experts to be examined concurrently (for example, by witness conferencing).
- 19.9. Issues concerning the sequestration of witnesses, including party representatives, will be determined by the Tribunal, following discussions in the pre-hearing organizational meeting.
- 19.10. The Tribunal will have full control at all times over witness and expert examination, including the right to limit or exclude questions to a witness or expert when it considers that the subject of the intended examination is sufficiently addressed by other evidence, or that the witness' examination is irrelevant, immaterial, burdensome or duplicative.

20. Pre-Hearing Organizational Meeting
Arbitration Rule 13

- 20.1. A pre-hearing organizational meeting shall be held at a date determined by the Tribunal after consultation with the parties, at least four weeks prior to the hearing. It shall comprise a teleconference or videoconference between the Tribunal, or its President, and the parties and should resolve any outstanding procedural, administrative, and logistical matters (including modality of interpretation and transcription) in preparation for the hearing.
- 20.2. At a date to be determined by the Tribunal, and in any event no later than the date of the pre-hearing conference, the parties shall submit to the Tribunal jointly – or, where they are unable to agree, separately – a proposal regarding a daily schedule for the hearing.

21. Hearings

Arbitration Rules 20(1)(e) and 32

- 21.1. The oral procedure shall consist of a hearing for examination of witnesses and experts, if any, and for oral arguments.
- 21.2. The hearing shall take place on the dates specified in the Procedural Calendar.
- 21.3. The Members of the Tribunal shall endeavor to reserve at least one day after the hearing to determine the next steps and to hold deliberations.
- 21.4. The issue of allocation of time between the parties at the hearing shall be determined by the Tribunal, following discussion in the pre-hearing organizational meeting.
- 21.5. The hearing will be streamed on the ICSID website after both parties are given sufficient time after the end of each hearing day to identify parts of the video recording to be removed prior to streaming. Further details concerning the streaming procedure will be discussed in the pre-hearing organizational meeting.
- 21.6. In preparation for the hearing, the Tribunal may instruct the parties to submit to the Tribunal jointly – or, where they are unable to agree, separately:
 - 21.6.1. A chronology of relevant facts in tabular form; and
 - 21.6.2. A list and brief description of the individuals and entities who/which are part of the relevant factual background (“*dramatis personae*”).

22. Records of Hearings and Sessions

Arbitration Rules 13 and 20(1)(g)

- 22.1. Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the parties and the Tribunal Members.
- 22.2. Verbatim transcript(s) in the procedural language(s) shall be made of any hearing and session other than sessions on procedural issues. Unless otherwise agreed by the parties or ordered by the Tribunal, the verbatim transcripts shall, if possible, be available in real-time using LiveNote or similar software and electronic transcripts shall be provided to the parties and the Tribunal on a same-day basis.
- 22.3. The parties shall agree on any corrections to the transcripts within 30 days of the later of the dates of the receipt of the sound recordings and transcripts. The agreed corrections may be entered by the court reporter in the transcripts (“revised transcripts”). The Tribunal shall decide upon any disagreement between the parties

and any correction adopted by the Tribunal shall be entered by the court reporter in the revised transcripts.

23. Post-Hearing Memorials and Statements of Costs

Convention Article 44; Arbitration Rule 28(2)

23.1. The Tribunal will consult with the Parties at the close of the hearing regarding the scope, form and deadline for any post-hearing submissions and submissions on costs.

23.2. No new evidence may be submitted in any post-hearing submissions.

24. Publication of the Award, Decisions and Orders

Convention Article 48(5), Administrative and Financial Regulation 22, Arbitration Rule 48(4)

24.1. The parties consent to ICSID publication of the award and any order or decision issued in the present proceeding, subject to redaction pursuant to the following rules:

24.1.1. Each party shall identify within 21 days after receipt of any award, decision, or order from the Tribunal all redactions that the party proposes to be made. To the extent that the other party disagrees with any of the proposed redactions, the following procedure shall apply:

24.1.1.1. The party opposing the redaction may, within 14 days after being notified of the other party's proposal, submit a reasoned application to the Tribunal for an order that the publication of the document be permitted without the redaction.

24.1.1.2. Within 14 days after the making of any such application, the party seeking the redaction may respond to the application.

24.1.1.3. The Tribunal will thereafter make an order in relation to the proposed redaction. In its decision, the Tribunal shall be guided, but not bound, by the criteria set out in Articles 7.2, 7.5, 7.6 and 7.7 of the UNCITRAL Transparency Rules. Pending any such order, the disputed portion may not be published.

24.2. The Tribunal will remain constituted for the purpose of making any order under this Section in relation to its final award or other final decision.

25. Transparency and Confidentiality of Other Case Materials

- 25.1. The parties shall not disclose any document produced by the other side in this proceeding, unless and until the document is subsequently entered into the record as an exhibit, in which case paragraph 25.2 shall apply.
- 25.2. The parties are not prohibited from disclosing submissions, witness statements, expert reports, exhibits, or hearing transcripts, subject to the following rules:
- 25.2.1. A party that intends to disclose (in full or in part) any submission, witness statement, expert report, exhibit, or transcript shall notify the other party within 14 days after the filing of the relevant document(s) or receipt of the corrected version of the relevant transcript. The parties shall confer and work constructively to resolve any disputes regarding the document(s) to be disclosed and any redactions to the document(s).
- 25.2.2. If the parties agree to the disclosure (in full or in part, with or without redactions) of any submission, witness statement, expert report, exhibit, or transcript, the party seeking to disclose the document(s) shall notify the Tribunal of the parties' agreement. Absent objection from the other party within five days after such notification, the Tribunal will authorize disclosure in accordance with the parties' agreement.
- 25.2.3. If the parties are unable to reach agreement on the document(s) to be disclosed and/or redactions, they shall confer and attempt to agree on a procedure by which the outstanding disputes are to be submitted to the Tribunal for resolution. Any agreed procedure shall be communicated to the Tribunal as a joint proposal of the Parties.
- 25.2.4. If the parties are unable to reach agreement on the procedure under paragraph 25.2.3, either party may make a proposal to the Tribunal. After giving the other party an opportunity to respond, the Tribunal will determine the applicable procedure and timeline, having regard to the amount and complexity of the material designated for disclosure.
- 25.2.5. The Tribunal will thereafter make an order in relation to the proposed disclosure and any contested redactions. In its decision, the Tribunal shall be guided, but not bound, by the criteria set out in Articles 7.2, 7.5, 7.6 and 7.7 of the UNCITRAL Transparency Rules.

26. Non-Disputing Party Submissions

Arbitration Rule 37(2)

- 26.1. ICSID Arbitration Rule 37(2) shall apply to any request from a non-disputing party to make a submission in this proceeding.

27. Cybersecurity

27.1. The parties agree to take appropriate measures for the secure transmission of documents, information and communications in this arbitration by using ICSID's file sharing platform and password protected USB drives. If a particular document or communication requires heightened security, the parties are to confer and determine the appropriate cybersecurity measures for its transmission.

28. General

28.1. The Tribunal may issue such directions and orders to the parties as are reasonably needed to enable an award to be made properly, fairly and efficiently.

28.2. The parties are to conduct themselves in a manner consistent with the efficient use of time and resources and observe Tribunal directions, so as to enable the arbitration to proceed to the award in a proper, fair and efficient way. The Tribunal may take unreasonable behavior into account when exercising its discretion to allocate costs. Unreasonable behavior includes unjustified failure to meet deadlines in the Procedural Calendar or comply with other procedural orders, dilatory tactics, excessive document production requests, unnecessarily intemperate inter-lawyer correspondence, unnecessary legal argument, excessive cross-examination, patently exaggerated claims or unjustified interim applications.



Lucy Reed
President of the Tribunal
Date: October 15, 2021

ANNEX A

ELECTRONIC FILE NAMING GUIDELINES

Please follow these guidelines when naming electronic files and for the accompanying Consolidated Hyperlinked Index. The examples provided (in *italics*) are for demonstration purposes only and should be adapted to the relevant phase of the case.

All pleadings and accompanying documentation shall indicate the LANGUAGE in which they are submitted (e.g. SPA=Spanish; FR=French; ENG= English). Such indication should be reflected both i) in the name used to identify each individual electronic file and ii) in the Consolidated Hyperlinked Index.

For cases with a single procedural language, the “LANGUAGE” designation may be omitted, except for documents in a language other than the procedural language and the corresponding translations.

SUBMISSION TYPE	ELECTRONIC FILE NAMING GUIDELINES
MAIN PLEADINGS	Title of Pleading–LANGUAGE
	<i>Memorial on Jurisdiction-FR</i>
	<i>Counter-Memorial on the Merits and Memorial on Jurisdiction-SPA</i>
	<i>Reply on Annulment-FR</i>
	<i>Rejoinder on Quantum-ENG</i>
SUPPORTING DOCUMENTATION	C-####–LANGUAGE
	R-####–LANGUAGE
	To be produced sequentially throughout the case.
	CLAIMANTS’ FACTUAL EXHIBITS
	<i>C-0001-ENG</i>
	<i>C-0002-SPA</i>
	RESPONDENT’S FACTUAL EXHIBITS
	<i>R-0001-FR</i>
	<i>R-0002-SPA</i>
	Legal Authorities
RL-####–LANGUAGE	
To be produced sequentially throughout the case.	
CLAIMANTS’ LEGAL AUTHORITIES	
<i>CL-0001-ENG</i>	
<i>CL-0002-FR</i>	
RESPONDENT’S LEGAL AUTHORITIES	
<i>RL-0001-SPA</i>	
<i>RL-0002-ENG</i>	
Witness Statements	Witness Statement-Name of Witness-Name of Submission-LANGUAGE
	<i>Witness Statement-Maria Jones-Memorial on Jurisdiction-SPA</i>
	<i>Witness Statement-Maria Jones-Reply on Jurisdiction-[Second Statement]-ENG</i>
Expert Reports	Expert Report-Name of Expert-Type-Name of Submission-LANGUAGE
	<i>Expert Report-Lucia Smith-Valuation-Memorial on Quantum-ENG</i>
	<i>Expert Report-Lucia Smith-Valuation-Reply on Quantum-[Second Report]-ENG</i>
Legal Opinions	Legal Opinion-Name of Expert-Name of Submission-LANGUAGE
	<i>Legal Opinion-Tom Kaine-Counter-Memorial on the Merits-FR</i>

RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands
(ICSID Case No. ARB/21/4)

Procedural Order No. 1 – Annexes

	<i>Legal Opinion-Tom Kaine-Rejoinder on the Merits-[Second Opinion]-FR</i>
Exhibits to Witness Statements, Expert Reports, Legal Opinions	WITNESS/EXPERT INITIALS-###
	<i>For exhibits filed with the Witness Statement of [Maria Jones]</i>
	<i>MJ-0001</i>
	<i>MJ-0002</i>
	<i>For exhibits filed with the Legal Opinion of [Tom Kaine]</i>
	<i>TK-0001</i>
	<i>TK-0002</i>
	<i>For exhibits filed with the Expert Report of [Lucia Smith]</i>
	<i>LS-0001</i>
<i>LS-0002</i>	
INDICES	Consolidated Hyperlinked Index
	Index of Exhibits-C-#### to C-####
	<i>Index of Exhibits-C-0001 to C-0023</i>
	Index of Legal Authorities-RLA-### to RLA-###
	<i>Index of Legal Authorities-RLA-0001 to RLA-0023</i>
OTHER APPLICATIONS	Name of Application-[Party]-LANGUAGE
	<i>Preliminary Objections under Rule 41(5)-SPA</i>
	<i>Request for Bifurcation-ENG</i>
	<i>Request for Provisional Measures-[Respondent]-SPA</i>
	<i>Request for Production of Documents-[Claimants]-SPA</i>
	<i>Request for Stay of Enforcement-FR</i>
	<i>Request for Discontinuance-[Claimants]-ENG</i>
	<i>Post-Hearing Brief-[Claimants]-SPA</i>
	<i>Costs Submissions-[Respondent]-ENG</i>
<i>Observations to Request for [XX]-[Claimants]-SPA</i>	

ANNEX B

PROCEDURAL CALENDAR

Description	By	Days	Date
First Session	All		30-Aug-21
Memorial	Claimants	110	18-Dec-21
Respondent to indicate whether it intends to raise an intra-EU objection. If so, Tribunal will invite requests for bifurcation and expedition, for prompt decision.	Respondent	27	14-Jan-22
Request for bifurcation of the intra-EU objection, if any	Either Party	14	28-Jan-22
Response to request for bifurcation of the intra-EU objection, if any	Either Party	14	11-Feb-22
Decision on bifurcation, if necessary	Tribunal	14	25-Feb-22

Scenario A – No request for bifurcation or decision not to bifurcate:

Description	By	Days	Date
Counter-Memorial, including any Preliminary Objections	Respondent	182	26-Aug-22
Document Production Phase			
Request to Produce	Parties	35	30-Sep-22
Production of Non-Objected Documents & Objections to Produce	Parties	28	28-Oct-22
Reply to Objections & Redfern Schedules sent to Tribunal	Parties	14	11-Nov-22
Letter & Document Production Application to the Tribunal	Parties	7	18-Nov-22
Decision on Request to Produce	Tribunal	21	9-Dec-22
Production as Ordered	Parties	42	20-Jan-23
Written Procedure: Round 2			
Reply on Merits and Counter-Memorial on Preliminary Objections, if any	Claimants	119	19-May-23
Rejoinder on Merits and Reply on Preliminary Objections, if any	Respondent	119	15-Sep-23
Rejoinder on Preliminary Objections, if Preliminary Objections were raised by Respondent	Claimants	49	3-Nov-23
Oral Procedure			
Notification of Witnesses and Experts	Parties	28	1-Dec-23

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Procedural Order No. 1

Notification of Witnesses and Experts not called by the Parties	Tribunal	14	15-Dec-23
Pre-Hearing Telephone Conference	All	35	19-Jan-24
First Hearing Day	All	24	TBD 12-Feb-24
Last Hearing Day (incl. Reserve Days)	All	12	TBD 24-Feb-24
Post-Hearing Phase			
Transcript Revision	Parties		TBD
Post-Hearing Submission (if any)	Parties		TBD
Reply Post-Hearing Submission (if any)	Parties		TBD
Cost Submission	Parties		TBD
Award	Tribunal		TBD

Scenario B – Decision to bifurcate intra-EU objection:¹

Description	By	Days	Date
Memorial on the Intra-EU Objection	Respondent	49	15-Apr-22
Counter-Memorial on the Intra-EU Objection	Claimants	49	3-Jun-22
Reply on the Intra-EU Objection	Respondent	35	8-Jul-22
Rejoinder on the Intra-EU Objection	Claimants	35	12-Aug-22
Hearing on the Intra-EU Objection, if necessary	All		12-Sep-22
Decision on the Intra-EU Objection or Award	Tribunal		TBD

¹ In the event a Decision on the intra-EU objection results in a determination that the case shall proceed to a further stage, the Tribunal will issue a further procedural calendar setting forth the next steps in the arbitration.

ANNEX C

REDFERN SCHEDULE FOR DOCUMENT REQUESTS

Document Request No. []	
A. Documents requested	
B. Relevance and materiality	
C. Disputing Party's Objections	
D. Reply	
E. Decision of the Tribunal	

ANNEX D

PRIVILEGE LOG

Req. No.	Document (Type)	Date	Sender	Recipient	Subject Matter	Scope of Information Withheld	Base of Privilege/Redaction