

ICSID

Case number: ARB/21/4

Date: 11 February 2022

**RESPONSE TO CLAIMANTS' REQUEST FOR BIFURCATION**

*in the matter of:*

1. **RWE AG,**
2. **RWE EEMSHAVEN HOLDING II B.V.,**

Claimant,

Counsel: Luther Rechtsanwaltsgesellschaft mbH

*against:*

**THE KINGDOM OF THE NETHERLANDS,**

Respondent,

Counsel: De Brauw Blackstone Westbroek N.V.

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## 1 INTRODUCTION

1. The Kingdom of the Netherlands submits this Response to RWE's Application for Bifurcation and Expedition dated 28 January 2022 (the "**Application**"). In the Application, RWE requests that the Tribunal bifurcate these arbitral proceedings and hear the Netherlands' intra-EU objection as well as one of RWE's merits claims in an expedited manner.
2. The Netherlands respectfully submits that the Application should be rejected because it is contrary to procedural efficiency and fairness. First, the Netherlands wishes to present its intra-EU objection by reference to a decision from the German courts on the issue of whether EU law permits or precludes intra-EU investor-State arbitration in this case. The German courts are seized of that issue, but may not yet have rendered their decision by the time briefing in a bifurcated scenario has completed.
3. If the intra-EU objection is bifurcated at a time that a German decision is not yet available, the objection – if it is not upheld – would have to be briefed, argued and considered again once that decision is available. This would cause a duplication of submissions, hearing time and the Tribunal's attention.
4. Second, bifurcation of the intra-EU objection would not promote procedural efficiency from RWE's perspective either. RWE's position is that the intra-EU objection should be rejected and this arbitration should proceed to the merits. If so, the conduct of a separate sequential phase and a separate hearing on the intra-EU objection is not procedurally efficient.
5. Rather than for reasons of procedural efficiency, the Application appears to have been made to prevent the Tribunal from taking a decision from the German courts into account when deciding on the intra-EU objection. This is not a valid or appropriate basis for bifurcation. The Tribunal should be able to take a decision on the intra-EU objection by reference to all relevant information.
6. Third, there is similarly no basis for RWE's new proposal that one of its merits claims be bifurcated. The claim is not dispositive of the arbitration. Whether it is rejected or upheld, the arbitration would proceed to a merits phase. In any event, the claim cannot be properly addressed in a schedule that was exclusively agreed and determined for the event that the intra-EU objection alone is bifurcated.

7. The Netherlands submits that RWE's claims should be dismissed both for lack of jurisdiction and for lack of merit, and the Netherlands intends to litigate both in parallel. It respectfully requests the Tribunal to reject the Application.

## 2 THE INTRA-EU OBJECTION SHOULD NOT BE BIFURCATED

8. RWE requests that the Netherlands' intra-EU objection be bifurcated and heard by the Tribunal in an expedited fashion. The Netherlands opposes that request.
9. It is common ground between the Parties that the Tribunal has wide discretion in its determination whether bifurcation of these proceedings is warranted or not.<sup>1</sup> In its Application, RWE submits that "*the guiding consideration for the Tribunal in the exercise of this discretion should be procedural efficiency and fairness*".<sup>2</sup> This is not disputed. What the Netherlands respectfully disputes, however, is that bifurcation would in the factual circumstances of this case promote procedural efficiency and ensure procedural fairness.
10. First, procedural fairness requires that all relevant evidence be made available to the Tribunal at the time it is asked to rule on a certain matter. This allows the Tribunal to reach a fully-informed and final decision on the issue.
11. In the course of the First Session, RWE agreed with this principle and assured the Tribunal that it had "*no plan whatsoever to deprive you of learning what the German court will say [...] we do not aim at precluding you from learning anything*".<sup>3</sup> Both Parties therefore recognized that the Tribunal should be put in the position to be informed of the outcome of the German Proceedings before deciding on the intra-EU objection.
12. Bifurcating these proceedings, however, 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. The German courts are seized of that EU law question, but may not yet have rendered a decision by the time briefing on the intra-EU objection in a bifurcated scenario has completed. Bifurcation would therefore require the Tribunal to take a decision on the intra-EU objection on the basis of an incomplete record.

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<sup>1</sup> Application, para. 14; ICSID Convention, Articles 41 and 44, ICSID Rules of Procedure, Rule 41.

<sup>2</sup> Application, para. 14.

<sup>3</sup> Recording of First Session of 30 August 2021, at 15:20.

13. Second, if the intra-EU objection is bifurcated at a time that the German court has not rendered its decision, the objection – if it is not upheld – would have to be revisited once the German courts have rendered their decision. This is procedurally (highly) inefficient.
14. It could mean that the Tribunal would have to consider, and the Parties would have to brief and argue, the intra-EU objection twice: first in the context of a bifurcated phase before a German decision is available, and if the objection is not upheld, a second time during the merits phase of the arbitration once that decision is available.
15. Third, according to RWE the intra-EU objection should be rejected.<sup>4</sup> On RWE's case, bifurcation is therefore procedurally inefficient as it leads to additional Party submissions, hearing time and Tribunal consideration that will be avoided in a non-bifurcated scenario.
16. RWE submits that bifurcation "*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*".<sup>5</sup> However, debating issues sequentially, rather than in parallel, is only procedurally efficient if the resolution of an issue that was 'frontloaded' may prevent the need to debate other issues later on. Based on RWE's submissions, this is not the case.
17. Fourth, absent considerations of procedural fairness and efficiency, it seems that the Application is driven by an attempt to preclude the Tribunal from taking the decision of the German courts into account. This is not a valid or appropriate basis to bifurcate.
18. RWE argues that "*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*".<sup>6</sup> This mischaracterizes the nature of the German proceedings.
19. 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. It is RWE's submission that the German Proceedings are not binding on the Tribunal as a matter of German law<sup>7</sup> or international

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<sup>4</sup> See e.g. Memorial, Section C.IV.

<sup>5</sup> Application, para. 6.

<sup>6</sup> Application, para. 19.

<sup>7</sup> Recording of First Session of 30 August 2021, at 15:40.

law.<sup>8</sup> 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.

20. Lastly, procedural fairness requires that a Party be allowed to present its case as it deems fit.<sup>9</sup> The Netherlands believes that its intra-EU objection is sound and should be sustained. However, the Netherlands also believes that the intra-EU objection is not the only reason why RWE's case should fail. RWE's claim fails on the merits as well. The Netherlands' aim in these proceedings is to have a final decision from the Tribunal in relation to *all* aspects of RWE's claim, without unreasonable delay. Accordingly, the Netherlands intends 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.
21. Absent overarching considerations of procedural efficiency or fairness, the Netherlands submits that it is entitled to present its defences in the manner that it deems appropriate. RWE has not referenced any precedent where bifurcation of a respondent's jurisdictional defence was ordered over a respondent's objection.

### **3 CLAIMANTS' MERIT CLAIM SHOULD NOT BE BIFURCATED**

22. RWE is also seeking bifurcation of one of its merits claims. This claim relates to alleged breaches of Articles 26 and 41 of the ICSID Convention on account of the German proceedings. There is no basis for this request.
23. First, Procedural Order No. 1 permits the Parties to request bifurcation of the intra-EU objection only, not of any other issue and certainly not of any merits claims. During the discussions on Procedural Order No. 1 RWE made no reference to potential merits claims that would have to be bifurcated,<sup>10</sup> nor has RWE sought reconsideration or amendment of Procedural Order No. 1. RWE's request to bifurcate a merit claim falls outside the scope of the request for bifurcation foreseen by Procedural Order No. 1 and is without basis.
24. Second, more generally bifurcation is intended for jurisdictional defences, not merits claims. Article 41(3) ICSID Arbitration Rules, on which RWE relies, provides that the Tribunal may "*suspend the proceeding on the merits*" pending consideration of an issue of jurisdiction, meaning that merits claims

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<sup>8</sup> Memorial, para. 406.

<sup>9</sup> **Exhibit RL-0001**, Nathan D. O'Malley. *Rules of Evidence in International Arbitration: an Annotated Guide* (Routledge 2013), para. 9.116.

<sup>10</sup> Memorial, para. 357.

are not susceptible to bifurcation under this provision. Professor Schreuer's commentary on the ICSID Convention supports the same reading.<sup>11</sup>

25. Third, the merits claim that RWE seeks to bifurcate are not dispositive of the arbitration, nor even a significant portion of the arbitration. Regardless whether the claim is rejected (as it should) or awarded, the remaining claims will still proceed to a merits phase. These remaining claims form the bulk of the Parties' debate. This is apparent from the Memorial, which devotes only a fraction to the claims that RWE proposes bifurcating. RWE also acknowledges this.<sup>12</sup> There is no procedural efficiency to be gained from debating a certain merits claim in a preliminary phase.
26. Fourth, the merits claim put forward for bifurcation is not substantial. The proceedings before the German court are exclusively about "*the operation of EU law*", as RWE acknowledges, and not about the Tribunal's jurisdiction under the ICSID Convention.<sup>13</sup> Moreover the Netherlands does not deny the Tribunal's competence to decide its own competence under the ICSID Convention.
27. Nor is there an issue of ICSID exclusivity under Article 26 of the ICSID Convention: 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. Provisions of EU law, including Article 344 TFEU put the Netherlands under an obligation to submit issues of interpretation and application of the EU Treaties to the EU courts.
28. Further, until submitting its memorial in December 2021, RWE had failed to disclose that it has commenced parallel proceedings before the Dutch courts in February 2021, one month after initiating this arbitration. There, RWE is seeking the same relief (monetary damages) from the same counterparty (the Kingdom of the Netherlands) in relation to the same regulatory measure (the Coal Act) in respect of the same purported investment (the Eemshaven Plant), as it is claiming before this Tribunal. To the extent Article 26 of the ICSID Convention is engaged at all, RWE has waived ICSID exclusivity and/or consented to non-exclusivity by commencing and maintaining

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<sup>11</sup> **Exhibit RL-0002**, Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair. *The ICSID Convention: A Commentary* (2nd edn. Cambridge: Cambridge University Press 2009), Article 41, para. 63, "*ICSID tribunals have routinely suspended proceedings on the merits upon receipt of an objection to jurisdiction.*"

<sup>12</sup> Application, para. 29.

<sup>13</sup> Application, paras. 9, 24.

proceedings before the Dutch courts on substantially the entire factual matrix that is also before the Tribunal.<sup>14</sup>

29. Finally, the briefing schedule for the intra-EU objection in Procedural Order No. 1 is not suitable to debate merits claims. It has not been agreed or ordered for the briefing of merits claims, and is far too restricted for the Netherlands to properly be heard on merits claims (and in fact would violate the Netherlands' right to be heard).
30. Moreover, RWE has already developed its claims in the Memorial, yet bifurcation would grant RWE still two rounds to brief those claims. This means that RWE is provided with more opportunities to make its case than the Netherlands, which violates the right to equal treatment.
31. As follows from all the foregoing, the Netherlands looks forward to addressing all aspects of RWE's claim, both the jurisdiction and the merits, in its Counter-Memorial.

#### **4 REQUEST FOR RELIEF**

32. In light of the foregoing, the Netherlands respectfully requests that the Tribunal:
  - (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.
33. The Netherlands reserves its right to supplement and/or amend its Response to request for bifurcation.

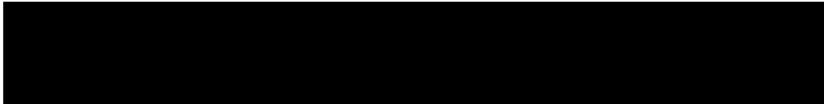
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<sup>14</sup> **Exhibit RL-0002**, Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair. *The ICSID Convention: A Commentary* (2nd edn. Cambridge: Cambridge University Press 2009), Article 26, para. 54.



Respectfully submitted on behalf of the Kingdom of the Netherlands,

Yours sincerely,  
De Brauw Blackstone Westbroek N.V.



**Albert Marsman**  
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