

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)*

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**CLAIMANTS' REQUEST FOR PROVISIONAL  
MEASURES**

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## A. Introduction

- 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' Request for the Recommendation of Provisional Measures (the "**Request**") in this ICSID arbitration between Claimants and the Kingdom of the Netherlands ("**the Netherlands**" or "**Respondent**") (jointly the "**Parties**").
- 2 Claimants ask the Tribunal to recommend provisional measures, directing Respondent to withdraw its self-proclaimed "*anti-arbitration proceedings*"<sup>1</sup> against Claimant RWE AG (the "**German Proceedings**") before the Higher Regional Court of Cologne (*Oberlandesgericht Köln* – the "**Cologne Court**"). Should the Tribunal consider a withdrawal to be disproportional, it should at least recommend that Respondent agree to a suspension of the German Proceedings until the Tribunal has rendered its award. In any event, Claimants request that the Tribunal also recommend that Respondent does not take any actions aimed at preventing or obstructing Claimants from participating in this arbitration, in particular not on the basis of a decision the Cologne Court may render before or after the Tribunal's decision on this Request.
- 3 In the following, Claimants explain the circumstances giving rise to the request, in particular how Respondent with the German Proceedings aims at stopping Claimants from further pursuing their rights in this arbitration (**B.**). This Tribunal has broad authority to order provisional measures (**C.**), and this Request meets all necessary requirements (**D.**). Specifically, provisional measures are urgently needed to protect the exclusivity of ICSID arbitration, the Tribunal's exclusive *Kompetenz-Kompetenz*, Claimants substantive rights and this arbitration's procedural integrity. Where an ICSID arbitration is threatened by domestic proceedings aimed directly at interfering with the tribunal's decision-making authority and *Kompetenz-Kompetenz*, a request for provisional measures is inherently urgent. In addition, there is the clear risk that the German court will decide before this summer and thus well before this Tribunal can render an award on the merits (**E.**).

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<sup>1</sup> [Exhibit C-0113: Letter from Minister Bastiaan vant Wout to the Lower House 17 May 2021](#), pp. 1-2.

**B. Circumstances giving rise to this Request**

- 4 The circumstances giving rise this Request are simple and straightforward.
- 5 Respondent pursues clear anti-arbitration proceedings. Respondent's petition before the Cologne Court is neither aimed at nor will it end with a restatement of EU law, as Respondent falsely claims. Instead, the German Proceedings will lead to a decision binding on the parties before the Cologne Court whether the present arbitral proceedings are admissible or not (I.)
- 6 Respondent's actions are perfectly in line with a playbook for EU member states to avoid intra-EU investment arbitration through the intervention of German courts, published by EU Commission officer Tim Maxian Rusche (who routinely represents the EU Commission as *amicus curiae* in intra-EU investment arbitrations). He specifically suggested in two academic articles that proceedings such as the ones initiated by Respondent before the Cologne Court should be admissible and could form the basis to request anti-arbitration injunctions against investors. He also argued that a decision of the German courts would be enforceable in other EU member states and potentially also third states and should be used to block the enforcement of ICSID awards (II.)
- 7 The Tribunal's intervention is necessary. Claimants have tried in vain to minimize the risk for the proceedings without burdening the Tribunal. Respondent, however, refused to agree to a suspension of the German Proceedings and failed to confirm that it would not request injunctions or similar measures (III).

**I. The German Proceedings are anti-arbitration proceedings**

- 8 The German Proceedings are clear anti-arbitration proceedings. None of Respondent's contentions to the contrary change that.
- 1. Proceedings under Section 1032 (2) of the German ZPO determine the admissibility or inadmissibility of arbitration proceedings**
- 9 The German Proceedings are based on Section 1032 (2) of the German Code of Civil Procedure (the "**German ZPO**"). It reads as follows:

*“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.”<sup>2</sup>*

- 10 This allows a party to an arbitration agreement to have German courts review and decide on the admissibility of a given arbitration. The provision does not have an equivalent in the 1985 UNCITRAL Model Law on International Commercial Arbitration, on which Germany's arbitration law – the 10<sup>th</sup> Book of the German ZPO (Sections 1025 – 1066) – is otherwise based.
- 11 Section 1032 (2) of the German ZPO is not only applicable if arbitrations have their legal seat in Germany. It is also considered applicable if they have their seat outside of Germany, or if the seat has not yet been determined.<sup>3</sup> In any case, it requires a legal seat and thus that the respective arbitration is subject to a *lex loci arbitri* – whether German or foreign. The rationale behind this provision is, as Respondent itself notes in its submissions to the Cologne Court, “to bring about a quick clarification of the question of the existence or non-existence of an arbitration agreement”<sup>4</sup>, at an early stage of arbitral proceedings.<sup>5</sup>
- 12 Pursuant to Section 1032 (3) of the German ZPO, arbitration proceedings may continue while the court proceedings are pending. A decision under Section 1032 (2) of the German ZPO is considered binding on the arbitral tribunal and the parties, and has prejudicial effect before German courts in subsequent proceedings. In particular, such effect is foreseen for review proceedings relating to an arbitral tribunal's decision on jurisdiction (under Section 1040 (3) German ZPO) and importantly in setting-aside proceedings relating to the tribunal's award (under Section 1059 German ZPO).<sup>6</sup>

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<sup>2</sup> [Exhibit C-0118: Sections 1025 and 1032 of the German ZPO \(Code of Civil Procedure\)](#).

Translation provided by the German Federal Ministry of Justice, available at:  
[https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html).

<sup>3</sup> That follows from section 1025 (2) ZPO: “The stipulations of sections 1032, 1033 and 1050 are to be applied also in those cases in which the venue of the arbitration proceedings is located abroad or has not yet been determined.” [Exhibit C-0118: Sections 1025 and 1032 of the German ZPO \(Code of Civil Procedure\)](#).

<sup>4</sup> [Exhibit C-0115: 2nd Submission by the Netherlands to the Cologne Court of 27 September 2021](#), para. 93.

<sup>5</sup> [Exhibit C-0115: 2nd Submission by the Netherlands to the Cologne Court of 27 September 2021](#), para. 85.

<sup>6</sup> [Exhibit C-0119: Peter Huber/Ivo Bach, § 1032, in Böckstiegel/Kröll/Nacimienta, Arbitration in Germany: The Model Law in Practice \(Wolters Kluwer, 2nd ed. 2014\)](#), paras 57 and 58.

13 The jurisdiction to exercise the review under Section 1032 (2) of the German ZPO falls to the German Higher Regional Courts (*Oberlandesgerichte*)<sup>7</sup>. Their task in Section 1032 (2) cases, and consequently also the Cologne Court's task in the German Proceedings, is to review the validity of the arbitration agreement that forms the basis for the arbitration, the admissibility of which is challenged.

14 Respondent itself already noted as much in its May 2021 letter to the ICSID Secretariat on the German Proceedings. There, Respondent stated it was seeking to

*"obtain a decision from the courts in RWE's home jurisdiction on the validity of an arbitration agreement which RWE alleges exists between it and the Netherlands by virtue of Article 26 of the Energy Charter Treaty, and that is said to be the basis for these proceedings before ICSID"*<sup>8</sup>.

15 Respondent's petition before the Cologne Court therefore undeniably aims at a determination of this Tribunal's jurisdiction by the domestic courts of an ICSID Contracting State.

## 2. The German Proceedings presuppose that arbitral tribunals do not have a true *Kompetenz-Kompetenz*

16 The very nature of the German Proceedings presupposes that German courts have the last word regarding arbitral determinations on jurisdiction. German arbitration law does not recognize the concept of a "true" – i.e. exclusive – *Kompetenz-Kompetenz* which the ICSID Convention confers upon this Tribunal. German procedural law, as reflected in the German ZPO and its section 1032 (2), operates on the basis that an arbitral tribunal's *Kompetenz-Kompetenz* is always limited by state-court intervention. As pointed out by the German Federal Court of Justice, the *Bundesgerichtshof*, state courts have the last word in arbitration matters:

*"In arbitral proceedings, the arbitral tribunal indeed first decides on its jurisdiction itself, either by an interim decision affirming its jurisdiction (section 1040 subsection 3 sentence 1 ZPO) and - exceptionally - in an award concluding the proceedings or - negatively - by a procedural award dismissing the arbitral claim as inadmissible [...]. However, the last word - with regard to the interim decision in the proceedings under section 1040 subsection 3 sentence 2 of the ZPO, and with regard to the arbitral award and the procedural arbitral award in the*

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<sup>7</sup> Due to Claimant RWE AG's corporate seat in Essen, Respondent filed its petition with the Cologne Court, which exercises local jurisdiction in arbitration matters for the German *Land* of North Rhine-Westphalia, where Essen is located.

<sup>8</sup> Letter from Respondent to the ICSID Secretariat, 21 May 2021, p. 1.

*annulment proceedings under section 1059 of the ZPO - has the state court [...].”<sup>9</sup>*

17 One of the leading treatises confirms:

*“Under German arbitration law, whenever courts are asked to decide on the jurisdiction of an arbitral tribunal, they will engage in a full review of the arbitration clause, its validity and its interpretation, and are not bound by a decision of the arbitral tribunal assuming jurisdiction. The full review principle applies at all stages of the process, i. e., independently of whether the state court is asked to dismiss an action in favour of the arbitral tribunal, whether it is asked to make a declaration that the tribunal has jurisdiction, whether it reviews a decision of the arbitral tribunal assuming jurisdiction or whether it is asked to set aside or enforce an award. Accordingly, state courts always retain the power to decide that a tribunal lacks jurisdiction, and a decision of the arbitral tribunal assuming jurisdiction, be it by an interim decision or in the award itself, is not binding on the state courts. This applies even where the parties agree to submit the question of jurisdiction to the decision of the tribunal: the parties cannot derogate the right to re-open the jurisdictional question before the state courts.”<sup>10</sup>*

18 Therefore, when Respondent contends that it does not deny the Tribunal's *Kompetenz-Kompetenz*, this is clearly wrong. The very nature of the German Proceedings presupposes that an arbitral tribunal's *Kompetenz-Kompetenz* is limited by and subject to state court intervention and supervision.

19 Before the Cologne Court, the parties to the German Proceedings have exchanged extensive submissions.<sup>11</sup> In its submissions, Claimant RWE AG has

- briefed the Cologne Court in relation to Respondent's and Germany's obligations under the ICSID Convention,
- made clear that Section 1032 (2) of the German ZPO cannot apply to ICSID proceedings since they are not subject to any *lex arbitri* and in particular not the 10<sup>th</sup> Book of the German ZPO (not only from an ICSID Convention perspective but equally from a German law perspective),

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<sup>9</sup> [Exhibit C-0120: German Federal Court of Justice \(Bundesgerichtshof\), Judgment of 13 January 2005, case no. III ZR 265/03.](#)

<sup>10</sup> [Exhibit C-0121: Stephan Balthasar, J. International Arbitration in Germany, in Balthasar, International Commercial Arbitration \(C.H. Beck, 2nd ed. 2021\), para. 34.](#)

<sup>11</sup> See already Claimants' Application for Bifurcation and Expedition, para. 9.

- and explained that an exercise of jurisdiction over Respondent's petition would engage also Germany's international responsibility.

20 Claimant RWE AG also submitted an expert opinion by Professor Christoph Schreuer to illustrate the situation under the ICSID Convention for the Cologne Court. Claimants append that opinion to this Request together with a translation approved by Professor Schreuer.<sup>12</sup>

21 Respondent, in contrast, argues that Section 1032 ZPO also applied to ICSID proceedings and that in any case the German courts must enforce the ECJ's decisions.

22 Since the Tribunal's Decision on Bifurcation with Procedural Order No. 2, further submissions were filed. In particular, the Cologne Court invited further and final comments by 18 March 2022 (which both parties there made use of) and indicated an intention to deliberate in April 2022.<sup>13</sup> The deliberation date has meanwhile been postponed to June 2022.<sup>14</sup> While Claimants have requested an oral hearing, the Court is not bound by such request and can decide without a hearing. Consequently, it is possible that a decision will be rendered soon after the June deliberations.

### 3. Respondent misrepresents the German Proceedings' nature and scope

23 Respondent has made certain representations regarding the German Proceedings, on which also the Tribunal relied when deciding on bifurcation. In particular, as recalled by the Tribunal in Procedural Order No.2, Respondent stated:

*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."*

*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."*

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<sup>12</sup> [Exhibit CL-0148: Expert Opinion by Professor Schreuer in the German Proceedings dated 7 July 2021.](#)

<sup>13</sup> [Exhibit C-0122: Letter from the Cologne Court to the parties of the German Proceedings dated 24 February 2022.](#)

<sup>14</sup> [Exhibit C-0123: Letter from the Cologne Court to the parties of the German Proceedings dated 11 April 2022.](#)

c. "the Netherlands does not deny the Tribunal's competence to decide its own competence under the ICSID Convention."<sup>15</sup>

24 As Claimants already noted shortly after Procedural Order No. 2 was rendered, these are clear misrepresentations.<sup>16</sup>

25 First, Respondent wrongly suggests the German Proceedings "are concerned with a question of EU law only". The subject-matter of the proceedings is the alleged inadmissibility of the proceedings, based on the argument that German courts should give effect to the ECJ's *Komstroy* decision. However, the relief it seeks is general. Respondent's request for relief is clear in that respect. Without any mention of or limitation to EU law, it asks the Cologne Court to determine

*"that the arbitration proceedings instituted by the respondent [to the petition] against the petitioner before the International Centre for Settlement of Investment Disputes, reference ICSID Case No. ARB/21/4, are inadmissible."*<sup>17</sup>

26 Further, Respondent precisely seeks a ruling on this Tribunal's jurisdiction under the ICSID Convention, which interferes with the Tribunal's exclusive authority:

*"The petitioner seeks a determination by the court that there is no consent to resolve the dispute by ICSID arbitration because of the absence of a legally binding offer to arbitrate under Article 26(2)(c) and (3) ECT on the part of the petitioner."*<sup>18</sup>

27 As explained, such a decision under German law would be considered binding on the parties and the Tribunal and would have precedential effect for later domestic enforcement proceedings.

28 Secondly, as is clear from the above, the German Proceedings will not merely "result in a declaratory judgment, which affirms what applies under EU law in any event". This statement is an unproven contention without any factual or legal basis. There exists no judgment of the ECJ requiring national courts to declare ICSID proceedings inadmissible.

29 In any event, the purpose of a petition under section 1032 (2) of the German ZPO is not to provide guidance on EU law, but – to the contrary – to determine that a tribunal

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<sup>15</sup> Procedural Order No. 2, para. 48 (footnotes and emphasis omitted.)

<sup>16</sup> Claimants' letter to the Tribunal of 2 March 2022.

<sup>17</sup> [Exhibit C-0117: Petition by the Netherlands to the Cologne Court of 10 May 2021](#), para. 1 lit. 1.

<sup>18</sup> [Exhibit C-0115: 2nd Submission by the Netherlands to the Cologne Court of 27 September 2021](#), para. 88 (emphasis added).

lacks jurisdiction to hear a certain matter. And Respondent, importantly, has neither limited its petition before the Cologne Court to the question it allegedly seeks to have clarified, nor could Respondent do so under German law.<sup>19</sup>

30 If the Cologne Court was to render a decision on substance, however, it will decide on this arbitration's admissibility as such. If it declares the proceedings inadmissible, this decision under German law has a binding effect on Claimant RWE AG. It would bind other German courts in case of enforcement proceedings, and very likely could be recognized and enforced in other EU member states and potentially even in third states.

31 Thirdly, contrary to what it alleges, Respondent already by filing the petition before the Cologne Court denied the Tribunal's *Kompetenz-Kompetenz*. As explained above, the very nature of the German Proceedings is based on a denial of an arbitral tribunals exclusive *Kompetenz-Kompetenz* as provided for by the ICSID Convention. Respondent has asked a German court to find that the pending ICSID proceedings are inadmissible. This of course denies the exclusive right of the Tribunal to decide its own competence.

**II. The ultimate aim of the German Proceedings is to end this arbitration by stopping Claimants from pursuing it**

32 The danger to this arbitration is not merely theoretical. The German Proceedings are part of a bigger strategy aimed at stopping this arbitration by stopping Claimants.

33 There are two ways how an arbitration can be ended by means of a court intervention: by compelling the arbitral tribunal to put an end to the proceedings, or by preventing the other party to further pursue its claims. The first option is not possible in an ICSID case. A German court judgment or decision cannot bind this Tribunal acting under international law, whatever German law says. However, the second option is possible: Respondent could – and very likely will – try to prevent Claimant RWE AG from further pursuing its case in this arbitration.

34 Respondent's statements and representations are only concerned with the first option, but not the second. Thus, they are not only false (see above, B.I.3.), but also irrelevant to dispel a risk for Claimants' ability to pursue their claims in this arbitration.

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<sup>19</sup> Claimants note that RWE AG had specifically invited Respondent to do so when informing the Cologne Court of this Tribunal's decision on bifurcation on 7 March 2022. Yet, in its last submission to the Cologne Court of 18 March 2022, Respondent merely stated that it stands by its previous submissions. [Exhibit C-0124: The Netherlands' submission to the Cologne Court dated 18 March 2022.](#)

35 It is evident that Respondent wants to end this arbitration before and without an award from this Tribunal. In his May 2021 letter to the Lower House, Dutch Minister van 't Wout noted that, only “[i]f it proves impossible to avert the [ICSID] proceedings, a defence on the merits will then be put forward.”<sup>20</sup> Contrary to the Tribunal's understanding in Procedural Order No. 2, Claimants respectfully submit that this has also been Respondent's position in this arbitration. In its 21 May 2021 communication to ICSID, Respondent merely confirmed it “take part in the present proceedings before ICSID while the proceedings in Germany are pending”<sup>21</sup>.

36 It is not possible to interpret this in any other way than to reflect Respondent's hope to end this arbitration via the German Proceedings. The only other option to achieve an early termination of the arbitration without a defence on the merits would have been a bifurcation – which Respondent has vehemently opposed.

#### 1. A German court decision would be used for an anti-arbitration injunction

37 The specific risk for Claimants stems from the possibility that a German court decision finding these arbitration proceedings inadmissible could form the basis of anti-arbitration injunction. While this is a legal position advanced in German legal literature with regard to commercial arbitration proceedings, it has only recently been proposed as a means to stop ICSID arbitration proceedings.

38 The precise playbook for Respondent's further actions has already been provided by Tim Maxian Rusche, one of the Commission's main representatives in its *amicus* submissions before investment tribunals as well as agent for the Commission before the ECJ.<sup>22</sup> In an article published in German private international law journal *IPrax*, Mr. Maxian Rusche not only set out that Section 1032 (2) of the German ZPO was the ideal tool for EU member states to resist intra-EU arbitrations. He also argues that a decision in favor of Respondent could form the basis for an anti-arbitration injunction in Germany (also in relation to an ICSID case):

*“The refusal of the arbitration scene to comply with the ECJ's ruling in Achmea forces EU member states against which an investor from another EU member*

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<sup>20</sup> [Exhibit C-0113: Letter from Minister Bastiaan van Wout to the Lower House 17 May 2021](#), pp. 2. In the same letter, Minister van 't Wout equally openly acknowledged that Respondent was forum shopping in the hope of seeking a favourable ruling. He observed that “*German courts have previously ruled that arbitration clauses in intra-EU investment protection agreements should be disapplied*” (p. 1-2).

<sup>21</sup> Letter from Respondent to the ICSID Secretariat, 21 May 2021, p. 2 (emphasis added).

<sup>22</sup> See only the list of representatives in [Exhibit CL-0012: ECJ, Judgment of 2 September 2021, Komstroy, ECLIEUC2021655](#).

*state wants to initiate investor-state arbitration proceedings against an investor from another EU member state to defend themselves in national courts against such abusive arbitration proceedings. German arbitration law offers a particularly effective way of doing so in the form of the declaratory action according to § 1032 (2) ZPO (German Code of Civil Procedure). In the event of non-compliance with the declaratory action by the investor, there is also the possibility of enforcing such a declaration by means of an action for an injunction."<sup>23</sup>*

39 The basis for such an injunction, according to Mr. Maxian Rusche, would be that "*the investor commits a tort by violating a final determination of a court*"<sup>24</sup>.

40 This background puts a new complexion on Respondent's persistent tactical maneuvers since commencing the German Proceedings. While Respondent affirmed in its submissions to the Cologne Court that it would raise jurisdictional objections in this arbitration at the earliest possibility<sup>25</sup>, it continuously failed to do so.<sup>26</sup> The reason for this is understandable: Respondent's objective is to seek a decision against Claimant RWE AG by the Cologne Court before this Tribunal can rule on jurisdiction. Respondent even confirmed as much in its Response to Claimants' Request for Bifurcation.<sup>27</sup>

## **2. Respondent might even request an injunction before the Cologne Court issues a decision**

41 Notably, Mr. Maxian Rusche has subsequently published this view also in the *European Investment Law and Arbitration Review (EILA Review)*. There, he even argues that an injunction may be applied for where there is no prior decision by a domestic court in proceedings such as the German Proceedings.<sup>28</sup>

42 There thus exists a clear and present risk that Claimants might be forced to suspend or agree to terminate the ICSID proceedings by way of a German (or other) court

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<sup>23</sup> [Exhibit C-0125: Maxian Rusche, IPRax 2021, 494](#), p. 502 (emphasis added).

<sup>24</sup> [Exhibit C-0125: Maxian Rusche, IPRax 2021, 494](#), pp. 501-502.

<sup>25</sup> [Exhibit C-0117: Petition by the Netherlands to the Cologne Court of 10 May 2021](#), para. 134.

<sup>26</sup> To recall for the benefit of the Tribunal, Respondent has neither filed an application under Arbitration Rule 41(5) to bring the intra-EU objection before the Tribunal, nor agreed to Claimants' proposal for an early resolution of this question. Ultimately, Respondent has not even used the chance offered by the Tribunal to apply for a bifurcation of its intra-EU objection.

<sup>27</sup> Respondent's Response to Claimants' Request for Bifurcation, para. 2.

<sup>28</sup> [Exhibit CL-0149: Maxian Rusche, 6 EILA Review 310 \(2021\)](#), pp. 314-315.

decision. It also cannot be excluded that a German court decision would be used as a basis for anti-arbitration proceedings in other EU member states.

### 3. Summary

43 A decision by the Cologne Court (or, after appeal, by the Federal Court of Justice) that these ICSID proceedings are inadmissible would be binding under German law on the parties to the German Proceedings. It would very likely lead to an anti-arbitration injunction against Claimants, intended to force them to withdraw this case. It has been argued that an injunction could even be applied for before a decision has been rendered. In any case, such decision might be used to start anti-arbitration proceedings in other EU member states and potentially even be used in third states to block an enforcement of a possible award.

### III. The Tribunal's intervention has become necessary

44 The Tribunal's intervention has become necessary. Claimants have tried in vain to solve the conflict directly with Respondent and the Cologne Court.

#### 1. Respondent refused to agree to a suspension of the German Proceedings

45 With their ancillary claim in their Memorial of 18 December 2021, Claimants had already brought Respondent's commencement of the German Proceedings and the resulting violations of international law before this Tribunal. On 22 December 2021, after filing their Memorial, Claimants wrote to Respondent's German counsel, inviting Respondent to agree to suspend the German Proceedings until this Tribunal takes a decision on Claimants' ancillary claim.<sup>29</sup> Claimants reminded Respondent of its obligations under international law to leave the decision on its jurisdiction to this Tribunal as the only competent forum.

46 Respondent rejected Claimants' invitation in a letter dated 5 January 2022. Specifically, that letter contends that "*the Netherlands has not violated any obligations under international law.*" The letter further argues that, "[w]ith the proceedings pending before the Cologne Higher Regional Court, the Kingdom of the Netherlands is rather fulfilling its duty of loyal cooperation as a Member State of the European Union"<sup>30</sup>.

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<sup>29</sup> [Exhibit C-0126: Claimants' letter to Respondent's counsel in the German Proceedings dated 22 December 2021](#).

<sup>30</sup> [Exhibit C-0127: Letter by Respondent's counsel in the German Proceedings to Claimants' counsel dated 5 January 2022](#), p. 1.

47 Referring to the ECJ judgments in *Achmea*, *Komstroy* and *PL Holdings*, Respondent purports to be obliged to challenge the validity of the present arbitration agreement on the basis of those decisions before the Cologne Court.<sup>31</sup> Respondent further stated that “*the Kingdom of the Netherlands cannot agree to any act which removes a dispute concerning the application and interpretation of Union law from the jurisdiction of the national courts of the EU Member States.*”<sup>32</sup>

48 This evidently is a hollow and untenable excuse. The claim pending before this Tribunal does not involve Union law. Claimants have based their claim on the ECT as international law. This dispute is not about EU law, but about the application and interpretation of the ECT as public international law by the forum authorized to do so: this Tribunal.

## 2. The Cologne Court did not suspend its own proceedings in deference to the Tribunal

49 In light of Respondent's unwillingness to cooperate, Claimant RWE AG turned to the Cologne Court on 20 January 2022 and asked the Court to suspend the German Proceedings (until this Tribunal decided about its jurisdiction) in an exercise of deference towards this Tribunal's authority and its exclusive *Kompetenz-Kompetenz*.<sup>33</sup> On 31 January 2022, Respondent answered to RWE AG's suspension request in a submission to the Cologne Court, once more rejecting the possibility of a suspension. Respondent wrote in particular:

*“The Senate's decision does not depend on the decision of the ICSID Arbitral Tribunal or even on the application of the ICSID Convention. The Senate can decide the relevant question in this proceeding, whether the arbitral proceedings are admissible on the basis of an effective arbitration agreement, exclusively on*

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<sup>31</sup> Claimants note that Respondent's approach to the matter is contradictory even under EU law. In *PL Holdings* ([Exhibit CL-0150: ECJ, C-109/20, Judgment of 26 October 2021 \(Republiken Polen v. PL Holdings Sàrl\)](#)), para. 52), the ECJ stressed that EU member states were obliged to challenge the validity of an arbitration agreement on the basis of an intra-EU BIT before the *competent* courts or the arbitral tribunal. Yet, in light of the ICSID Convention, the Cologne Court is not competent to hear Respondent's petition, and Respondent at the same time delays raising it before this Tribunal.

<sup>32</sup> [Exhibit C-0127: Letter by Respondent's counsel in the German Proceedings to Claimants' counsel dated 5 January 2022](#), p. 2.

<sup>33</sup> [Exhibit C-0128: RWE AG's suspension application in the German Proceedings dated 20 January 2022](#).

*the basis of Union law and German law. The applicability of the ICSID Convention depends on the effectiveness of the offer to arbitrate in Art. 26.”<sup>34</sup>*

- 50 Despite its statements to the contrary before this Tribunal, Respondent thus once more denied the Tribunal's *Kompetenz-Kompetenz* before the Cologne Court. Essentially, Respondent says that consent to arbitration under the ICSID Convention can only exist if confirmed by the Cologne Court. If Respondent were correct, which it is not, then German courts could stop ICSID arbitrations as long as they consider the state's consent to be invalid or inapplicable. They would act as a review forum for the jurisdiction of ICSID arbitrations not foreseen in the ICSID Convention. That would be literally the end of the ICSID system as such. Already now, Germany has filed a similar claim in the ICSID case of *Mainstream Investments v. Germany* (ICSID Case ARB/21/26) with the domestic courts in Berlin.
- 51 What is more, Respondent's counsel in the German Proceedings had the audacity to tell the Cologne Court that, “[i]f anything, the ICSID Arbitral Tribunal would be required to suspend its proceedings, as its jurisdiction depends on the existence of an effective arbitration agreement.”<sup>35</sup> Such statement would be correct with respect to domestic arbitration proceedings, i.e. subject to German *lex arbitri*. However, it is flatly incorrect with respect to ICSID proceedings and turns allocation of decision-making authority under the ICSID Convention on its head. The Netherlands' statements towards the Cologne Court show that it does not respect this Tribunal's *Kompetenz-Kompetenz*.
- 52 The problem posed by the German Proceedings could have been easily solved if Respondent had agreed to the requested suspension and had equally not opposed a bifurcation of this arbitration. The bifurcation would have made it at least likely that the Tribunal had been in a position to render its decision on jurisdiction before a decision by the Cologne Court. Such a decision by the Tribunal would have equally rendered the proceedings under Section 1032 (2) of the German ZPO inadmissible as a matter of German law.<sup>36</sup> And had the Tribunal dismissed the case for lack of jurisdiction in a bifurcated phase, the German Proceedings would also have become superfluous. However, Respondent refused to agree to neither the suspension nor the bifurcation.

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<sup>34</sup> [Exhibit C-0129: Respondent's opposition to RWE AG's suspension application in the German Proceedings dated 31 January 2022](#), para. 8.

<sup>35</sup> [Exhibit C-0129: Respondent's opposition to RWE AG's suspension application in the German Proceedings dated 31 January 2022](#), para. 12.

<sup>36</sup> [Exhibit C-0119: Peter Huber/Ivo Bach, § 1032, in Böckstiegel/Kröll/Nacimiento, Arbitration in Germany: The Model Law in Practice \(Wolters Kluwer, 2nd ed. 2014\)](#), paras 62/63.

53 The Cologne Court, in turn, has so far failed to rule on RWE AG's suspension request, despite the fact that more than three months have passed. The matter remains pending, with the Cologne Court indicating its intention to deliberate (and potentially then rule on the petition) in June 2022.

**3. Respondent refused to confirm it would not seek injunctive or similar relief to stop Claimants from pursuing their rights in this arbitration**

54 In the light of what Claimants learned, Claimants wrote to Respondent a few days before the Tribunal decided on bifurcation with Procedural Order No. 2. Claimants made explicit reference to the strategy outlined by Mr. Rusche and requested Respondent to give an assurance that it would not follow this strategy. Specifically, Claimants wrote:

*"With a view to Respondent's duty to participate in the arbitration in good faith, we therefore request that the Netherlands confirm in writing that*

***it will not seek any injunctive or similar relief on the basis of a potential decision in the German Proceedings and refrain from taking any other action on that basis to restrict any of the Claimants in their ability to pursue the ICSID arbitration.*"<sup>37</sup>**

55 Respondent first failed to respond to Claimants. Only upon a reminder by Claimants, the Netherlands replied on 22 March 2022 – a month after Claimants' request. In its letter of that date, however, Respondent failed to give the requested assurance, despite the fact that it essentially would have been a mere restatement of the Netherlands' obligations under the ICSID Convention. Instead, Respondent reiterated it sought to "fulfil its obligations under EU law"<sup>38</sup> with the German Proceedings. Further, Respondent confirmed

*"that, subject to any jurisdictional objections and the above-mentioned obligations, the Netherlands has no intention to preclude the RWE Claimants from continuing to participate in the arbitration between the RWE Claimants and the Netherlands (ICSID Case No. ARB/21/4)."<sup>39</sup>*

56 Notably, Respondent made its statement that it does not intend to preclude Claimants from participating in this arbitration "subject to" its obligations – or rather what it

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<sup>37</sup> [Exhibit C-0130: Claimants' letter concerning the German Proceedings dated 23 February 2022](#), p. 2 (emphasis in the original).

<sup>38</sup> [Exhibit C-0131: Respondent's answer to Claimants' letter of 23 February 2022 concerning the German Proceedings dated 22 March 2022](#).

<sup>39</sup> [Exhibit C-0131: Respondent's answer to Claimants' letter of 23 February 2022 concerning the German Proceedings dated 22 March 2022](#) (emphasis added).

perceives as its obligations – under EU law and its jurisdictional objections. Respondent thereby made clear that it will seek to make use of institutions other than this Tribunal to enforce its arguments that this Tribunal lacks jurisdiction. In particular, Respondent currently pursues its jurisdictional objections solely in the German Proceedings, and may continue to do so by way of an injunction.

- 57 Respondent's conduct is intolerable under the ICSID Convention. Already its initiation of the German Proceedings as such attacks the delocalization of ICSID proceedings. The self-contained nature of ICSID arbitration and the exclusion of intervention by domestic courts is the key feature of the Convention. The playbook Respondent's conduct follows, however, is intended to apply the axe to this core principle.

**C. This Tribunal has broad authority to recommend provisional measures**

- 58 Under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1), this Tribunal has broad authority to issue provisional measures.

- 59 Article 47 provides as follows:

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

- 60 ICSID Arbitration Rule 39(1) provides as follows:

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

- 61 ICSID tribunals have consistently exercised this power to enjoin participation in parallel domestic proceedings in order to protect the exclusivity of ICSID arbitration.<sup>40</sup>

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<sup>40</sup> See, e.g., [Exhibit CL-0151: Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005](#), para. 7 (“Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative”); [Exhibit CL-0152: Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010](#), para. 127 (citing *Tokios* for the same proposition). See also [Exhibit CL-0153: Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite](#)

Similarly, ICSID tribunals have consistently deployed provisional measures to safeguard their exclusive *Kompetenz-Kompetenz*.<sup>41</sup>

#### D. Circumstances justifying provisional measures

##### I. The requested provisional measures and rights sought to be preserved

62 The Request seeks to preserve Claimants' right to the exclusivity of ICSID arbitration as guaranteed in Article 26 of the ICSID Convention (1.), the Tribunal's exclusive *Kompetenz-Kompetenz* as guaranteed in Article 41 of the ICSID Convention (2.), the integrity of this arbitration, including Claimants' right to participate fully in this arbitration (3.), as well as their right of access to arbitration in general under the ECT (4.).

63 Respondent's initiation of the German Proceedings jeopardizes these rights and urgently warrants the requested recommendations.

64 Specifically, Claimants ask the Tribunal to recommend that Respondent withdraws the German Proceedings. Respondent would not suffer harm as it could still bring its – erroneous – arguments in the context of enforcement proceedings as also suggested by Mr. Rusche.<sup>42</sup> Should the Tribunal disagree, the Tribunal should at least recommend that Respondent agree to a suspension of the German Proceedings until an award on the merits is rendered. This measure is necessary to

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[Kingdom of Jordan, ICSID Case No. ARB/13/38, Order on Application for the Grant of Provisional Measures, 24 November 2014](#), para. 68 (“It is well accepted that ICSID tribunals may exercise their power to grant provisional measures in order to enforce the exclusive remedy of ICSID proceedings”); [Exhibit CL-0154: Maritime International Nominees Establishment \(“MINE”\) v. Republic of Guinea, ICSID Case No. ARB/84/4, Award, 6 January 1988](#), para. 41 (“The Tribunal recommended that MINE immediately withdraw and permanently discontinue all pending litigation in national courts and that it commence no new action. Litigation based upon the AAA award was deemed to arise out of the ICSID arbitration for purposes of the Provisional Measure”); [Exhibit CL-0155: Millicom International Operations B.V. and Sentel GSM S.A. v. The Republic of Senegal, ICSID Case No. ARB/08/20, Decision on the Application for Provisional Measures, 9 December 2009](#), paras 40-51 (recommending provisional measures to restrain the continued pursuit of domestic proceedings in which the respondent sought to confirm termination of the claimants' license—a central issue in the arbitration).

<sup>41</sup> [Exhibit CL-0134: Perenco Ecuador Ltd. v. Ecuador, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009](#), para. 64. See also [Exhibit CL-0156: SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ARB/01/13, Procedural Order No. 2, 16 October 2002](#), para. 30.

<sup>42</sup> [Exhibit CL-0149: Maxian Rusche, 6 EILA Review 310 \(2021\)](#), pp. 328-330.

ensure Claimants continued participation in this case without restrictions, to safeguard the Tribunal's decision-making authority and to maintain ICSID's exclusivity rule.

- 65 For the same reasons, and in order to cater for the necessary flexibility in light of the German Proceedings' constant development, Claimants request the Tribunal also recommends that Respondent does not take any actions aimed at preventing or obstructing Claimants from participating in this arbitration. In particular, Respondent must not take any such actions on the basis of a decision which the Cologne Court may render before or after the Tribunal's decision on this Request.

## 1. The German Proceedings threaten the exclusivity of ICSID arbitration

- 66 The German proceedings threaten the exclusivity of this ICSID arbitration. As Claimants have already set out in their Memorial<sup>43</sup>, it is generally accepted that ICSID proceedings are self-contained. This exclusivity of ICSID proceedings is reflected in and given content to by several provisions of the ICSID Convention, in particular Articles 26 and 41. It is the key feature differentiating ICSID arbitration from other forms of investment arbitration.

### a) The exclusivity of ICSID arbitration excludes recourse to any other remedy, including state courts

- 67 The exclusivity of ICSID arbitration is equally embodied in an investor's right to effective dispute resolution in any investment treaty providing for ICSID as a forum. Giving effect to the protective nature of the investors' right to a neutral dispute resolution forum, and observing the importance it carries,<sup>44</sup> ICSID tribunals have also consistently enforced the exclusivity of ICSID arbitration by recommending provisional measures. For instance, the *Tokios Tokelés* tribunal observed that:

*"Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative."*<sup>45</sup>

- 68 Courts that are confronted with a petition or lawsuit relating to a matter that is at the same time pending before an ICSID tribunal have a corresponding, "negative"

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<sup>43</sup> Claimants' Memorial, paras 669 et seq.

<sup>44</sup> See also further below, **Section D.I.4.**

<sup>45</sup> [Exhibit CL-0151: Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005](#), para. 7.

obligation to “abstain from taking any action that might interfere with the autonomous and exclusive character of ICSID arbitration”<sup>46</sup>. This is a far-reaching obligation, encompassing also situations in which the ICSID tribunals jurisdiction may be contested.<sup>47</sup> As noted by former ICSID Senior Legal Adviser Georges Delaume, where

*“the possibility exists that the claim may fall within the jurisdiction of ICSID, the court must refrain from further consideration of the matter and refer the parties to ICSID to seek a ruling on the subject”*.<sup>48</sup>

69 Professor Schreuer's commentary confirms this position:

*“Art. 26 applies from the moment of consent (see Art. 25, paras. 468-78). Therefore, it is not necessary for the operation of this provision that ICSID arbitration proceedings have been instituted. If ICSID arbitration has been instituted, there will be a finding by the Secretary-General in accordance with his or her screening power under Art. 36(3) or a decision on jurisdiction by the tribunal under Art. 41. If the Secretary-General has found that, because of a lack of consent, the dispute is manifestly outside the jurisdiction of the Centre or if the tribunal has determined that the Centre does not have jurisdiction because there is no valid consent, Art. 26 does not apply and other remedies may be pursued. Prior to the determination by the Secretary-General and by the ICSID tribunal, it will be incumbent upon the non-ICSID forum seized of the same claim to stay the proceedings and to await the ICSID decision as to jurisdiction (see Art. 41, paras 16-20).”*<sup>49</sup>

70 In his expert opinion in the German Proceedings, Professor Schreuer equally stated:

*“The exclusive remedy rule of Article 26 applies if and as soon as the “consent of the parties to arbitration” is obtained. This means that the ‘exclusive remedy’ rule applies from the time of the existence of an arbitration agreement. In the present case, the arbitration agreement is based on an offer in an international treaty, the Energy Charter Treaty. This offer was accepted by the arbitration claimant by letter of 16 December 2020 and again by filing the request for arbitration on 20 January 2021.*

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<sup>46</sup> [Exhibit CL-0133: Georges R. Delaume, ICSID Arbitration and the Courts, 77 AJIL 784 \(1983\), 785 \(1983\).](#)

<sup>47</sup> [Exhibit CL-0133: Georges R. Delaume, ICSID Arbitration and the Courts, 77 AJIL 784 \(1983\), 785 \(1983\).](#)

<sup>48</sup> [Exhibit CL-0133: Georges R. Delaume, ICSID Arbitration and the Courts, 77 AJIL 784 \(1983\), 785 \(1983\).](#)

<sup>49</sup> [Exhibit CL-0132: Christoph Schreuer et al., The ICSID Convention: A Commentary \(2nd edition, 2009\)](#), Article 26, para. 6.

*Since then, there has been an arbitration agreement within the meaning of Article 26 and the 'exclusive remedy' rule thus applies.*

*Article 26 also applies in cases where – as here – the respondent state objects to the jurisdiction of the arbitral tribunal (i.e. where the state claims that it did not agree to the arbitration). Also, the question of whether an arbitration agreement exists falls within the exclusive competence of the arbitral tribunal (see also Article 41(1)).”<sup>50</sup>*

- 71 The position under Article 26 of the ICSID Convention is straightforward. It essentially requires “*an automatic deference to the impending decision of the Arbitral Tribunal on its jurisdiction*”.<sup>51</sup> Numerous examples of domestic courts observing this rule have arisen throughout ICSID’s existence. For instance, in *Mobil v. New Zealand*, when faced with a respondent state that violated Article 26 of the ICSID Convention, the High Court of New Zealand ordered a stay of all domestic proceedings until an ICSID tribunal could determine its jurisdiction.<sup>52</sup> Equally, in *MINE v. Guinea*, the United States government affirmed the exclusivity of ICSID arbitration in its Brief as Intervenor and Suggestion of Interest before the U.S. courts:

*To prevent United States courts from improperly asserting jurisdiction over ICSID cases, and to accord the necessary deference to ICSID’s jurisdictional autonomy, the United States submits that a rule of abstention should be followed in U.S. courts.”<sup>53</sup>*

**b) The German Proceedings breach the exclusivity of ICSID arbitration**

- 72 Yet, in the present case, neither Respondent nor the Cologne Court have so far acted in line with the ICSID Convention. Instead of automatic deference to this Tribunal’s authority, the case remains pending before the Cologne Court. Respondent even purports in its submission of 31 January 2022 in the German Proceedings, that this ICSID Tribunal “*would be required to suspend its proceedings,*

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<sup>50</sup> [Exhibit CL-0148: Expert Opinion by Professor Schreuer in the German Proceedings dated 7 July 2021](#), pp. 3-4.

<sup>51</sup> [Exhibit CL-0157: Christoph Schreuer et al., The ICSID Convention: A Commentary \(Cambridge University Press, 2nd edition, 2009\)](#), Article 26, para. 157.

<sup>52</sup> [Exhibit CL-0158: Mobil Oil Corporation and others v. New Zealand, ICSID Case No. ARB/87/2, Judgment of the High Court of New Zealand, 1 July 1987, 2:2 ICSID Review - Foreign Investment Law Journal \(1987\) 495](#), p. 517: “*there will be a stay of all proceedings until the Arbitral Tribunal constituted has determined its jurisdiction and thereafter until the further order of the Court*”).

<sup>53</sup> [Exhibit CL-0159: MINE v. The Republic of Guinea, Brief for the United States of America as Intervenor and Suggestion of Interest, United States Court of Appeals for the District of Columbia Circuit, 22 October 1981, reprinted in ILM 1981, 1436](#), p. 1478.

as its jurisdiction depends on the existence of an effective arbitration agreement<sup>54</sup>, which Respondent intends to have declared inexistent in Germany. As explained, this would be arguable for proceedings subject to German law, but not for ICSID proceedings.

- 73 Respondent may attempt to argue that its circumvention of the exclusivity of ICSID arbitration was in some way acceptable in light of the Dutch domestic proceedings relating to the Eemshaven power plant. Indeed, in its Response to Claimants Request for Bifurcation, Respondent already attempts to rely on a misguided waiver argument in this regard.<sup>55</sup> Yet, the Dutch domestic proceedings are fundamentally different from what Respondent engages in with the German Proceedings. The Dutch litigation is pending between different parties (Claimant RWE AG is not a party to these proceedings) and with different legal questions at stake. The Dutch claimant is pursuing the domestic litigation on the basis of Dutch law and the European Convention on Human Rights.<sup>56</sup> That case has not been submitted under Article 26 ECT, and it does not concern questions this Tribunal will have to decide.
- 74 By contrast, what Respondent seeks to obtain with the German Proceedings is a ruling on a matter that – as Claimants will now illustrate – falls exclusively to this ICSID Tribunal, namely its decision on jurisdiction.

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<sup>54</sup> [Exhibit C-0129: Respondent's opposition to RWE AG's suspension application in the German Proceedings dated 31 January 2022](#), p. 3.

<sup>55</sup> Respondent's Response to Claimants' Request for Bifurcation, 11 February 2022, para. 28. Claimants note that Respondent also knowingly makes false statements in this respect, when it argues in the same paragraph that, "*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*". As the Tribunal will recall, the parallel Dutch litigation had already been a topic at the First Session, when Claimants illustrated their proposed schedule for the submission of their Memorial. In fact, Respondent's counsel Mr Marsman even referred to them himself, saying the following (recording of the First Session, 28:12 et seq.): "*The second point is, of course, the Dutch proceedings. These are initiated by Claimants themselves, and we find it a bit rich to invoke proceedings commenced by Claimants themselves now as an excuse to delay an arbitration also commenced by Claimants.*"

<sup>56</sup> Emphasis added: See already Claimants Memorial, para. 4. Claimants further note that Respondent in the Dutch litigation has not raised any admissibility objections based on the prior existence of this ICSID arbitration.

**2. The German Proceedings threaten the Tribunal's exclusive *Kompetenz-Kompetenz***

75 The German Proceedings threaten this Tribunal's *Kompetenz-Kompetenz*. The institution and continuation of the German Proceedings presuppose that these ICSID proceedings are subject to a national *lex arbitri*, so that a final determination on jurisdiction can be made by German courts. That is the exact opposite of what the ICSID Convention says.

**a) The scope and effect of the Tribunal's exclusive *Kompetenz-Kompetenz***

76 Article 41 of the ICSID Convention establishes the Tribunal's *Kompetenz-Kompetenz*. Already the wording of Article 41 (2) makes clear that this is an exclusive one:

*"Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal [...] ."*

77 In conjunction with Article 26, Article 41 ensures that an ICSID tribunal remains the sole judge of its competence.<sup>57</sup> This exclusive competence operates from the moment consent to arbitration has been perfected, and also in case there is a dispute as to whether valid consent exists.<sup>58</sup> The obligation to observe the tribunal's exclusive competence is not only on the relevant non-ICSID forum that may be seized with a particular case. Of equal importance is also the obligation on parties to an ICSID arbitration not to take any steps that could compromise this competence.<sup>59</sup>

78 In the German Proceedings, Professor Schreuer illustrated the relevance of Article 41 (1) of the ICSID Convention in his expert opinion as follows:

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<sup>57</sup> See already Claimants' Memorial, paras 671-673.

<sup>58</sup> [Exhibit CL-0132: Christoph Schreuer et al., The ICSID Convention: A Commentary \(2nd edition, 2009\)](#), Article 26, para. 6. See also [Exhibit CL-0148: Expert Opinion by Professor Schreuer in the German Proceedings dated 7 July 2021](#), pp. 3-4.

<sup>59</sup> See already Claimants' Memorial, para. 679 et seq. See also [Exhibit CL-0138: Pierre Lalive, The First 'World Bank' Arbitration \(Holiday Inns v. Morocco\)—Some Legal Problems 51\(1\) British YB Int'l. Law 123 \(1981\)](#), 134: "*parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general not allow any step of any kind to be taken which might aggravate or extend the dispute.*"

*"[T]he arbitral tribunal itself has exclusive jurisdiction to decide on the jurisdiction of an ICSID arbitral tribunal. Doubts about the jurisdiction of an arbitral tribunal can be raised in the proceedings before the arbitral tribunal – and only in those proceedings. Unlike in other arbitration proceedings, state courts cannot review decisions on jurisdiction of ICSID arbitral tribunals and are bound by an ICSID arbitral tribunal's decision on its own jurisdiction."*<sup>60</sup>

- 79 As a consequence, ICSID tribunals have consistently deployed provisional measures to protect their *Kompetenz-Kompetenz* from collateral attack in another forum. Specifically confirming that Articles 26 and 41 of the ICSID Convention operate also in circumstances where the respondent may raise jurisdictional objections, the *Perenco v. Ecuador* tribunal held:

*"once putatively vested with jurisdiction to hear a claim (subject to resolving any objections thereto definitively), an ICSID tribunal has the duty to protect its jurisdiction to resolve the dispute that has been put before it."*<sup>61</sup>

- 80 Granting provisional measures, the tribunal stated in straightforward terms:

*"Unless and until the Tribunal rules that it has no jurisdiction to entertain this dispute, if its jurisdiction is hereafter challenged, or the Tribunal delivers a final award on the merits, none of the parties may resort to the domestic courts of Ecuador to enforce or resist any claim or right which forms part of the subject matter of this arbitration."*<sup>62</sup>

- 81 This practice is good guidance also for this Tribunal. As the Honorable Charles N. Brower and Ronald E.M. Goodman already stated, *"it is difficult to conceive of an ICSID tribunal not recommending provisional measures directed to the suspension of identical and parallel proceedings in a municipal court."*<sup>63</sup> The reason for that is

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<sup>60</sup> [Exhibit CL-0148: Expert Opinion by Professor Schreuer in the German Proceedings dated 7 July 2021](#), pp. 4-5.

<sup>61</sup> [Exhibit CL-0134: Perenco Ecuador Ltd. v. Ecuador, ISCID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009](#), para. 64.

<sup>62</sup> [Exhibit CL-0134: Perenco Ecuador Ltd. v. Ecuador, ISCID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009](#), para. 61.

<sup>63</sup> [Exhibit CL-0136: Charles N. Brower and Ronald E.M. Goodman, Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings, 6\(2\) ICSID Review 431 \(1991\)](#), 460 (emphasis in the original).

simple: "Only by asserting itself in this way could it effectively protect its ability to decide on its own jurisdiction, which, if established, is hermetically exclusive."<sup>64</sup>

**b) The German Proceedings attack the Tribunal's *Kompetenz-Kompetenz***

82 The German Proceedings, and Respondent's open intention behind them, are a textbook example of a collateral attack at this Tribunal's exclusive *Kompetenz-Kompetenz*. Already in its May 2021 letter to ICSID, Respondent made it clear that it seeks to clarify the existence of an arbitration agreement between the Parties on the basis of the ECT before the Cologne Court.<sup>65</sup> More than three months after the registration of this ICSID arbitration, and almost five months after Claimants had accepted Respondent's offer to arbitrate at ICSID contained in the ECT<sup>66</sup>, Respondent asked another forum to decide the core question of this Tribunal's *Kompetenz-Kompetenz*, the question of jurisdiction.

83 In fact, Respondent acts on the assumption that domestic courts could limit this Tribunal's *Kompetenz-Kompetenz*. In its 2<sup>nd</sup> submission to the Cologne Court, Respondent argued:

*"Section 1032 (2) of the German Code of Civil Procedure does not deny the power of an arbitral tribunal to decide on its own jurisdiction under Article 41 ICSID Convention. Rather, the provision offers parties facing an unjustified arbitration claim an opportunity to have the validity of the alleged arbitration agreement reviewed at an early stage of the dispute, irrespective of an arbitral tribunal's assessment of jurisdiction. In this way, unjustified arbitration proceedings can be effectively averted."*<sup>67</sup>

84 This statement is already contradictory in and of itself: The German Proceedings cannot on the one hand not interfere with this Tribunal's power to decide on its own jurisdiction and on the other hand "*effectively avert*" the present arbitration proceedings. Respondent's statement thus shows that it does not recognize this Tribunal's competence to finally decide on its own jurisdiction but believes that German courts should have the last word. Equally, in its Response to Claimants' Request for Bifurcation, Respondent purports that this Tribunal's ruling on jurisdiction was dependent on the outcome of the German Proceedings. In

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<sup>64</sup> [Exhibit CL-0136: Charles N. Brower and Ronald E.M. Goodman, Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings, 6\(2\) ICSID Review 431 \(1991\)](#), 460.

<sup>65</sup> See Letter from Respondent to the ICSID Secretariat, 21 May 2021.

<sup>66</sup> [Exhibit C-0114: Claimants' Letter, Consent to Arbitration, dated 16 December 2020](#).

<sup>67</sup> [Exhibit C-0115: 2nd Submission by the Netherlands to the Cologne Court of 27 September 2021](#), para. 85.

Respondent's view, this goes even so far that a German decision after a ruling by this Tribunal would require that ruling's reconsideration:

*"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."<sup>68</sup>*

85 Respondent tried to argue and in fact represented towards this Tribunal that the German Proceedings were not intended to resolve the question of this Tribunal's jurisdiction, but only address the matter from the angle of EU law.<sup>69</sup> Yet, Respondent itself could not have been clearer on this point. In its Response to Claimants' Request for Bifurcation, it characterized the expected decision by the Cologne Court as a ruling "*that is at the core of the intra-EU objection.*"<sup>70</sup>

86 Further, as noted above, any such argument cannot be reconciled with the petition filed before the Cologne Court.<sup>71</sup> The relief Respondent seeks in the German Proceedings is general. It asks the court to declare that the present arbitration is inadmissible. It has not – and could not under German procedural law – limit its request to a declaration of inconformity of this arbitration with EU law. Claimant RWE AG had specifically invited Respondent to do so ahead of Respondent's last submission to the Cologne Court of 18 March 2022, but decided not to do so.<sup>72</sup>

87 In Respondent's own words, before the Cologne Court, it

*"seeks a determination by the court that there is no consent to resolve the dispute by ICSID arbitration because of the absence of a legally binding offer to arbitrate under Article 26(2)(c) and (3) ECT on the part of the petitioner. It is precisely the existence of this consent that is disputed in the proceedings before*

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<sup>68</sup> Respondent's Response to Claimants' Request for Bifurcation, para. 3.

<sup>69</sup> Claimants note that Respondent, in its Response to Claimants' Request for Bifurcation, also misrepresented Claimants' position in that regard. Contrary to what Respondent suggests (Response to Claimants' Request for Bifurcation, para. 26), Claimants have not acknowledged that the German Proceedings "*exclusively*" deal with EU law. Rather, as in this Request, Claimants have pointed out also in their Request for Bifurcation and Expedition, paras 9 and 24, that Respondent seeks to rely on EU law to have this arbitration declared inadmissible.

<sup>70</sup> Respondent's Response to Claimants' Request for Bifurcation, para. 12 (emphasis added).

<sup>71</sup> On the procedural framework, see above **Section B.I.**

<sup>72</sup> [Exhibit C-0124: The Netherlands' submission to the Cologne Court dated 18 March 2022.](#)

*this court on the basis of section 1032 (2) of the German Code of Civil Procedure.*<sup>73</sup>

88 As explained, the very nature of the German Proceedings presupposes that German courts have the last word regarding arbitral determinations on jurisdiction. Not only did the German Federal Court of Justice, the *Bundesgerichtshof*, expressly state so in a 2005 judgment already quoted above<sup>74</sup>, this view is also generally shared by commentators:

*“The state mistrusts arbitral tribunals. For this reason, the 10th book of the ZPO - if one leaves purely procedural orders out of consideration - regularly provides for a direct or indirect possibility of reviewing of arbitral decisions. For this reason, German law does not recognise a genuine Kompetenz-Kompetenz of the arbitral tribunal! Although the arbitral tribunal makes a binding decision on its jurisdiction, this decision is reviewable by the state courts.”<sup>75</sup>*

89 By implication, any petition under section 1032 (2) of the German ZPO in relation to an ICSID arbitration infringes upon the ICSID tribunal's exclusive competence. There is no other way, since an exclusive *Kompetenz-Kompetenz* does not exist under German arbitration law. And so already the filing of the German Proceedings interferes with this Tribunal's *Kompetenz-Kompetenz*.<sup>76</sup>

90 As a consequence, the German Proceedings pose a serious risk to the Tribunal's exclusive authority. Respondent's conduct threatens the very core of what the delocalization and exclusivity of ICSID proceedings seek to protect.

91 In that way, the present case is also to be distinguished from others such as *Plama v. Bulgaria*, where the tribunal declined to recommend provisional measures, finding that the “*Claimant's right to pursue its claims for damages in this arbitration and the Arbitral Tribunal's ability to decide these claims will not be affected*” by domestic

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<sup>73</sup> [Exhibit C-0115: 2nd Submission by the Netherlands to the Cologne Court of 27 September 2021](#), para. 88 (emphasis added).

<sup>74</sup> [Exhibit C-0120: German Federal Court of Justice \(Bundesgerichtshof\), Judgment of 13 January 2005, case no. III ZR 265/03](#).

<sup>75</sup> [Exhibit C-0132: Rolf A. Schütze, § 5: Arbitration agreements, in: Schütze/Thümmel, Schiedsgericht und Schiedsverfahren \(C. H. Beck, 7th ed. 2021\)](#), 115 (emphasis added, footnotes omitted).

<sup>76</sup> Therefore, in the German Proceedings, Claimant RWE AG has explained in depth to the Cologne Court why the provisions of the German ZPO do not and should not be applied to ICSID proceedings.

bankruptcy proceedings.<sup>77</sup> What is more, in the present case, the German Proceedings are intended as a basis to prevent Claimants from further pursuing their claims at ICSID.

### 3. The German Proceedings threaten this arbitration's procedural integrity

92 By instituting and further pursuing the German Proceedings, Respondent threatens the procedural integrity of this arbitration. As explained above, these proceedings are ultimately aimed at forcing the Claimants to stop this arbitration.

93 ICSID tribunals have regularly granted provisional measures when faced with circumstances that threaten the procedural integrity of ICSID arbitration.

94 As the *Quiborax* tribunal stated, it had "*no doubt that it has the power to grant provisional measures to preserve the procedural integrity of the ICSID proceedings*".<sup>78</sup> In line with that tribunal's decision, provisional measures are in particular necessary when a party's "*opportunity to present its case*" is threatened.<sup>79</sup> In that case, the tribunal therefore ordered the respondent to take all appropriate measures to suspend criminal proceedings against the claimants and their witnesses.

95 Similarly, in the case of the *Nova Group v. Romania*, the tribunal observed that, "*where the right at issue involves a party's ability to effectively pursue and litigate its claim [...] the injury to the right is inherently irreparable by monetary damages*" and therefore warrants the indication of provisional measures.<sup>80</sup> That tribunal

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<sup>77</sup> [Exhibit CL-0160: Plama v. Bulgaria, ICSID Case No. ARB/93/24, Order of 6 September 2005](#), para. 46.

<sup>78</sup> [Exhibit CL-0152: Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010](#), para. 141.

<sup>79</sup> [Exhibit CL-0152: Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010](#), para. 153

<sup>80</sup> [Exhibit CL-0161: Nova Group Investments, B.V. v. Romania, ICSID Case No. ARB/16/19, Procedural Order No. 7: Decision on Claimant's Request for Provisional Measures, 29 March 2017](#), para. 240 (emphasis in the original).

consequently granted provisional measures restraining the respondent from continuing to pursue extradition proceedings against claimant's chairman.<sup>81</sup>

- 96 As explained above, Respondent's conduct and statements only leave the conclusion that it intends to derail this arbitration, should the Cologne Court find that no arbitration agreement existed between the Respondent and RWE AG as a matter of German and EU law. Already Minister van 't Wout acknowledged this when initially describing the German Proceedings as "*anti-arbitration proceedings*", and noting Respondent would put forward a defence on the merits only "*[i]f it proves impossible to avert the [ICSID] proceedings*"<sup>82</sup>. In fact, even Respondent's letter to ICSID indicates as much, when stating that Respondent would "*take part in the present proceedings before ICSID while the proceedings in Germany are pending*"<sup>83</sup> (not irrespective of their outcome), implying that other consequences follow thereafter.
- 97 In light of the playbook set out by Mr. Maxian Rusche, such consequences, however, are clearly not intended to be merely Respondent's non-participation in this case. A decision in favour of Respondent by the Cologne Court would form a basis for an application for an anti-arbitration injunction (which might even be initiated already alongside the German Proceedings). And Respondent's refusal to issue an assurance towards Claimants not to apply for such an injunction speaks volumes in that respect.
- 98 The German Proceedings thus threaten the Claimants' ability to present their case. They therefore also threaten the procedural integrity of this arbitration. In fact, the threat in the present arbitration is a much greater one than the tribunals were confronted with in the *Quiborax* and *Nova Group* cases. While in those cases, the relevant criminal proceedings were directed against the Claimants and their witnesses, thereby only impairing their ability to fully develop their arguments and participate in hearings, Respondent presently seeks to prevent Claimants from pursuing this arbitration altogether. If Respondent's plan were successful, Claimants could be entirely denied access to arbitration for their ECT claims. A more serious threat to the procedural integrity of this arbitration is difficult to conceive.

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<sup>81</sup> [Exhibit CL-0161: Nova Group Investments, B.V. v. Romania, ICSID Case No. ARB/16/19, Procedural Order No. 7: Decision on Claimant's Request for Provisional Measures, 29 March 2017](#), para. 365(a).

<sup>82</sup> [Exhibit C-0113: Letter from Minister Bastiaan van Wout to the Lower House 17 May 2021](#), pp. 2.

<sup>83</sup> Letter from Respondent to the ICSID Secretariat of 21 May 2021, p. 2 (emphasis added).

**4. The German Proceedings threaten Claimants' right of access to arbitration as a part of the ECT's protections**

99 Finally, Respondent's anti-arbitration petition directly infringes upon Claimants' rights guaranteed by the ECT. Recourse to international arbitration as a neutral forum has been referred to as a distinct feature of investment treaties on multiple occasions, specifically also under the ECT.<sup>84</sup> The arbitration provision in Article 26 of the ECT is a fundamental part of the investment protection scheme under that treaty. The importance of an arbitration clause in an investment treaty, and the lack of a corresponding protection in the EU Treaties, was highlighted *inter alia* by the tribunal in *Eastern Sugar v. Czech Republic*:

*"From the point of view of the promotion and protection of investments, the arbitration clause is in practice the most essential provision of Bilateral Investment Treaties. Whereas general principles such as fair and equitable treatment or full security and protection of the investment are found in many international, regional or national legal systems, the investor's right arising from the BIT's dispute settlement clause to address an international arbitral tribunal independent from the host state is the best guarantee that the investment will be protected against potential undue infringements by the host state. EU law does not provide such a guarantee."<sup>85</sup>*

100 Other ICSID tribunals have routinely stressed that an investor's right to dispute settlement by way of arbitration is a key feature of the protections offered by investment treaties, and that it itself has a protective character.

101 In the words of the tribunal in *Hochtief v. Argentina*:

*"the possibility of recourse to arbitration in addition to the right to have recourse to national courts, are a form of protection that is enjoyed within the scope of "the management, utilization, use and enjoyment of an investment". Unlike the inter-State dispute settlement provisions in Article 9, which safeguard the interests of the States parties in the event of a dispute regarding the*

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<sup>84</sup> Cf. [Exhibit CL-0162: Plama v. Bulgaria, ICSID Case No. ARB/93/24, Decision on Jurisdiction, 8 February 2005](#), para. 141: "By any standards, Article 26 is a very important feature of the ECT which is itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law."

<sup>85</sup> [Exhibit CL-0163: Eastern Sugar v. Czech Republic, SCC Case No. 088/2004, Partial Award, 27 March 2007](#), para. 165 (emphasis added). The importance of an effective dispute settlement provision has been emphasized by several arbitral tribunals (see [Exhibit CL-0164: Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000](#), paras 54-55; [Exhibit CL-0165: Gas Natural SDG, SA. v. Argentine Republic, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005](#), para. 31.

*interpretation or application of the BIT, Article 10 is a benefit conferred on investors and designed to protect their interests and the interests of a State Party in its capacity as a host State party to a dispute with an investor: it is a protective right that sits alongside the guarantees against arbitrary and discriminatory measures, expropriation, and so on.*"<sup>86</sup>

102 In *Suez and Vivendi v. Argentina*, the tribunal phrased this as follows:

*"The right to have recourse to international arbitration is very much related to investors' "management, maintenance, use, enjoyment, or disposal of their investments." It is particularly related to the "maintenance" of an investment, a term which includes the protection of an investment.*"<sup>87</sup>

103 Respondent's attempt to deprive Claimants of their right to ICSID arbitration, which is equally the subject of Claimants' ancillary claim, thus directly infringes on the substantive protections under the ECT. It not only is an unreasonable measure affecting the management, maintenance and use of their investments, but also denies them most constant protection and security by trying to dismantle the legal standard of protection under which Claimants have invested.

104 Indeed, as was held in the case of *Gas Natural v. Argentina*, "*provision for international investor-state arbitration in bilateral investment treaties is a significant substantive incentive and protection for foreign investors*"<sup>88</sup>.

105 Equally, already the tribunal in *Maffezini v. Spain* outlined that the procedural protection of investments by way of arbitration is an essential component of any investment treaty's protection standards:

*"International arbitration and other dispute settlement arrangements have replaced [...] older and frequently abusive practices of the past. These modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded. Traders and investors, like their States of nationality, have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic*

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<sup>86</sup> [Exhibit CL-0166: Hochtief AG v. The Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011](#), para. 68 (emphasis added).

<sup>87</sup> [Exhibit CL-0167: 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 Jurisdiction, 3 August 2006](#), para. 57.

<sup>88</sup> [Exhibit CL-0165: Gas Natural SDG, SA. v. Argentine Republic, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005](#), para. 31.

*courts, while the host governments have traditionally felt that the protection of domestic courts is to be preferred.*<sup>89</sup>

106 Respondent's initiation of the German Proceedings puts Claimants' right of access to international arbitration – together with the exclusivity of the ICSID system as such as well as the Tribunal's *Kompetenz-Kompetenz* and the integrity of this arbitration – in jeopardy. As Claimants will show in the following, all additional requirements for this Tribunal to step in and provisionally safeguard these rights are met.

## II. Applicable standard of decision

107 Although formulated in different ways, investment tribunals have articulated additional criteria for the grant of provisional measures. These are *prima facie* jurisdiction of the tribunal and the establishment of a *prima facie* case on the merits (1.), urgency (2.) and necessity (3.) of the measures requested and their proportionality (4.).<sup>90</sup>

108 All of these criteria are fulfilled:

### 1. The Tribunal has *prima facie* jurisdiction and a *prima facie* case on the merits exists

109 With their Request for Arbitration and their Memorial, Claimants have set out a *prima facie* case on jurisdiction and merits. This assessment seems to be shared by Respondent, which has decided not to file objections under ICSID Arbitration Rule 41 (5).

110 The ECJ's *Komstroy* judgment does not alter this result. In any event, provisional measures can be granted even when a tribunal's jurisdiction is contested.<sup>91</sup> Accordingly, Respondent's stated intention to object to the Tribunal's jurisdiction in this arbitration cannot *ipso facto* defeat Claimants' Request. Any other result would

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<sup>89</sup> [Exhibit CL-0164: Emilio Agustin Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000](#), para. 55.

<sup>90</sup> See e.g. [Exhibit CL-0168: United Utilities \(Tallinn\) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia, ICSID Case No. ARB/14/24, Decision on Respondent's Application for Provisional Measures, 12 May 2016](#), para. 78; [Exhibit CL-0169: Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Order on Interim Measures, 2 September 2008](#), para. 45.

<sup>91</sup> [Exhibit CL-0170: Tethyan Copper Company Pty Limited v. The Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Decision on Claimant's Request for Provisional Measures, 13 December 2012](#), para. 121: "an arbitral tribunal may recommend provisional measures before it has decided on whether it has jurisdiction over the dispute".

also be at odds with principles of procedural fairness. A respondent state could otherwise always raise a jurisdictional objection to pre-empt any request for provisional measures, rendering Article 47 of the ICSID Convention meaningless.

## 2. The requested measures are urgent

111 According to the criteria established in arbitral practice, the grant of provisional measures requires urgency.

112 This Request is urgent. Numerous ICSID tribunals have found this element inherently satisfied when the procedural integrity of ICSID arbitration – as in this case – is threatened.<sup>92</sup> Equally, as the Honorable Charles N. Brower and Ronald E.M. Goodman observed, urgency is also inherent where domestic parallel proceedings are aimed at attacking an international arbitration:

*“In respect of all categories of provisional measures other than that which forms the subject of this article, urgency is a sine qua non; an international tribunal must, in effect, be shown the prospective harm it is urged to prevent. In the case of a threat to that tribunal’s jurisdiction, however, the harm is inherent, and hence indisputable. Furthermore, the threat is posed not simply to the rights of a disputant; it is directed to the very heart of the adjudicative process. Its patent presence dispenses the parties from any burden to demonstrate the same.”<sup>93</sup>*

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<sup>92</sup> See, e.g., [Exhibit CL-0171: Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016](#), para. 235 (“where the integrity of the arbitral proceedings is threatened [...] the need for the measures is *inherently urgent*”) (emphasis added); [Exhibit CL-0152: Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010](#), para. 153 (observing that these standards are met where a party’s “opportunity to present its case” is threatened and that “if measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, they are *urgent by definition*. Indeed, the question of whether a Party has the opportunity to present its case or rely on the integrity of specific evidence is essential to (and therefore cannot await) the rendering of an award on the merits”) (emphasis added); [Exhibit CL-0161: Nova Group Investments, B.V. v. Romania, ICSID Case No. ARB/16/19, Procedural Order No. 7: Decision on Claimant’s Request for Provisional Measures, 29 March 2017](#), para. 241 (“the requirement of *urgency inherently is met* when relief is needed to preserve the integrity of the arbitration”) (emphasis added).

<sup>93</sup> [Exhibit CL-0136: Charles N. Brower and Ronald E.M. Goodman, Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings, 6\(2\) ICSID Review 431 \(1991\)](#), 461 (emphasis added).

- 113 The tribunal in *Ipek v. Turkey* granted provisional measures in precisely these circumstances, *i.e.* where a domestic court was purporting to decide the tribunal's jurisdiction. It held that "*the continued pendency of these [domestic] proceedings would infringe the exclusivity of ICSID arbitration, a cardinal element of the scheme of the Convention to which all Contracting States have subscribed*". Accordingly, "*a provisional measure staying the [domestic proceedings] is necessary to preserve the position of both Parties pending the outcome of the Preliminary Objections phase*".<sup>94</sup>
- 114 Already on this basis, Claimants' request is clearly, inherently urgent. The German Proceedings threaten Claimants' ability to present their case, in fact they are intended to deprive Claimant RWE AG of the exercise of its right to effective dispute resolution under the ECT altogether. What is more, the German Proceedings are a collateral attack on this Tribunal's jurisdiction and exclusive *Kompetenz-Kompetenz*. Before the Cologne Court, Respondent seeks a declaration that no agreement to arbitrate exists between Claimant RWE AG and Respondent.<sup>95</sup> As a consequence, the threat inherent in the German Proceedings is posed not only to the Claimants, but even to the Tribunal's decision making-authority under the ICSID Convention. In these circumstances, urgency of harm is already inherent.
- 115 This urgency is even exacerbated by the procedural situation in the German Proceedings. Respondent insisted in the German Proceedings that the Cologne Court move quickly.<sup>96</sup> While the Cologne Court has so far not followed suit, it indicated in its latest procedural correspondence an intention to deliberate in June 2022.<sup>97</sup> A decision by the Court, and a subsequent request for an injunction, can be presumed to be rendered shortly thereafter, adding to the harm of urgency inherent

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<sup>94</sup> [Exhibit CL-0172: Ipek Investment Limited v. Republic of Turkey, ICSID Case No. ARB/18/18, Procedural Order No. 5 Claimant's Request for Provisional Measures, 19 September 2019](#), para. 95.

<sup>95</sup> The exact relief requested by Respondent is declaration that "*the arbitration proceedings instituted by the respondent [to the petition] against the petitioner before the International Centre for Settlement of Investment Disputes, reference ICSID Case No. ARB/21/4, are inadmissible*." [Exhibit C-0117: Petition by the Netherlands to the Cologne Court of 10 May 2021](#), para. 1.

<sup>96</sup> See [Exhibit C-0116: 3rd Submission by the Netherlands to the Cologne Court of 21 January 2022](#), paras 37-38.

<sup>97</sup> [Exhibit C-0123: Letter from the Cologne Court to the parties of the German Proceedings dated 11 April 2022](#).

in Respondent's pursuit of the German Proceedings as such. Moreover, Claimants have tried in vain to obtain a suspension of the German Proceedings.<sup>98</sup>

### 3. The requested measures are necessary

116 Provisional measures are granted in circumstances that present a danger of serious prejudice to the requesting party, i.e., necessitous circumstances. In this context, the *Quiborax* tribunal considered that provisional measures are invariably necessary when the procedural integrity of ICSID arbitration is threatened. The tribunal reasoned:

*"Claimants submit that the provisional measures requested are necessary because the harm caused would not be adequately repaired by an award of damages. The Tribunal agrees with Claimants in this respect: any harm caused to the integrity of the ICSID proceedings, particularly with respect to a party's access to evidence or the integrity of the evidence produced could not be remedied by an award of damages."*<sup>99</sup>

117 Equally, in *Nova Group v. Romania*, the tribunal pointed out that "*where the right at issue involves a party's ability to effectively pursue and litigate its claim [...] the injury to the right is inherently irreparable by monetary damages.*"<sup>100</sup>

118 Such an understanding is only more appropriate here: it is not the ability of a claimant to pursue its case *properly* that is at stake, but that claimant's ability to pursue its claim *at all*. If Respondent were allowed to continue the German Proceedings, Claimants might have to discontinue these proceedings, erasing the possibility to remedy any harm caused by an award altogether. The necessity of provisional measures is therefore particularly prevalent in cases where the threat posed to the integrity of the arbitration relates to parallel proceedings aimed at usurping an ICSID tribunal's exclusive mandate to determine its own jurisdiction. In fact, as the Honorable Charles N. Brower and Ronald E.M. Goodman note,

*"[p]rovisional measures to protect the tribunal's own right to address its competence seems to present [...]. the most 'compelling' or 'exceptional'*

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<sup>98</sup> See above, **Sections B.III.1. and B.III.2.**

<sup>99</sup> [Exhibit CL-0093: Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia, ICSID Case No ARB/06/2, Award, 16 September 2015](#), para. 157

<sup>100</sup> [Exhibit CL-0161: Nova Group Investments, B.V. v. Romania, ICSID Case No. ARB/16/19, Procedural Order No. 7: Decision on Claimant's Request for Provisional Measures, 29 March 2017](#), para. 240.

*instance for application of its broader powers to recommend measures under Article 47 of the Convention.”<sup>101</sup>*

- 119 The German Proceedings indeed present a serious and real threat to the integrity of this arbitration. Moreover, they are intended to affect Claimant RWE AG's ability as such to pursue its claim at ICSID, a right guaranteed under the ECT. Ultimately, Respondent also seeks to deprive this Tribunal of its authority to determine its jurisdiction itself
- 120 What is more, relief from the Tribunal is necessary ahead of a decision by the Cologne Court. As the Tribunal is aware, its powers to grant provisional measures extend only in relation to the Parties, which Germany is not. If the Cologne Court were to render a decision in favour of Respondent, the Tribunal will not be in a position anymore to fashion appropriate relief in relation to such a German court decision. As a consequence, the Tribunal must act before a decision is rendered.

#### **4. The requested measures are proportional**

- 121 The proportionality requirement weighs the burden to the party against whom the provisional measures are sought against the risk to the party seeking the measures if the tribunal does not grant the measures.
- 122 Here, the risk presented by Respondent pursuing the German Proceedings outweighs any burden to Respondent of discontinuing them, at least temporarily. As explained above, the German Proceedings pose a serious and undeniable threat to Claimants' ability to effectively present their case – in fact to RWE AG's ability to present its case at all – and thus to the procedural integrity of the arbitration.
- 123 Conversely, Respondent will suffer no comparable harm if required to discontinue the German Proceedings, let alone to temporarily have them suspended. Indeed, such an order would simply require Respondent to comply with its ICSID Convention obligations, something which cannot be viewed as burdensome given that it freely agreed to the terms of the Convention. As set out in Article 26 of the Vienna Convention on the Law of Treaties, “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”. This applies squarely to Respondent's obligations under the ICSID Convention. Requiring Respondent to comply with its treaty obligations imposes no burden at all. That obligation already exists. And the ICSID Convention provides in Articles 26 and 41 (2) that the only

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<sup>101</sup> [Exhibit CL-0136: Charles N. Brower and Ronald E.M. Goodman, Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings, 6\(2\) ICSID Review 431 \(1991\)](#), 461 (emphasis added).

proper forum for the resolution of Respondent's jurisdictional objection is in the arbitration itself.

- 124 Ultimately, Respondent would still be free to file whatever objections under EU law which it believes it has to file when the Tribunal has rendered its award and if that award needs to be enforced. At that point in time Respondent's actions would still be unjustified, but could no longer endanger and put at risk these proceedings.
- 125 Ultimately, Respondent's initiation of the German Proceedings is a tactical, collateral attack on this Tribunal's jurisdiction that may cause serious and substantial prejudice to Claimants. Respondent's stated aim is to use the German courts to prevent Claimants from having their ICSID claim heard entirely in circumstances where Respondent is under an international law obligation to abide by the exclusivity of ICSID arbitration. Granting provisional measures in these circumstances would be a proportionate response from the Tribunal.

### III. The practice of ICSID tribunals supports the grant of this Request

- 126 In line with the above, Claimants' Request meets all criteria for the Tribunal to grant provisional measures. Claimants' Request is further supported by what Gabrielle Kaufmann-Kohler and Michele Potestà have called an "*abundant practice*"<sup>102</sup> of ICSID tribunals granting provisional measures in similar contexts. In fact, as these two learned authors note, looking at all known provisional measures decisions issued by ICSID tribunals between 1972 and 2009,

*"over 50% [...] concerned a request to enjoin parties from pursuing parallel domestic proceedings. Provisional measures seeking to restrain a party from commencing or continuing parallel domestic litigation are usually requested by the investor, although in certain cases they have also been sought by the State. In essence, investment tribunals have found justification for the issuance of interim relief (sometimes in the form of an "anti-suit injunction"), in the exclusive remedy rule of Article 26 of the ICSID Convention (where such provision was applicable) and/or in the need to protect the tribunal's jurisdiction, the integrity of the arbitration proceedings, or in the prohibition of aggravating the dispute."<sup>103</sup>*

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<sup>102</sup> [Exhibit CL-0137: Gabrielle Kaufmann-Kohler and Michele Potestà, Investor-State Dispute Settlement and National Courts \(2020\)](#), p.59.

<sup>103</sup> [Exhibit CL-0137: Gabrielle Kaufmann-Kohler and Michele Potestà, Investor-State Dispute Settlement and National Courts \(2020\)](#), pp. 59-60 (emphasis added, footnotes omitted).

127 Claimants note that the ICSID tribunal in the parallel arbitration of *Uniper SE et al. v. The Netherlands* has already recommended provisional measures.<sup>104</sup> In particular, that tribunal expressed

*“grave concern regarding the specific mechanism engaged by the Respondent in the German Court to seek an interpretation of EU law, as pursuant to section 1032(2) of the German Code of Civil Procedure (i) the timing of the request must precede the constitution of the Tribunal; and (ii) the request for relief said to be formally required by this mechanism, and in any event sought by the Respondent, could result in a declaration that Claimants’ claims in this specific Arbitration are “inadmissible”, i.e., without jurisdiction.”*<sup>105</sup>

128 Against that background, the *Uniper* tribunal only refrained from recommending as a provisional measure that the Netherlands withdraw its in parallel pending petition under section 1032 (2) German ZPO against Uniper SE in light of similar – and as shown above false – representations made by the Netherlands.<sup>106</sup> It, however,

*“strongly recommend[ed] that the Respondent take no further steps that could aggravate the dispute or deter, restrain or preclude any of the Claimants from continuing to participate fully and freely in this Arbitration.”*<sup>107</sup>

129 On the basis of the evidence and arguments presented, Claimants’ present request, by contrast, must be granted in full.

130 This is reinforced by other provisional measures decisions of previous ICSID tribunals. Further illustrative for present purposes is in particular the decision by the ICSID tribunal in *Ipek v. Turkey*. There, the tribunal recommended provisional measures restraining the continued pursuit of a domestic proceeding involving the validity of a sale and purchase agreement. Crucially, the issue of the agreement’s validity was also central to the parties’ cases on jurisdiction in the ICSID

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<sup>104</sup> [Exhibit CL-0173: Uniper SE et al. v. The Netherlands, ICSID Case No. ARB/21/22, Decision on the Claimants’ Request for Provisional Measures \(without reasons\), 17 February 2022.](#)

<sup>105</sup> [Exhibit CL-0173: Uniper SE et al. v. The Netherlands, ICSID Case No. ARB/21/22, Decision on the Claimants’ Request for Provisional Measures \(without reasons\), 17 February 2022](#), p. 2 lit. c.

<sup>106</sup> See [Exhibit CL-0173: Uniper SE et al. v. The Netherlands, ICSID Case No. ARB/21/22, Decision on the Claimants’ Request for Provisional Measures \(without reasons\), 17 February 2022](#), p. 2 lit. d.

<sup>107</sup> [Exhibit CL-0173: Uniper SE et al. v. The Netherlands, ICSID Case No. ARB/21/22, Decision on the Claimants’ Request for Provisional Measures \(without reasons\), 17 February 2022](#), p. 2 lit. j.

arbitration.<sup>108</sup> When granting the claimant's request for provisional measures, the tribunal reasoned that "*the continued pendency of [the domestic] proceedings would infringe the exclusivity of ICSID arbitration, a cardinal element of the scheme of the Convention to which all Contracting States have subscribed.*" This was because a "*central element*" of the tribunal's jurisdictional determinations was the agreement's validity. Consequently, "*neither Party should be placed in a position of having to litigate the same issue at the same time in a national court.*"<sup>109</sup>

- 131 Similarly, in *SGS v. Pakistan*, the tribunal recommended provisional measures to restrain Pakistan from acting on a Pakistan Supreme Court judgment that had found the investors lacked standing in ICSID arbitration against the state.<sup>110</sup> The tribunal in particular granted provisional measures because it found it

*"essential for the proper operation of both the BIT and the ICSID Convention that the right of access to international adjudication be maintained. In the Tribunal's view, it has a duty to protect this right of access and should exercise such powers as are vested in it under Article 47 of the ICSID Convention in furtherance of that duty."*<sup>111</sup>

- 132 The case of *SGS v. Pakistan* is also particularly instructive here, given the tribunal highlighted its discomfort with the fact that a first decision had already been taken by Pakistan's courts in disregard of ICSID's exclusivity rule, which it had no possibility to alter:

*"[W]hile the Tribunal accepts that the Judgment of the Supreme Court is final, it requests the Respondent not to act on its earlier complaint of an alleged breach of the Court's stay or to file a new complaint. We recommend further that, in the event that any other party, including the Supreme Court of Pakistan sua sponte,*

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<sup>108</sup> [Exhibit CL-0172: Ipek Investment Limited v. Republic of Turkey, ICSID Case No. ARB/18/18, Procedural Order No. 5 Claimant's Request for Provisional Measures, 19 September 2019](#), para. 26 (noting that a share purchase agreement was at "*the heart of both the Claimant's claim to jurisdiction and the Respondent's objection*" since it formed "*the basis for the Claimant's claim to be a 'company' [...] that has made an 'investment' in Turkey within the meaning of the BIT; and a 'national of another Contracting State' for the purpose of the ICSID Convention*").

<sup>109</sup> [Exhibit CL-0172: Ipek Investment Limited v. Republic of Turkey, ICSID Case No. ARB/18/18, Procedural Order No. 5 Claimant's Request for Provisional Measures, 19 September 2019](#), para. 95.

<sup>110</sup> [Exhibit CL-0156: SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ARB/01/13, Procedural Order No. 2, 16 October 2002](#), para. 16.

<sup>111</sup> [Exhibit CL-0156: SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ARB/01/13, Procedural Order No. 2, 16 October 2002](#), para. 30 (emphasis added).

*were to initiate a complaint, Pakistan take all necessary steps to inform the relevant court of the current standing of this proceeding and of the fact that this Tribunal must discharge its duty to determine whether it has the jurisdiction to consider the international claim on the merits.”<sup>112</sup>*

- 133 As in those two cases, also this Tribunal is confronted with a respondent that seeks to have an incompetent forum, the Cologne Court, rule on whether there is a basis for its jurisdiction. Yet, Respondent not only challenges the Tribunal's exclusive authority by pursuing the German Proceedings and continuously aggravates the dispute. Respondent also seeks to undermine Claimants' right to effective dispute resolution under the ECT.
- 134 It is not only within the Tribunal's power under Article 47 of the ICSID Convention to put an end to these attempts, in particular before a first German court decision challenging the ICSID regime's exclusivity has been rendered. It is also the Tribunal's duty to do so in the exercise of its mandate to bring this dispute closer to a settlement.

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<sup>112</sup> [Exhibit CL-0156: SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ARB/01/13, Procedural Order No. 2, 16 October 2002](#), para. 35.

**E. Relief requested**

135 For the reasons set out above, Claimants respectfully request the Tribunal to

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

**alternatively,**

- (ii) **Order Respondent to immediately after the Tribunal's decision agree to a suspension of the German Proceedings pending before the Higher Regional Court of Cologne (Oberlandesgericht Köln) under case no. 19 SchH 15/21 until the Tribunal has rendered its award, and to communicate such agreement also immediately to the Cologne Court;**
2. **Order Respondent, in any case, to refrain from taking any steps outside of this arbitration to prevent Claimants from further pursuing their case at ICSID, and in particular not to initiate any further judicial proceedings (including interim measures) against any of the Claimants aimed at preventing them from continuing this arbitration, either before or after any decision in the German Proceedings;**
3. **Order Respondent to pay the full costs associated with this request; and**
4. **Provide such other relief as the Tribunal may deem appropriate.**

Hamburg, 29 April 2022

Luther Rechtsanwaltsgesellschaft mbH

