

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. 2
DECISION ON BIFURCATION**

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

25 February 2022

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I. INTRODUCTION

1. This Order addresses the Application for Bifurcation submitted by RWE AG and RWE Eemshaven Holding II BV (together, the **Claimants** or **RWE**) on 28 January 2022, in which the Claimants ask the Tribunal to resolve two issues on a preliminary and accelerated basis (the **Application**). The Respondent, the Kingdom of the Netherlands (the **Respondent** or the **Netherlands**), opposes the Application.

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 2022.
3. In May 2021, the Netherlands commenced proceedings against one of the Claimants, RWE AG, before the Higher Regional Court of Cologne (the **German Proceedings**), seeking a declaration pursuant to Section 1032(2) of the German Code of Civil Procedure, which provides that:¹

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.

4. Citing the judgment of the Court of Justice of the European Union in *Achmea B.V. v. The Slovak Republic* (**Achmea**), the Netherlands argues in the German Proceedings that there is no agreement to arbitrate between RWE AG and the Netherlands under Article 26 of the ECT, because arbitration clauses in investment protection agreements between Member States of the European Union (the **EU**) are incompatible with EU law.²

¹ 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.

² See C-117, Petition by the Netherlands to the Cologne Court, 10 May 2021.

5. 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 German Proceedings, explaining that:³

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.

6. In a letter of 21 May 2021, the Netherlands informed ICSID of the German Proceedings, noting that the Netherlands would “continue to diligently take part in the present proceedings before ICSID while the proceedings in Germany are pending.”⁴ RWE responded on 27 May 2021 and asserted that the Netherlands’ “action is in grave breach of Article 26 ICSID Convention.”
7. The Tribunal was constituted on 2 June 2021. As an initial procedural step, on 23 July 2021, the Tribunal invited the Parties to confer regarding the procedural matters addressed in a draft Procedural Order No 1 by 1 August 2021, later extended until 13 August 2021. The Parties submitted their comments on the draft on 13 August 2021, indicating areas of agreement and their respective positions on certain points of disagreement. In its comments, RWE proposed that if the Netherlands wished to raise an intra-EU jurisdictional objection in this arbitration, that objection should be bifurcated and heard on an expedited basis. The Netherlands opposed RWE’s proposal, stating that it would not be in a position to determine whether to request bifurcation of any of its jurisdictional objections before seeing RWE’s full case on the merits.
8. During the first session on 30 August 2021, the Tribunal and the Parties discussed RWE’s bifurcation proposal among other procedural matters.

³ C-113, Letter from Minister Bastiaan van Wout to the Lower House, 17 May 2021.

⁴ Letter from the Respondent to ICSID, 21 May 2021.

9. On 15 October 2021, the Tribunal issued Procedural Order No 1, including the Procedural Timetable as Annex B. Although the Tribunal did not adopt RWE's bifurcation proposal, it included in the Timetable a procedure whereby either Party could request bifurcation after RWE had filed its Memorial and the Netherlands had indicated whether it intends to raise an intra-EU objection. The Timetable provided two scenarios: Scenario A, to apply in the case of no request for bifurcation or a decision not to bifurcate; and Scenario B to apply in the case of a decision to bifurcate the intra-EU objection.
10. In accordance with the Procedural Timetable, on 18 December 2021, RWE filed its Memorial, which included a claim relating to the German Proceedings and request that the Tribunal:⁵

(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.

11. On 14 January 2022, the Netherlands notified the Tribunal that it intends to raise an intra-EU objection in this arbitration.
12. On 28 January 2022, RWE filed the Application, while the Netherlands did not file a request for bifurcation.
13. The Netherlands filed its response to the Application on 11 February 2022 (the **Response**).
14. The German Proceedings have progressed alongside this arbitration. RWE AG filed a response to the Netherlands' petition on 9 July 2021, the Netherlands filed a reply submission on 27 September 2021,⁶ and both sides made their final submissions on 21 and

⁵ Memorial, para 689(2).

⁶ Memorial, para 362; **C-115**, Second Submission by the Netherlands to the Cologne Court, 27 September 2021.

26 January 2022 respectively.⁷ In its final submission, the Netherlands asked the court to render a decision before 25 February 2022, the expected date of the Tribunal’s decision on bifurcation.⁸

III. SUMMARY OF THE PARTIES’ POSITIONS ON THE APPLICATION

A. THE CLAIMANTS’ POSITION

15. RWE submits that the Tribunal should bifurcate this arbitration and resolve the following two issues in an initial, expedited phase of the proceeding as set out in Scenario B of the Procedural Timetable: (a) the Netherlands’ intra-EU objection; and (b) RWE’s “ancillary claim” that the German Proceedings violate the ICSID Convention.⁹

1. *Applicable Standards*

16. According to RWE, Articles 41 and 44 of the ICSID Convention and Rule 41 of the ICSID Arbitration Rules give the Tribunal wide discretion in deciding whether to bifurcate this proceeding, and the Tribunal should be guided by the overarching considerations of procedural efficiency and fairness.¹⁰

17. More specifically, RWE states that ICSID tribunals take into account the following factors when deciding whether to bifurcate jurisdictional objections:¹¹

- *Whether the objection to jurisdiction is substantial in the sense that it is not made frivolously or as a dilatory tactic;*
- *Whether the objection to jurisdiction, if granted, results in a material reduction of the proceedings at the next phase, and in particular could dispose of the case as such;*

⁷ Application, para. 10.

⁸ **C-116**: Third Submission by the Netherlands to the Cologne Court, 21 January 2022, paras 37-38.

⁹ Application, para 3.

¹⁰ Application, para 14.

¹¹ Application, para 15, *citing* **CL-139**, *Glamis Gold Ltd. v. USA*, UNICTRAL / NAFTA, Procedural Order No. 2 (Revised), 31 May 2005, para 12; **CL-140**: *Emmis et al. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent’s Application for Bifurcation, 13 July 2013, paras 47-56; **CL-141**: *Tulip Real Estate v. Turkey*, ICSID Case No. ARB/11/28, Decision on the Respondent’s Request for Bifurcation under Art. 41(2) of the ICSID Convention, 2 November 2012, paras 37 and 44; **CL-142**: *Philip Morris v. Australia*, UNCITRAL, PCA Case No. 2012-12, Procedural Order No. 8, 14 April 2014, para. 109; **CL-143**: *Lighthouse Corp. v. Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 3 on Bifurcation and Related Requests, 8 July 2016, para 23.

- *Whether bifurcation is practical in that the relevant jurisdictional issue identified is not so intertwined with the merits that an early resolution of the question is impossible.*

18. RWE adds that “tribunals have at times also considered whether bifurcation would prejudice the claimants, in particular beyond a simple delay that could be compensated for in costs.”¹²
19. Although RWE acknowledges that the case law addressing bifurcation beyond jurisdictional objections has not produced a clear list of factors to be weighed, RWE asserts that procedural efficiency and fairness remain the paramount considerations in deciding whether to bifurcate merits claims.¹³
20. Applying these standards in the present case, RWE argues that bifurcation of both the intra-EU objection and the ancillary merits claim would promote efficiency and fairness, whereas RWE would suffer unjustifiable prejudice in the absence of bifurcation.¹⁴

2. Bifurcation of the Intra-EU Objection

21. In RWE’s view, “the intra-EU objection completely conforms to all criteria that speak in favour of bifurcation.”¹⁵ First, the intra-EU objection is substantial, in the sense that the Tribunal cannot *prima facie* exclude its success, especially because the Netherlands has still failed to raise the objection in this arbitration.¹⁶ Second, if the Netherlands were to succeed on its objection, the arbitration would end without the need for further proceedings. Third, the intra-EU objection relates to a legal issue that is entirely separate from RWE’s main claims on the merits and thus constitutes a “text book case of an objection appropriate

¹² Application, para 16, *citing CL-143: Lighthouse Corp. v. Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 3 on Bifurcation and Related Requests, 8 July 2016, para 20; **CL-140: Emmis et al. v. Hungary**, ICSID Case No. ARB/12/2, Decision on Respondent’s Application for Bifurcation, 13 July 2013, para 56.

¹³ Application, para 17.

¹⁴ Application, para 3.

¹⁵ Application, para 21.

¹⁶ Application, para 22, *citing CL-142, Philipp Morris v. Australia*, UNCITRAL, PCA Case No. 2012-12, Procedural Order No. 8, 14 April 2014, para 111.

for bifurcation.”¹⁷ Indeed, by raising this legal issue before the German court, the Netherlands has acknowledged that it is ripe for decision.¹⁸

22. Moreover, RWE says it would be seriously prejudiced by a decision not to bifurcate the intra-EU objection. RWE stresses that the Netherlands has described the German Proceedings as “anti-arbitration proceedings” that are “primarily aimed at averting the arbitration,” thereby preventing RWE from pursuing its claims at ICSID.¹⁹ In RWE’s view, the Netherlands’ current strategy is to obtain a decision from the German court before the Tribunal has an opportunity to rule on the matter.²⁰ However, RWE considers that it has “a right to have the jurisdiction of this Tribunal determined authoritatively by this Tribunal, and only by this Tribunal.”²¹

3. Bifurcation of RWE’s Ancillary Merits Claim

23. RWE argues that bifurcation of its ancillary merits claim would also promote efficiency and fairness. RWE sees this claim and the intra-EU objection as “inextricably linked both factually and legally, like two sides of the same coin.”²² In contrast, RWE says the claim is not intertwined with its main claims and can be decided irrespective of the merits of the Parties’ underlying dispute.
24. Additionally, RWE considers that “[t]he ancillary claim concerns purely legal issues, which are neither complicated nor novel, but rather well-settled in arbitral jurisprudence and literature.”²³ It follows for RWE that the claim could easily be integrated into the existing briefing schedule for the intra-EU objection under Scenario B of the Procedural Timetable. Deciding these matters in a preliminary phase would, in RWE’s view, serve

¹⁷ Application, para 24, *citing* **CL-5: Vattenfall v. Germany**, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, para 3 (“The Achmea issue is a distinct matter, unrelated to the remainder of the issues between the Parties to this arbitration. The Tribunal considers it appropriate and in the interests of efficiency and procedural economy to issue this separate Decision prior to any further ruling in these proceedings, in order to address the specific jurisdictional objection by Respondent with respect to the Achmea issue.”).

¹⁸ Application, para 20.

¹⁹ Application, para 26, *quoting* **C-113**: Letter from Minister Bastiaan van Wout to the Lower House, 17 May 2021.

²⁰ Application, para 19.

²¹ Application, para 27.

²² Application, para 6.

²³ Application, para 30.

procedural fairness and “allow the Parties to focus on the real issues in dispute” later in the proceeding.²⁴

4. Request for Relief

25. Therefore, RWE requests that the Tribunal:²⁵

bifurcate these proceedings and hear Respondent’s intra-EU objection and Claimants’ ancillary claim in an expedited manner in accordance with the briefing schedule set out in Annex B – Scenario B of Procedural Order No. 1.

B. THE RESPONDENT’S POSITION

26. The Netherlands submits that the Application is contrary to procedural efficiency and fairness and should be rejected.²⁶

1. Applicable Standards

27. The Netherlands agrees with RWE that the Tribunal has wide discretion to decide whether bifurcation is warranted in this case, and that the guiding considerations are procedural efficiency and fairness.²⁷ However, the Netherlands diverges from RWE on the application of those considerations in the factual circumstances of this case.

2. Bifurcation of the Intra-EU Objection

28. The Netherlands urges the Tribunal not to bifurcate the intra-EU objection for several reasons.

29. First, the Netherlands says bifurcation would not serve procedural fairness because it “could preclude the Tribunal from taking account of a ruling on a question of EU law rendered by the competent EU court that is at the core of the intra-EU objection.”²⁸ Specifically, if the German court has not rendered its judgment before briefing on the intra-

²⁴ Application, para 31.

²⁵ Application, para 32.

²⁶ Response, para 2.

²⁷ Response, para 9.

²⁸ Response, para 12.

EU objection in a bifurcated scenario has completed, the Tribunal will have an incomplete record on which to make its decision.²⁹

30. Second, the Netherlands advances a related argument that bifurcation could lead to procedural inefficiency because the Tribunal would need to revisit its decision on the intra-EU objection once the court renders its judgment in the German Proceedings.³⁰
31. Third, the Netherlands asserts that bifurcation is inefficient on RWE's own case. Given RWE's position that the intra-EU objection must fail, there can be no efficiency gained in debating that issue first, rather than in parallel with the merits.³¹
32. Fourth, the Netherlands alleges that the Application is motivated by RWE's desire to prevent the Tribunal from considering the German court's decision, which is not a valid basis on which to seek bifurcation. According to the Netherlands, RWE has mischaracterized the German Proceedings, which are in fact "concerned with a question of EU law only, and do not affect the Tribunal's power to rule on its own competence under Article 41 [of the] ICSID Convention."³²
33. Finally, the Netherlands emphasizes the principle that a Party has the right to present its case as it sees fit. In this case, the Netherlands says that absent concerns of procedural efficiency or fairness, it is entitled to proceed with its plan "to present in its Counter-Memorial a full picture of why RWE's case should be rejected, both on the jurisdiction and on the merits."³³ The Netherlands notes that RWE has not cited any case in which a jurisdictional objection was bifurcated over the respondent's opposition.³⁴

3. Bifurcation of RWE's Ancillary Merits Claim

34. The Netherlands similarly presents several reasons why, in its view, RWE's ancillary merits claim should not be bifurcated.

²⁹ Response, para 12.

³⁰ Response, paras 13-14.

³¹ Response, paras 15-16.

³² Response, para 19.

³³ Response, para 20.

³⁴ Response, para 21.

35. First, the Netherlands asserts that RWE's request to bifurcate this claim was neither contemplated in Procedural Order No. 1 nor referenced by RWE in the discussions surrounding that Order. Thus, RWE's request falls outside the scope of Procedural Order No.1 and lacks any basis.³⁵
36. Second, the Netherlands notes the language of Article 41(3) of the ICSID Arbitration Rules, which states that the Tribunal may "suspend the proceeding on the merits" pending consideration of jurisdictional issue. For the Netherlands, it follows that this provision does not provide a basis for bifurcation of a merits issue.³⁶
37. Third, in the Netherlands' view, there is no procedural efficiency to be gained from bifurcating this specific claim, which is not dispositive of the arbitration or any significant portion of it.³⁷
38. Fourth, the Netherlands contends that RWE's claim is not substantial, because: (a) the German Proceedings are about the operation of EU law, which do not in any way inhibit the Tribunal from determining its own jurisdiction under the ICSID Convention; and (b) there is no concern about exclusivity pursuant to Article 26 of the ICSID Convention, as "issues of EU law are not exclusively for an ICSID tribunal to determine but rather for the EU courts under the supervision of the CJEU."³⁸ In fact, says the Netherlands, "[t]o the extent Article 26 of the ICSID Convention is engaged at all, RWE has waived ICSID exclusivity and/or consented to non-exclusivity" by initiating parallel proceedings before the Dutch courts regarding the same purported investment and the same regulatory measure at issue in this arbitration.³⁹
39. Finally, the Netherlands considers that Scenario B of the Procedural Timetable is not suitable for merits claims and would give RWE more opportunities to brief the issue than

³⁵ Response, para 23.

³⁶ Response, para 24, *citing* **RL-2**, Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair. *The ICSID Convention: A Commentary* (2nd ed. Cambridge University Press 2009), Article 41, para 63 ("ICSID tribunals have routinely suspended proceedings on the merits upon receipt of an objection to jurisdiction.").

³⁷ Response, para 25.

³⁸ Response, para 27.

³⁹ Response, para 28, *citing* **RL-2**, Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair. *The ICSID Convention: A Commentary* (2nd ed. Cambridge University Press 2009), Article 26, para 54.

the Netherlands would have, violating the Netherlands' right to be heard and right to equal treatment.⁴⁰

4. Request for Relief

40. Therefore, the Netherlands requests that the Tribunal:⁴¹

(a) REJECT the Request for Bifurcation of the Intra-EU objection and one of RWE's merits claims;

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

IV. THE TRIBUNAL'S ANALYSIS

41. At the outset, the Tribunal emphasizes that the purpose of this Order is to decide whether to bifurcate the present proceedings. The Tribunal takes no decision at this stage on the merits of the two issues identified in the Application. 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 finding of fact or conclusion of law.

A. APPLICABLE STANDARDS

42. In ICSID proceedings, requests for bifurcation of one or more jurisdictional objections are common. The applicable standards are well known and uncontested in this case. Both sides acknowledge that the Tribunal has broad discretion under the ICSID Convention and Arbitration Rules to determine whether bifurcation is warranted here.

43. To recall, Article 41(2) of the ICSID Convention provides that:

Any objection by a party to the dispute that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

ICSID Arbitration Rule 41(4) provides in relevant part that the Tribunal:

⁴⁰ Response, paras 29-30.

⁴¹ Response, para 32.

may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

44. Neither the ICSID Convention nor the Arbitration Rules set forth specific criteria to be considered in deciding whether to bifurcate objections, leaving the decision entirely to the discretion of a tribunal. In exercising this discretion, ICSID tribunals have identified certain factors as important to the analysis, including: (a) whether the objection is substantial and not frivolous; (b) whether the objection, if granted, has the potential either to dispose of the entire case or to result in a material reduction of scope in the next phase of proceedings; and (c) whether the jurisdictional issue is sufficiently discrete and not so intertwined with the merits that it may be fairly resolved separate from the merits and without the risk of duplicative proceedings.⁴² More generally, as noted by both sides, the analysis should be driven by the overarching considerations of procedural fairness and efficiency. The Tribunal fully agrees with this framework.
45. That being said, there are important aspects of the present Application that set it apart from a common request for bifurcation. First, in most cases it is the respondent State that seeks bifurcation of jurisdictional objections, whereas here it is the *Claimants* that are seeking bifurcation, and that over the objection of the Netherlands. Second, the Claimants seek preliminary resolution not only of a jurisdictional objection, but also a merits claim. Third, it is clear to the Tribunal that the key driving factor for both the Application and the Netherlands' opposition is the potential impact of the German Proceedings on the arbitration – not the traditional considerations of procedural efficiency set out above. Although none of these characteristics of the Application weighs automatically in favor of or against bifurcation, each of them must factor into the Tribunal's analysis.

⁴² See, e.g., **CL-139**, *Glamis Gold Ltd. v. USA*, UNICTRAL / NAFTA, Procedural Order No. 2 (Revised), 31 May 2005, para 12; **CL-140**: *Emmis et al. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation, 13 July 2013, paras 47-56; **CL-141**: *Tulip Real Estate v. Turkey*, ICSID Case No. ARB/11/28, Decision on the Respondent's Request for Bifurcation under Art. 41(2) of the ICSID Convention, 2 November 2012, paras 37 and 44; **CL-142**: *Philip Morris v. Australia*, UNCITRAL, PCA Case No. 2012-12, Procedural Order No. 8, 14 April 2014, para. 109; **CL-143**: *Lighthouse Corp. v. Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 3 on Bifurcation and Related Requests, 8 July 2016, paras 20-21.

B. THE INTRA-EU OBJECTION

46. In approaching the question of whether bifurcation is warranted in this case, the Tribunal begins with the nature of the intra-EU objection. Although the precise contours of the Netherlands' objection will not be known until later in the proceeding, it is already apparent that the objection meets many of the criteria identified above weighing in favor of bifurcation. The question presented is likely to be purely legal and capable of resolution without a detailed investigation of the underlying facts of this case.⁴³ The objection is substantial, as RWE acknowledges, and a decision upholding the objection would dispose of the entire case. In the Tribunal's view, the Netherlands has provided no persuasive reason why the nature of this jurisdictional issue is not appropriate for bifurcation. Thus, the traditional test for bifurcation would appear to be satisfied.
47. As already noted, however, the Application is not a traditional request for bifurcation. The Claimants address procedural efficiency only briefly, focusing instead on their main argument that the German Proceedings are designed to undermine the integrity of the arbitration and prevent RWE from pursuing claims at ICSID. The purpose of the Application is, in the Claimants' words, to preserve their "right to have the jurisdiction of this Tribunal determined authoritatively by this Tribunal, and only by this Tribunal."⁴⁴
48. The Tribunal fully understands RWE's concerns, particularly in light of statements by the Dutch Minister of Economic Affairs and Climate Policy that the German Proceedings are "primarily aimed at averting the arbitration."⁴⁵ At the same time, the Tribunal understands that the Minister's statements do not reflect the Netherlands' position in this arbitration. To the contrary, the Netherlands states in its Response that:
- a. "The German proceedings are concerned with a question of EU law only, and **do not affect the Tribunal's power to rule on its own competence under Article 41 ICSID Convention.**"⁴⁶

⁴³ See **CL-5: *Vattenfall v. Germany***, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, para 3 ("The Achmea issue is a distinct matter, unrelated to the remainder of the issues between the Parties to this arbitration.").

⁴⁴ Application, para 27.

⁴⁵ **C-113**: Letter from Minister Bastiaan van Wout to the Lower House, 17 May 2021.

⁴⁶ Response, para 19 (emphasis added).

- b. “The German proceedings moreover result in a declaratory judgment, which affirms what applies under EU law in any event, i.e. regardless whether the German courts render their decision. No prejudice can result from such an affirmation.”⁴⁷
 - c. “the Netherlands does not deny the Tribunal’s competence to decide its own competence under the ICSID Convention.”⁴⁸
49. The Tribunal understands these statements by the Netherlands as assurances that it will not take any steps to interfere with the Tribunal’s *kompetenz-kompetenz*. Given these assurances, and absent any indication from the Claimants as to precisely how the German Proceedings might be used to prevent them from pursuing their claims at ICSID, the Tribunal is not persuaded that RWE would be prejudiced by a decision not to bifurcate the intra-EU objection.
50. Also as noted, another significant aspect of the Application is that it is the Claimants that are requesting bifurcation of *the Respondent’s* forthcoming objection. This unusual procedural posture gives rise to the Netherlands’ main argument against bifurcation – that it deserves the right to argue its intra-EU objection as it sees fit. Specifically, the Netherlands wishes to address the outcome of the German Proceedings – whatever the outcome – when asserting its intra-EU objection, which it plans to do with its full defense in the Counter-Memorial. Without taking any view on the various questions surrounding the German Proceedings, including whether those proceedings have any bearing on the intra-EU objection, the Tribunal considers the Netherlands’ position to be reasonable. In the Tribunal’s view, a respondent State is entitled to the opportunity to frame its jurisdictional objections as it wishes, absent overriding considerations of efficiency or fairness.
51. Taking all these points together, the Tribunal finds the balance to be against bifurcation of the intra-EU objection, particularly because: (a) it is the Claimants that have made the Application; (b) the Claimants have done so on the basis of concerns about procedural integrity that do not appear to be justified at this stage; (c) the Netherlands’ stated desire to address the outcome of the German Proceedings when briefing the intra-EU objection is credible and reasonable in light of its indication that those proceedings will not be used to

⁴⁷ *Id.*

⁴⁸ Response, para 26.

undermine the Tribunal's *kompetenz-kompetenz*; and (d) ultimately, if it transpires that the Netherlands' opposition to bifurcation has resulted in wasted costs, any harm to RWE can be remedied through the Tribunal's allocation of costs.

52. For the avoidance of doubt, the Tribunal does not consider that a claimant's application to bifurcate a jurisdictional objection is *per se* unacceptable. To the contrary, the Tribunal's view is that considerations of fairness and procedural efficiency apply equally irrespective of whether the respondent or the claimant applies for bifurcation. In the specific circumstances of this case, the Tribunal finds that those considerations, viewed holistically, weigh against bifurcation.

C. RWE'S ANCILLARY MERITS CLAIM

53. Turning to RWE's ancillary merits claim, the Tribunal can be brief.
54. As RWE appears to acknowledge, this claim does not fall within the legal framework of Article 41(2) of the ICSID Convention and ICSID Arbitration Rule 41(4), which concerns only preliminary jurisdictional and competence objections. Rather, as embodied in Article 44 of the ICSID Convention, the authority of an ICSID tribunal to bifurcate a merits claim falls within its residual power to decide procedural matters not covered by the Arbitration Rules.
55. Given that requests to bifurcate merits claims are relatively rare, the applicable standards are less developed than those set out above for jurisdictional objections. That being said, the Tribunal has no doubt that fairness, justice and procedural efficiency remain paramount considerations.
56. In the Tribunal's view, these considerations do not support bifurcation of RWE's merits claim, particularly in light of the Tribunal's decision not to bifurcate the intra-EU objection. As RWE explains, its claim and the intra-EU objection are "inextricably linked both factually and legally, like two sides of the same coin."⁴⁹ Thus, it is evident that hearing the ancillary merits claim and the intra-EU jurisdictional objection in separate phases of

⁴⁹ Application, para 6.

the proceeding would lead to duplicative proceedings. The Tribunal sees no reason to put that burden on the Parties.

D. CONCLUSION

57. To conclude, the Tribunal determines that, in the unusual circumstances of this case, separate preliminary resolution of the Netherlands' intra-EU objection and RWE's ancillary claim would not serve the overall interests of justice, the interests of the Parties, or the integrity of the proceedings. The Claimants' Application is therefore denied. The case will move forward on the schedule for non-bifurcated proceedings in the Procedural Timetable.
58. Again, the Tribunal underscores that its decision is taken in light of the Netherlands' assurances that it will not take any steps to interfere with the Tribunal's *kompetenz-kompetenz*.

V. ORDER

59. For the reasons stated above, the Tribunal DECIDES and ORDERS as follows:
- (A) The Claimants' Application is **denied**.
 - (B) The arbitration is to proceed in accordance with the schedule for non-bifurcated proceedings set out in Scenario A of the Procedural Timetable at Annex B of Procedural Order No 1, unless subsequently modified by the Tribunal.
 - (C) The issue of costs is reserved to a later stage of the arbitration.

For the Tribunal

[Signed]

Lucy Reed
President of the Tribunal