

IN AN ARBITRATION UNDER THE
RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS OF THE

**International Centre for
Settlement of Investment Disputes**

Washington, D.C.

between

RWE AG
RWE Eemshaven Holding II BV
(Claimants)

and

The Kingdom of the Netherlands
(Respondent)

**CLAIMANTS' APPLICATION FOR BIFURCATION
AND EXPEDITION**

28 January 2022

Luther.

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- 1 As Counsel for the German company RWE AG ("**RWE AG**") and its Dutch subsidiary RWE Eemshaven Holding II BV ("**RWE Eemshaven**" or, collectively with RWE AG, "**Claimants**") we hereby respectfully submit Claimants' Application for Bifurcation and Expedition in this ICSID arbitration between Claimants and the Kingdom of the Netherlands ("**the Netherlands**" or "**Respondent**") (jointly the "**Parties**") in line with the Procedural Calendar set by Procedural Order No. 1.
- 2 As the Tribunal will recall, Claimants have early on, already during the First Session, suggested the bifurcation of the intra-EU objection, and explained why this would serve these proceedings in the light of the anti-arbitration petition filed by Respondent before German courts (the "**German Proceedings**"). As Claimants will explain in this Application, the development of the German Proceedings now has even strengthened the case for bifurcation.
- 3 The Tribunal should bifurcate this arbitration and hear both Respondent's intra-EU objection and Claimants' ancillary claim in an expedited fashion, in line with the briefing schedule already foreseen in Annex B – Scenario B of Procedural Order No. 1. Such a bifurcation is in line with the guiding principles of procedural economy and fairness of the proceedings. In fact, not bifurcating this arbitration would seriously and unjustifiably prejudice Claimants, since it would give Respondent free reign to continue its attack on this case in another forum.
- 4 The intra-EU objection fulfils all the requirements established by investment arbitral jurisprudence to warrant bifurcation. It is substantial, even according to Respondent ripe for decision and a purely legal matter, entirely separate from any (factual or legal) merits issue of this case. If accepted by the Tribunal (*quod non*), it had the potential to dispose of this case in its entirety.
- 5 Equally, the ancillary claim raised by Claimants solely relates to Respondent's attempts to have German courts declare these proceedings inadmissible. Such actions not only violate the ICSID Convention, but also Claimants' right to effective dispute resolution under the ECT that is intrinsically linked to its protection standards. Yet, the violation of this right is not further intertwined with any other merits point in this case, can be decided once the Tribunal is briefed by both Parties, and – if expedited – would finally resolve a matter separate from the main issues in this arbitration in a final and time-efficient manner.

6 Finally, the intra-EU objection and Claimants' ancillary claim are inextricably linked both factually and legally, like two sides of the same coin. Hearing them jointly in an expedited manner would serve procedural efficiency by "frontloading" a matter for which no time then would need to be reserved at a later stage, allowing the Parties to concentrate on the real questions in dispute.

A. BACKGROUND TO THIS APPLICATION

7 As Claimants have already set out in detail in their Memorial,¹ more than eight months ago, after the registration of this arbitration, and already in receipt of the Request for Arbitration for quite some time, Respondent commenced its self-proclaimed "*anti-arbitration proceedings*"² before the Higher Regional Court of Cologne (*Oberlandesgericht Köln* – the "**Cologne Court**"). The German Proceedings, based on Section 1032(2) of the German Code of Civil Procedure,³ are directed against Claimant RWE AG only. They have been widely reported on and their outcome may have a significant impact on the future of ICSID as a delocalized international arbitration system.

8 In the German Proceedings, Respondent seeks a declaration from the Cologne Court that these ICSID proceedings are inadmissible. In fact, in his letter to the Lower House of 17 May

¹ Claimants' Memorial, section B.X.4.

² [Exhibit C-0113: Letter from Minister Bastiaan van Wout to the Lower House 17 May 2021](#), p. 1.

³ This provision reads in full in the English translation provided by the German Federal Ministry of Justice, available at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html:

"Section 1032: Arbitration agreement and proceedings brought before the courts

(1) Should proceedings be brought before a court regarding a matter that is subject to an arbitration agreement, the court is to dismiss the complaint as inadmissible provided the defendant has raised the corresponding objection prior to the hearing on the merits of the case commencing, unless the court determines the arbitration agreement to be null and void, invalid, or impossible to implement.

(2) Until the arbitral tribunal has been formed, a petition may be filed with the courts to have it determine the admissibility or inadmissibility of arbitration proceedings.

(3) Where proceedings are pending in the sense as defined by subsection (1) or (2), arbitration proceedings may be initiated or continued notwithstanding that fact, and an arbitration award may be handed down."

2021, Minister Bastiaan van 't Wout explained the German Proceedings “*are primarily aimed at averting the arbitration*”⁴.

- 9 In substance, Respondent argues in the German Proceedings that no arbitration agreement existed between RWE AG and Respondent under the ECT due to the operation of EU law. Over the course of the German Proceedings, the parties before the Cologne Court have exchanged detailed submissions. Respondent developed its argument, in particular, based on the Court of Justice of the European Union’s (“**ECJ**”) decisions in *Achmea*, *Komstroy*, and *PL Holdings*. In its submissions to the Cologne Court, Respondent again reiterated that the rationale of a petition such as its own was “*to bring about a quick clarification of the question of the existence or non-existence of an arbitration agreement*”⁵ – “*at an early stage*”⁶ – so that the arbitration could be “*effectively averted.*”⁷
- 10 The parties to the German Proceedings submitted final comments to the Cologne Court on 21 January 2022 and 26 January 2022 respectively. Respondent in its latest submission even urged the Cologne Court to decide on the matter quickly, i.e. by the time this Tribunal would decide on the bifurcation on 25 February 2022.⁸
- 11 While Respondent has fully briefed an incompetent forum on the question of its intra-EU objection, and urges that forum to decide quickly, it has so far not made any such argument before this Tribunal. It only informed the Tribunal and Claimants of its intention to do so on 14 January 2022.⁹ This already stands in stark contrast to Respondent’s statement in its petition before the Cologne Court dated 10 May 2021, where Respondent affirmed it would raise jurisdictional objections in this arbitration at the earliest possibility.¹⁰ Meanwhile,

⁴ [Exhibit C-0113: Letter from Minister Bastiaan van Wout to the Lower House 17 May 2021](#), p. 2.

⁵ [Exhibit C-0115: 2nd Submission by the Netherlands to the Cologne Court of 27 September 2021](#), para. 93.

⁶ [Exhibit C-0115: 2nd Submission by the Netherlands to the Cologne Court of 27 September 2021](#), para. 85.

⁷ [Exhibit C-0115: 2nd Submission by the Netherlands to the Cologne Court of 27 September 2021](#), para. 85.

⁸ [Exhibit C-0116: 3rd Submission by the Netherlands to the Cologne Court of 21 January 2022](#), paras 37-38.

⁹ See Respondent’s letter to the Tribunal of 14 January 2022.

¹⁰ [Exhibit C-0117: Petition by the Netherlands to the Cologne Court of 10 May 2021](#), para. 134.

Respondent has neither filed an application under Arbitration Rule 41(5) to bring the question before the Tribunal, nor agreed to Claimants' proposal for an early resolution of this question.

- 12 Only shortly after Claimants became aware of the German Proceedings, Claimants already pointed out towards Respondent and ICSID that "*Respondent's action is in grave breach of Article 26 ICSID Convention.*" Claimants further noted that the "*only forum which can determine whether an ICSID tribunal has jurisdiction over a specific case is that ICSID Tribunal, Article 41 (1) ICSID Convention.*"¹¹
- 13 In wilful disregard of the Tribunal's authority and its *Kompetenz-Kompetenz*, Respondent has further pursued the German Proceedings ever since. Respondent seeks to deprive Claimants of access to ICSID by asking a domestic court to declare these arbitral proceedings inadmissible. This infringes upon Claimants' right to ICSID arbitration which is an intrinsic part of their rights under the ECT. With their ancillary claim, Claimants have thus requested that the Tribunal order Respondent to withdraw the German Proceedings and compensate Claimants for any damages caused.¹²

B. THE REQUIREMENTS FOR GRANTING THE APPLICATION FOR BIFURCATION AND EXPEDITION

- 14 As is generally accepted, this Tribunal enjoys wide discretion under Articles 41 and 44 of the ICSID Convention and Rule 41 of the ICSID Arbitration Rules in its decision whether or not to bifurcate the present arbitration. Equally, it should be undisputed that the guiding consideration for the Tribunal in the exercise of this discretion should be procedural efficiency and fairness.
- 15 More specifically, the jurisprudence of investment tribunals indicates that questions of jurisdiction and the merits should be bifurcated in light of the following factors:
- Whether the objection to jurisdiction is substantial in the sense that it is not made frivolously or as a dilatory tactic;

¹¹ Claimants' letter to ICSID of 27 May 2021.

¹² Claimants' Memorial, section F. and Prayers for Relief, lit. (C).

- 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;
- 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.¹³

16 Notably, 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.¹⁴

17 Further, the decision to bifurcate proceedings in different stages than jurisdiction and merits is to be taken in light of the specific circumstances of the case. While arbitral jurisprudence has not yet developed an equally clear list of criteria that speak in favour of bifurcation, the governing principle remains for the Tribunal to ensure procedural efficiency and fairness.¹⁵

18 As Claimants will show in the following, considerations of procedural efficiency and fairness mandate that the Tribunal bifurcate this arbitration and hear both Respondent's intra-EU objection and Claimants' ancillary claim in a joint, expedited phase.

¹³ Cf. [Exhibit CL-0139: Glamis Gold Ltd. v. USA, UNICTRAL / NAFTA, Procedural Order No. 2 \(Revised\), 31 May 2005](#), para. 12, and subsequently, e.g., [Exhibit CL-0140: Emmis et al. v. Hungary, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation, 13. July 2013](#), paras 47-56; [Exhibit CL-0141: 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; [Exhibit CL-0142: Philipp Morris v. Australia, UNCITRAL, PCA Case No. 2012-12, Procedural Order No. 8, 14 April 2014](#), para. 109; [Exhibit CL-0143: Lighthouse Corp. v. Timor-Leste, ICSID Case No. ARB15/2, Procedural Order No. 3 on Bifurcation and Related Requests, 8 July 2016](#), para. 23.

¹⁴ [Exhibit CL-0143: Lighthouse Corp. v. Timor-Leste, ICSID Case No. ARB15/2, Procedural Order No. 3 on Bifurcation and Related Requests, 8 July 2016](#), para. 20; [Exhibit CL-0140: Emmis et al. v. Hungary, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation, 13. July 2013](#), para. 56.

¹⁵ See, e.g., [Exhibit CL-0144: Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010](#), paras 272-273; [Exhibit CL-0145: Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Procedural Order No. 2, 28 June 2018](#), para. 61.

C. BIFURCATION OF RESPONDENT'S INTRA-EU OBJECTION IS WARRANTED

- 19 Claimants expect Respondent to continue its gamesmanship and not apply for bifurcation of its intra-EU objection. Respondent's current strategy seems to be to obtain a final and binding decision by German courts before this Tribunal, as the only competent forum, can pronounce on the issue.
- 20 If Respondent were to apply for bifurcation, Claimants certainly agree to it. Should Respondent decide not to apply for bifurcation, however, Claimants nevertheless insist that the proceedings be bifurcated. Respondent cannot have its cake and eat it, too. It should be held by its word that the intra-EU objection is ripe for decision and finally raise it in this arbitration in a bifurcated phase.
- 21 Both the general practice of ICSID tribunals and the specific background of this case mandate an expedited procedure for Respondent's intra-EU objection. Bifurcating jurisdiction and merits of a dispute is not only "*standard procedure*" in ICSID arbitration, as Professor Schreuer's commentary notes,¹⁶ the intra-EU objection completely conforms to all criteria that speak in favour of bifurcation.¹⁷ The objection is substantial, a decision in favour of Respondent would dispose of the entire claim, and it is ripe for decision. In fact, any other decision than to bifurcate would unjustifiably prejudice Claimants.
- 22 As the tribunal in *Philipp Morris v. Australia* specified, an objection is to be considered substantial if the tribunal "*cannot prima facie exclude that this Objection might be successful.*"¹⁸ In this case, the Tribunal certainly cannot *prima facie* exclude the success of the intra-EU objection, given Respondent's continuous failure to present it in this arbitration.

¹⁶ [Exhibit CL-0146: C. Schreuer et al., The ICSID Convention: A Commentary, 2nd ed. \(Cambridge University Press, 2009\), Article 41](#), 537-8, mn. 77.

¹⁷ This is also confirmed by ICSID practice. Several other tribunals have bifurcated intra-EU objections or treated them as a separate matter. See e.g. [Exhibit CL-0020: Eskosol v. Italy, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019](#); [Exhibit CL-0009: LBBW v Spain, ICSID ARB/15/45, Intra EU, 25 Feb 2019](#); [Exhibit CL-0005: Vattenfall v. Germany, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018](#).

¹⁸ [Exhibit CL-0142: Philipp Morris v. Australia, UNCITRAL, PCA Case No. 2012-12, Procedural Order No. 8, 14 April 2014](#), para. 111.

Respondent does not seek to use its objection as a dilatory tactic. It uses dilatory tactics to delay its objection, which could and should have been raised by now.

- 23 Respondent's intra-EU objection also conforms to the second criterion for bifurcation. As brought before the Cologne Court, the objection is characterized by the fact that it denies the applicability of Article 26(2)(c), (3) and (4) of the ECT between investors of one EU member state (such as Claimants) and another EU member state (such as Respondent) in total. If accepted, Respondent's intra-EU objection would remove the entire basis of this arbitration, thereby putting an end to it.
- 24 Thirdly, bifurcation would be practical, since the intra-EU objection is not intertwined with the merits of this dispute at all. It can be heard and decided irrespective of the merits of Claimants' main claim. As submitted to the Cologne Court, and as Respondent can hardly deny, it relates to a purely legal matter, namely whether Respondent's consent to arbitration under the ECT is invalid due to the operation of EU law, and in particular the ECJ's *Komstroy* decision. It is a text book case of an objection appropriate for bifurcation.¹⁹ In relation to a similar intra-EU objection, the *Vattenfall* tribunal held:

*"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."*²⁰

¹⁹ See [Exhibit CL-0147: Carolyn Lamm et al., International Centre for Settlement of Investment Dispute, in The Rules, Practice, and Jurisprudence of International Courts and Tribunals \(Chiara Giorgetti ed., Brill 2012\)](#) 77, 89 n.70: "Bifurcation may be appropriate when the determination of facts needed to decide the jurisdictional objections is independent from the issues that would arise in an examination of the merits of the case (i.e. the tribunal in its discretion assesses whether they are intertwined); or when the facts that must be considered at the preliminary stage are largely separate, and the parties and arbitrators can concentrate on relevant preliminary issues, and they need not expend time and resources engaging in an intensive investigation of what are typically more complex issues of a dispute's merits when examining those issues may ultimately prove unnecessary to the resolution of the case."

²⁰ [Exhibit CL-0005: Vattenfall v. Germany, ISCID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018](#), para. 3 (footnote omitted).

- 25 Finally, any other decision than to bifurcate this arbitration would unjustifiably prejudice Claimants. ICSID Arbitration Rule 41(1) requires Respondent to make its objection “as early as possible”. That Respondent has to file jurisdictional objections at the latest in line with “the time-limit fixed for the filing of the counter-memorial” cannot excuse Respondent’s delay tactics in light of the purely legal nature of this specific objection. The basis for Respondent’s intra-EU objection is clear, and equally clear is that Respondent considers it ripe for decision, just in another forum.
- 26 What is more, Respondent seeks to use this other forum, the Cologne Court, to put a stop to this arbitration before the Tribunal takes a decision. Not only did Minister van ’t Wout describe the German Proceedings as “*anti-arbitration proceedings*”²¹ that are “*primarily aimed at averting the arbitration.*”²² He also set out in his May 2021 letter that, only “[i]f it proves impossible to avert the proceedings, a defence on the merits will then be put forward.”²³ As illustrated above,²⁴ Respondent reemphasized its intention to avert the arbitration also in its submissions to the Cologne Court. The only logical and possible inference to be drawn from those statements, and from Respondent’s opposition to have this Tribunal decide the issue early, is that Respondent intends to use the German Proceedings as a means to somehow prevent Claimants from pursuing their claims at ICSID.
- 27 Not to bifurcate this arbitration would require Claimants to fight the entirely same battle at two fronts, with potentially changing facets to the argument raised by Respondent as the relevant proceedings progress. Claimants have a right to have the jurisdiction of this Tribunal determined authoritatively by this Tribunal, and only by this Tribunal. Expediting Respondent’s intra-EU objection is a first step towards ensuring this basic element of fairness of this arbitration.

²¹ [Exhibit C-0113: Letter from Minister Bastiaan van Wout to the Lower House 17 May 2021](#), p. 1.

²² [Exhibit C-0113: Letter from Minister Bastiaan van Wout to the Lower House 17 May 2021](#), p. 2.

²³ [Exhibit C-0113: Letter from Minister Bastiaan van Wout to the Lower House 17 May 2021](#), p. 2.

²⁴ See above, para. 9.

D. BIFURCATION OF THE ANCILLARY CLAIM IS WARRANTED

- 28 Bifurcating and expediting Claimants' ancillary claim is also mandated by considerations of procedural economy and fairness.
- 29 Claimants' ancillary claim is not so intertwined with the merits of the main claim of this dispute that it could not be resolved separately. The decision over the ancillary claim can be taken irrespective of the Tribunal's decision over the merits of the main claim. It is, to the contrary, both factually and legal intertwined with Respondent's intra-EU objection and thus should be decided together with it. Claimants' ancillary claim is a direct result of Respondent's attempt to have this Tribunal's jurisdiction determined by an incompetent forum, the Cologne Court.²⁵
- 30 Expediting Claimants' ancillary claim together with Respondent's intra-EU objection is also time- and cost-efficient. The ancillary claim concerns purely legal issues, which are neither complicated nor novel, but rather well-settled in arbitral jurisprudence and literature. Its resolution could easily be integrated into the already existing briefing schedule for the resolution of the intra-EU objection under Scenario B of Annex B to Procedural Order No. 1.
- 31 Finally, bifurcating and expediting the ancillary claim serves procedural fairness. Currently, Claimants have to defend themselves against Respondent's attempts to misuse German courts to declare that the Tribunal lacks jurisdiction and that the proceedings are inadmissible. Deciding the ancillary claim together with the intra-EU objection would ultimately also allow the Parties to focus on the real issues in dispute. Such later stage of the proceedings would then no longer be burdened by jurisdictional questions.

²⁵ In its submissions to the Cologne Court, Respondent argues: "The ICSID Convention only applies between the parties if there is a corresponding effective arbitration agreement pursuant to Art. 26 ECT and the dispute can be decided by arbitration at all. However, as the ECJ has ruled, this is not the case in intra-EU relations." [Exhibit C-0115: 2nd Submission by the Netherlands to the Cologne Court of 27 September 2021](#), para. 4.

E. RELIEF REQUESTED

32 In light of the foregoing, Claimants respectfully request that the Tribunal

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.

Hamburg, 28 January 2022

Luther Rechtsanwaltsgesellschaft mbH

