DE BRAUW
BLACKSTONE
WESTBROEK

ICSID
Case number: ARB/21/4
Date: 31 May 2022

RESPONSE TO REQUEST FOR PROVISIONAL MEASURES

in the matter of:

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

Claimants,
counsel: Luther Rechtsanwaltsgesellschaft mbH

against:

THE KINGDOM OF THE NETHERLANDS,

Respondent,
counsel: De Brauw Blackstone Westbroek N.V.

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1 INTRODUCTION

1. The Kingdom of the Netherlands submits this Response in relation to RWE's Request for Provisional Measures dated 29 April 2022 (the "**Request**"). The Request calls for an order that the Netherlands withdraw or suspend a proceeding pending between the first Claimant (RWE AG) and the Netherlands before the German courts (the "**German Proceedings**").

2. The Netherlands respectfully submits that the Request should be rejected. The German Proceedings do not violate the ICSID Convention, and the requirements that necessitate the exceptional step of an urgent intervention in the form of a provisional measure are not present.

3. First, the issue that is before the German courts is one of interpretation and application of EU Law (i.e. the EU Treaties themselves and secondary sources of Union law which stem from the EU treaties). The Request is based on the premise that the Tribunal should resolve such a question of interpretation and application of the EU Treaties to the exclusion of the EU courts.[1] That premise is incorrect. The Tribunal has *Kompetenz-Kompetenz* under the ICSID Convention.

4. Contrary to the submissions of RWE, however, the Tribunal does not have an exclusive competence to issue a legally binding interpretation of EU law, especially as far as it concerns obligations of Member States of the European Union (and their judiciary) under EU law. The latter is the purview of the judiciary of the Member States of the European Union under the supervision of the CJEU.[2] However, the Tribunal may take guidance from EU law as interpreted by the national judiciary and the CJEU.

5. Second, the Tribunal's powers and competence under the ICSID Convention and the ECT are not matters that are before the German courts. The German Proceedings are concerned with the issue of whether the *EU Treaties* permit or preclude intra-EU investor-State arbitration under Article 26 ECT.[3] The German Proceedings will provide clarity on that EU law question, not render a judgment on the Tribunal's competence under the ICSID Convention or the ECT (nor on the Tribunal's *Kompetenz-Kompetenz*). RWE seems to ignore

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1 Meaning the courts of the EU Member States under the supervision of the Court of Justice of the European Union ("**CJEU**").

2 Article 344 and 267 TFEU and article 19 TEU as interpreted in **Exhibit RL-0003**, Slovak Republic v. Achmea BV, CJEU, Case C-284/16, ECLI:EU:C:2018:158, Judgment dated 6 March 2018.

3 Claimants acknowledge that the question before the German courts is one of EU law. See Request, para. 96.

the fact that different jurisdictions with regard to their purview and applicable field of law may have concurrent competence.

6. The Netherlands has in full transparency informed the ICSID Secretariat and Claimants of the German Proceedings.[4] It has also confirmed that it does not deny the Tribunal's *Kompetenz-Kompetenz* under the ICSID Convention.[5] It reiterates that commitment. The Tribunal's decision in Procedural Order No. 2 of 25 February 2022 also covered this topic and since then no new facts or circumstances have arisen that would warrant urgent intervention at all.

7. Third, the German Proceedings at hand will result in a *declaratory* judgment on the EU law question that is before those EU courts. Such a declaratory decision will express what already applies (and has applied) as a matter of EU law. There can be no urgent need to preclude a declaration of what applies as a matter of EU law in any event, regardless of whether the German courts affirm that in the form of a declaration.

8. EU law obliges the Netherlands to ensure that the questions of EU law at issue in the German Proceedings are put before the EU courts, as a recent letter from the European Commission to the Netherlands confirms. With the German Proceedings the Netherlands has sought to ensure its compliance with its obligations under EU law. It is rather RWE that is asking the Tribunal to rule on issues that are outside the scope of its jurisdiction.

9. However, if the Request were granted, it would require the Netherlands to choose between complying with the Tribunal's recommendation and its obligations under the EU Treaties to put EU law questions before the EU courts. Provisional measures would therefore disproportionately affect the Netherlands. There is, understandably, no precedent for an ICSID tribunal using its power to recommend provisional measures that would call on a State to breach its obligations under another treaty.

10. The Netherlands has cooperated with this arbitration in every respect and has acted in good faith in order to comply with its obligations under the ICSID Convention. The Netherlands will continue to do so regardless of what the German courts may decide. This is in line with the principle of comity between judiciaries and tribunals, when dealing with different bodies of law. The Netherlands hopes the Tribunal will take note of this principle and will not put the Netherlands in a position where it is unable to comply with its legal

[4] **Exhibit R-0001**, Letter from the Netherlands to the ICSID Secretariat dated 21 May 2021.
[5] Response to Claimants' Request for Bifurcation, para. 26.

obligations under different treaties such as the ICSID Convention and the EU Treaties.

2 BACKGROUND

11. Before addressing the substance of the Request, the Netherlands will briefly describe the legal proceedings that are currently pending between RWE and the Netherlands before the Dutch courts (Section 2.1) and the German courts (Section 2.2).

2.1 RWE's commencement of parallel proceedings in the Netherlands

12. On 26 February 2021, just over one month after initiating the present arbitration, the second Claimant commenced "*parallel litigation*"[6] proceedings against the Kingdom of the Netherlands before the District Court of The Hague (the "**Dutch Proceedings**"). There, it claims the same remedy (monetary damages) from the same counter-party (the Kingdom of the Netherlands) in connection with the same environmental measures (the Coal Act) and the same purported investment (the Eemshaven plant) as it is seeking from this Tribunal. RWE has filed a 214-page brief setting forth its claim for compensation and requesting that the District Court make determinations on substantially the entire factual matrix that is presented to the Tribunal in the present arbitration, including but not limited to RWE's allegations on:[7]

- the legal framework upon which RWE claims to have based its investment decision;
- RWE's environmental commitments to reduce CO_2 emissions and its failure to fulfill them;
- the legislative background and history of the Coal Act;
- the foreseeability of the Coal Act and CO2 reduction measures in general;

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6 Recording of First Session of 30 August 2021, at 24:24, "*There is a parallel litigation pending before the Dutch courts based on the European Convention on Human Rights instituted by claimants, by the Dutch claimants. And there was a so-called writ of summons, which is the equivalent of a statement of claim, and a statement of defence by the Netherlands which was recently filed. We cannot ignore the statement of defence when writing our Memorial. Would violate our duties to our client and our duties also towards this tribunal if we were to ignore the arguments*"

7 **Exhibit R-0002-ENG**, RWE's Writ of Summons dated 26 February 2021 (**Exhibit R-0002-NL**, RWE's Writ of Summons dated 26 February 2021).

- the expectations which RWE claims to have had, including RWE's claim that it reasonably expected not to be confronted with CO_2 reduction measures;

- the absence or existence of causality between the Coal Act and the future damages RWE claims it will suffer from 2030; and

- the absence or existence of damages RWE claims it will suffer from 2030.

13. RWE submitted near identical expert reports from Brattle[8] and Nera[9] in both the Dutch Proceedings and this arbitration. It stated that when drafting its Memorial in these arbitration proceedings "*it could not ignore the Statement of Defence*" submitted by the Netherlands in the Dutch Proceedings, and that failing to address arguments raised by the Netherlands in the Dutch Proceedings would be a violation of RWE's duties "*towards this Tribunal*".[10]

14. RWE did not notify the Tribunal or the ICSID Secretariat of the existence of the Dutch Proceedings. It mentioned them in passing during the First Session on 30 August 2021, some 6 months after RWE had commenced the Dutch Proceedings.[11]

2.2 The German Proceedings commenced by the Netherlands

15. On 10 May 2021, the Netherlands commenced the German Proceedings against the first Claimant before the Higher Regional Court of Cologne, Germany, the jurisdiction in which the first Claimant is seated. The Netherlands submits copies of its pleadings before the German court along with unofficial translations together with this Response.[12] The Netherlands informed the ICSID Secretariat of the German Proceedings and noted that it had commenced the proceedings to comply with its obligations under the EU

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8 **Exhibit R-0003**, Redline of first Brattle report submitted in the Dutch Proceedings against the Brattle report submitted in the arbitration.

9 **Exhibit R-0004**, Redline of Nera report submitted in the Dutch Proceedings against the Nera report submitted in the arbitration.

10 Recording of First Session of 30 August 2021, at 24:24, "*There is a parallel litigation pending before the Dutch courts based on the European Convention on Human Rights instituted by claimants, by the Dutch claimants. And there was a so-called writ of summons, which is the equivalent of a statement of claim, and a statement of defence by the Netherlands which was recently filed. We cannot ignore the statement of defence when writing our Memorial. Would violate our duties to our client and our duties also towards this tribunal if we were to ignore the arguments*"

11 Recording of First Session of 30 August 2021, at 24:24.

12 **Exhibit R-0005-ENG**, The Netherlands' Application to the German Court dated 10 May 2021 (**Exhibit R-0005-DE**, The Netherlands' Application to the German Court dated 10 May 2021), **Exhibit R-0006-ENG**, The Netherlands' submission to the German Court dated 29 September 2021 (**Exhibit R-0006-DE**, The Netherlands' submission to the German Court dated 29 September 2021), **Exhibit R-0007-ENG**, The Netherlands' submission to the German Court dated 21 January 2022 (**Exhibit R-0007-DE**, The Netherlands' submission to the German Court dated 21 January 2022**)**.

Treaties as confirmed by the CJEU in the case of *Slovak Republic v. Achmea* of 6 March 2018 (the "***Achmea* Decision**").[13] The Netherlands also informed the ICSID Secretariat that it would continue to participate diligently in these arbitral proceedings.

16. The German Proceedings have been raised by the Parties on several occasions during these proceedings. At no point did RWE indicate that provisional measures would be necessary or appropriate. In the Request RWE reverses this earlier position. In doing so, the Request does not consider the Tribunal's prior findings and disregards the Netherlands' confirmation not to preclude RWE from continuing the arbitration (Section 2.2.1). Instead, the Request includes a number of submissions as to the nature and purpose of the German Proceedings which are incorrect. In particular, RWE contests that the German Proceedings relate to a question of EU law (Section 2.2.2), and contests the declaratory nature of the relief sought (Section 2.2.3).

2.2.1 The German Proceedings have already been addressed on multiple occasions

17. During the First Session, RWE stated that it "*fully believe*[s] *and ha*[s] *reason to believe that the decision of the German court is of no relevance for these* [arbitral] *proceedings*".[14] This was mirrored in RWE's submissions before the German court where it contended that the German Proceedings were "*objectively pointless*".[15] Thus, RWE's position was that the German Proceedings are not an impediment for this arbitration to proceed. Instead, RWE submitted a Memorial which included what it refers to as an "*ancillary claim*" on the merits on the basis of the German Proceedings.[16]

18. In its application for bifurcation, RWE argued that its ancillary claim on the merits is "*inextricably linked both factually and legally, like two sides of the same coin*"[17] to the Netherlands' intra-EU objection. In other words, RWE's grievances concerning the German Proceedings were meant to be

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13 **Exhibit R-0001**, Letter from the Netherlands to the ICSID Secretariat dated 21 May 2021.

14 Recording of First Session of 30 August 2021, at 26:01.

15 **Exhibit R-0008-ENG**, RWE's submission to the German Court dated 18 March 2022, para. 31**. (Exhibit R-0008-DE**, RWE's submission to the German Court dated 18 March 2022**)**. See also, **Exhibit R-0009-ENG**, RWE's submission to the German Court dated 9 July 2021, paras 16 and 17 (**Exhibit R-0009-DE**, RWE's submission to the German Court dated 9 July 2021). **Exhibit R-0010-ENG**, RWE's submission to the German Court dated 21 January 2022, para. 3 (**Exhibit R-0010-DE**, RWE's submission to the German Court dated 21 January 2022). **Exhibit R-0008-ENG**, RWE's submission to the German Court dated 18 March 2022, para. 6 **(Exhibit R-0008-DE**, RWE's submission to the German Court dated 18 March 2022**)**.

16 Memorial, Chapter F. See also Claimants' Application for Bifurcation and Expedition dated 28 January 2022.

17 Claimants' Application for Bifurcation and Expedition dated 28 January 2022, para. 6.

incorporated into a jurisdictional phase, but did not form the basis of a provisional measures application.

19. The Tribunal rejected the application for bifurcation and held that the ancillary claim on the merits need not be heard in an expedited fashion. This conclusion was based, among others, on the Tribunal's findings that:

- "*the Tribunal is not persuaded that RWE would be prejudiced by a decision not to bifurcate the intra-EU objection*";[18]
- that RWE's "*concerns about procedural integrity* […] *do not appear justified at this stage*";[19] and
- that it is "*credible and reasonable*" for the Netherlands to wish to address the outcome of the German Proceedings when asserting its intra-EU objection in the Counter-Memorial.[20]

20. Since the last round of filings in January 2022, no new facts or circumstances have arisen that warrant granting the application for provisional measures. or justify reversal of the Tribunal's earlier findings.[21]

2.2.2 The German Proceedings are intended to address a question of EU law

21. By way of the German Proceedings the Netherlands has sought a declaration as to whether the EU Treaties preclude or permit intra-EU investor-State arbitration under Article 26(4) ECT and to fulfil its obligations under EU law.

22. By way of background:

- The EU is a treaty-based international organization of 27 Member States. The EU has a unique kind of legal order, the nature of which is peculiar to the EU, with its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation.
- In particular, as the CJEU has noted, EU law is characterized by the fact that it stems from an independent source of law, the Treaties, by

[18] Procedural Order No. 2, para. 49.
[19] Procedural Order No. 2, para. 51(b).
[20] Procedural Order No. 2, paras. 50 and 51.
[21] **Exhibit R-0011**, The Netherlands' letter to the Tribunal dated 3 May 2022.

its primacy over the laws of the Member States[22], and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.[23]

- On the basis of article 19 TEU and articles 267 and 344 TFEU questions relating to the interpretation or application of EU law must be submitted to a European court with the CJEU holding ultimate authority to interpret the EU Treaties.[24] Based on article 4(3) TEU Member States are required to take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of the EU Treaties or resulting from the acts of the institutions of the Community, including to give effect to rulings of the CJEU.[25]

23. In its judgment in *Achmea,* confirmed in *Komstroy*[26]*,* the CJEU held that EU Member States are under an obligation not to submit a dispute concerning the interpretation or application of EU law to any method of settlement other than those provided for in the EU Treaties. Consequently, the CJEU found that the EU Treaties preclude an investor-State arbitration clause in an investment treaty between EU Member States, under which an investor from one of those Member States, may bring proceedings concerning an investment in the other Member State, against that other Member State before an arbitral tribunal.[27] In its subsequent judgment in *PL Holdings* the CJEU further confirmed that EU Member States are required to challenge the validity of the arbitration clause on the basis of which the dispute was brought

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22 **Exhibit RL-0004**, Costa v. Enel, CJEU, Case 6/64, ECLI:EU:C:1964:66, Judgment dated 15 July 1964, p. 594; **Exhibit RL-0005**, Internationale handelsgesellschaft v. Einfuhr- und Vorratstelle Für Getreide und Futtermittel, CJEU, Case C-11/70, ECLI:EU:C:1970:114, Judgment dated 17 December 1970, para. 3; **Exhibit RL-0006**, Opinion 1/91, CJEU, ECLI:EU:C:1991:490, dated 14 December 1991, para. 21; **Exhibit RL-0007**, Opinion 1/09, CJEU, Case C-1/09, ECLI:EU:C:2011:123, dated 8 March 2011, para. 65; **Exhibit RL-0008**, Melloni v. Ministero Fiscal, CJEU, Case C-399/11, EU:C:2013:107, Judgment dated 26 February 2013, para. 59.

23 **Exhibit RL-0009**, Van Gend en Loos v. Nederlandse Tariefcommissie, CJEU, Case 26/62, ECLI:EU:C:1963:1, Judgment dated 5 February 1963, p. 12, and **Exhibit RL-0006**, Opinion 1/91, CJEU, ECLI:EU:C:1991:490, dated 14 December 1991, para. 65.

24 See amongst all, **Exhibit RL-0010**, Opinion 1/17, CJEU, ECLI:EU:C:2019:341, dated 30 April 2019, **Exhibit RL-0011**, Opinion 2/15, CJEU, ECLI:EU:C:2017:376, dated 16 May 2017, **Exhibit RL-0012**, Opinion 2/13, CJEU, ECLI:EU:C:2014:2454, dated 18 December 2014, **Exhibit RL-0007**, Opinion 1/09, CJEU, Case C-1/09, ECLI:EU:C:2011:123, dated 8 March 2011.

25 See **Exhibit R-0012**, Letter from the European Commission to the Netherlands dated 4 March 2022.

26 **Exhibit CL-0012**, ECJ, Judgment of 2 September 2021, Komstroy, ECLIEUC2021655, 02 September 2021.

27 **Exhibit RL-0003**, Slovak Republic v. Achmea BV, CJEU, Case C-284/16, ECLI:EU:C:2018:158, Judgment dated 6 March 2018, para. 60.

before the respective arbitration body by any possible means, including before a national court with jurisdiction.[28]

24. The Netherlands is bound to comply with its obligations under the EU Treaties. Based on the principle of autonomy of EU law and the duty of loyal cooperation which are core elements of EU law, the Netherlands has put the question of whether the EU Treaties preclude intra-EU investor-State arbitration proceedings based on Article 26 ECT before the competent EU court. Importantly, in a letter to the Netherlands the European Commission has recognised that the application the Netherlands had made under Article 1032(2) of the German Code of Civil Procedure (ZPO) was made "*in order to comply with its obligations under Articles 19(1) TEU, 267 and 344 TFEU and the principles of mutual trust and autonomy of* [European] *Union law*".[29]

25. In the German Proceedings the Netherlands has also noted that the German Proceedings are not concerned with the ICSID Convention because the issue in the German Proceedings is whether the EU Treaties preclude intra-EU arbitration under Article 26 ECT (Step 1) regardless of whether the arbitration is conducted under the ICSID Convention or other (Step 2).

26. The competent court is the Higher Regional Court of Cologne. Germany is the home jurisdiction of the first Claimant. German law also expressly provides parties with the opportunity to seek clarification as to an arbitration agreement's validity by way of Article 1032(2) German Code of Civil Procedure (ZPO) in a manner that "*will clarify the Parties' legal positions at an early stage*".[30] This includes clarification on the discrete question of whether the EU Treaties preclude intra-EU investor-State arbitration under the ECT.

27. In its application to the German Court the Netherlands has only raised arguments in relation to EU law. RWE has acknowledged this in these arbitral

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28 **Exhibit CL-0150**, ECJ, C-109/20, Judgment of 26 October 2021 (*Republiken Polen v. PL Holdings Sàrl*), 26 October 2021, para. 52.

29 See **Exhibit R-0013**, Letter from the European Commission to the Netherlands dated 22 September 2021, para. 12

30 **Exhibit R-0001**, Letter from the Netherlands to the ICSID Secretariat dated 21 May 2021.

proceedings,[31] although RWE best describes the content of the German Proceedings in its request for bifurcation:[32]

> "*In substance, Respondent argues in the German Proceedings that no arbitration agreement existed between RWE AG and Respondent under the ECT* ***due to the operation of EU law***"

28. This is also how the Netherlands has presented its case in the German Proceedings. It stated in its submission to the German Courts that:

> "*the question before this Court, however,* ***is not one of the ICSID Convention****, but rather one of EU and German law*".[33]

> "*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 the basis of*** **[European]** ***Union law and German law****.*"[34]

> "*It bears remembering that,* ***as Applicant has stated before, the question before the Senate relates to EU law****.*"[35]

29. Unlike the *Ipek v. Turkey*[36] case, the German Courts have been posed a question pursuant to a different law than the one the Tribunal will apply. RWE's contention that the relief in the German Proceedings sought is general[37] is irrelevant. Under German procedural law the relief sought must mirror the language of the cause of action. It is not possible for parties to deviate from this language. RWE also acknowledges this in the Request.[38]

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31 Recording of First Session of 30 August 2021, at 06:48, The German Proceedings are "*based on the well-known Achmea objection, and have filed approx. 30 page objection, explaining why under EU law these proceedings are inadmissible and the German court should declare so*". See also Recording of First Session of 30 August 2021, at 14:15 ""*the Netherlands has filed objections against jurisdiction of this tribunal with the domestic court in Germany which are based on intra-EU law* [sic]"(emphasis added)

32 Claimants' Application for Bifurcation and Expedition dated 28 January 2022, para. 9 (emphasis added). See also Claimants' Application for Bifurcation and Expedition dated 28 January 2022, para. 24.

33 **Exhibit R-0006-ENG**, The Netherlands' submission to the German Court dated 29 September 2021, para. 5. (**Exhibit R-0006-DE**, The Netherlands' submission to the German Court dated 29 September 2021).

34 **Exhibit C-0129**, Respondent's opposition to RWE AG's suspension application in the German Proceedings dated 31 January 2022, 31 January 2022.

35 **Exhibit R-0014-ENG**, The Netherlands' submission to the German Court dated 20 May 2022 (**Exhibit R-0014-DE**, The Netherlands' submission to the German Court dated 20 May 2022). .

36 **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, 19 September 2019.

37 Request, para. 25.

38 Request, para. 86 "*It has not – and could not under German procedural law – limit its request to a declaration of inconformity of this arbitration with EU law.*"

The fact remains that the Netherlands has only raised arguments in relation to EU law.

2.2.3 The German Proceedings are not injunctive proceedings

30. The German Proceedings are concerned with a request for declaratory and not injunctive relief.

31. First, the relief sought by the Netherlands in the German Proceedings is a declaratory judgment. A decision from the German Court is not an order, much less an order aimed at the Tribunal or an injunction against RWE.

32. Thus, unlike the case of *SGS v. Pakistan*[39] the German Proceedings will not create an impediment for RWE to continue to participate in the arbitration. Also unlike the case of *SGS v. Pakistan*[40] there is no concept of contempt of court in German law that could apply to RWE and result in some form of impediment.

33. Second, the Netherlands has confirmed that it will continue to participate in the ICSID proceedings while the German Proceedings are pending,[41] and it will continue to do so once those proceedings have been concluded, regardless of their outcome.

34. Moreover, the Netherlands confirmed on 22 March 2022 that it "*has no intention to preclude the RWE Claimants from continuing to participate in the arbitration*".[42]

35. Third, the Netherlands has been clear on what it intends to do with a decision from the German courts. It will seek to brief the Tribunal on such a decision as "*the Netherlands wishes to present its intra-EU objection by reference to a decision from the German courts on the issue of whether EU law permits or precludes intra-EU investor-State arbitration in this case*".[43] The

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39 **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, 16 October 2002.

40 **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, 16 October 2002.

41 **Exhibit R-0001**, Letter from the Netherlands to the ICSID Secretariat dated 21 May 2021.

42 **Exhibit C-0131**, Respondent's answer to Claimants' letter of 23 February 2022 concerning the German Proceedings dated 22 March 2022.

43 Response to Claimants' Request for Bifurcation dated 11 February 2022, para. 2. See also, Recording of First Session of 30 August 2021, at 12:51, in relation to the German Proceedings the Netherlands stated: "*we think the Tribunal should have more rather than less information*". See also Recording of First Session of 30 August 2021, at 28:50, in opposition to bifurcating the intra-EU objection "[…] *allows the Tribunal to take into account what is going on in Germany and the parties to take into account what is happening in Germany and to brief on that*"

Netherlands' approach has been recognised by the Tribunal as being "*credible and reasonable*".[44]

36. The Netherlands does not contest the Tribunal's *Kompetenz-Kompetenz*.[45] The Netherlands wishes the Tribunal to have as much information as possible to reach its decision. RWE agreed with this position. It confirmed that it had "*no plan whatsoever to deprive* [the Tribunal] *of learning what the German courts will say*".[46]

3 THE GERMAN PROCEEDINGS ARE NOT IN BREACH OF THE ICSID CONVENTION

37. Article 47 ICSID Convention[47] and Article 39 ICSID Arbitration Rules[48] provide that a request for provisional measures must establish existing rights of the applicant that require protection.[49] The German Proceedings are not in violation of any of RWE's purported rights.

38. The German Proceedings are not in breach of Article 41, even if that were a 'right' of RWE, because they do not preclude the Tribunal from being the judge of its own competence (Section 3.1). Nor are the German Proceedings in violation of the exclusive remedy clause in Article 26 ICSID Convention (Section 3.2), because that clause does not apply in this case, and does not apply to the EU law question that is before the German courts. Similarly, the German Proceedings do not affect the integrity of these arbitral proceedings, because they do not preclude Claimants from presenting their case (Section 3.3). Finally, RWE's assertions in relation to the right to arbitrate are unfounded (Section 3.4).

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44 Procedural Order No. 2, para 51.

45 **Exhibit R-0006-ENG**, The Netherlands' submission to the German Court dated 29 September 2021, para 86 "*Accordingly, § 1032 (2) ZPO and Art. 41 ICSID Convention do not compete with each other, but can coexist*" (**Exhibit R-0006-DE**, The Netherlands' submission to the German Court dated 29 September 2021).

46 Recording of First Session of 30 August 2021, at 15:19.

47 Article 47 ICSID Convention: "*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*." (Emphasis added).

48 Rule 39(1) Rules of Procedure for Arbitration Proceedings: "*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*." (Emphasis added.)

49 **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 dated 29 March 2017, para. 232.

3.1 The German Proceedings do not impinge on the Tribunal's *Kompetenz-Kompetenz* (Article 41 ICSID Convention)

39. The German Proceedings have no bearing on the Tribunal's *Kompetenz-Kompetenz* under Article 41 ICSID Convention.

40. The German Proceedings are concerned with a request for declaratory relief and they render no judgment on the Tribunal's competence under the ICSID Convention or the ECT. Moreover, Article 41 ICSID Convention does not preclude that another judicial body decides a matter that may be relevant to a decision by an ICSID tribunal for its competence (Section 3.1.1).

41. Not only do the German Proceedings not impinge on the Tribunal's authority to decide on its competence, its *Kompetenz-Kompetenz* is also left unaffected by virtue of the nature of the German Proceedings (Section 3.1.2).

3.1.1 The German Proceedings have no bearing on the Tribunal's *Kompetenz-Kompetenz* under Article 41 ICSID Convention

42. Article 41 ICSID Convention provides that:

> "*(1) The Tribunal shall be the judge of its own competence.*
>
> *(2) 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 which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.*"

43. The German Proceedings do not preclude the Tribunal from being the judge of its own competence.

44. First, the German Proceedings are concerned with a request for declaratory relief. They do not result in an order directed at the Tribunal, much less an order that precludes the Tribunal from taking a decision on its competence.

45. Regardless of the outcome of the German Proceedings, the Tribunal retains the authority to decide on its own competence.[50] This is also in line with the position taken by RWE in these arbitral proceedings. RWE has submitted that

[50] The German Proceedings are therefore unlike the provisional measures requested by RWE which, if granted, would actually prevent the German court from deciding whether it is competent to rule on the EU law question before it.

as a matter of German law[51] and international law[52] the Tribunal is not bound by the German Proceedings.

46. Second, as mentioned in para 25 above the German Proceedings do not pass judgment on the Tribunal's powers and competence under the ICSID Convention or the ECT. The German Proceedings are concerned with a question of interpretation and application of EU law – namely whether the EU Treaties permit or preclude the intra-EU application of the investor-State arbitration clause in the ECT – not a question relating to the competence of the Tribunal under the ICSID Convention. RWE's statements regarding delocalization are therefore also without merit.[53]

47. In the German Proceedings, the Netherlands has expressly submitted that the German court "*is not called upon to decide a question of the ICSID Convention, but to clarify a question of* [European] *Union law and German law*".[54]

48. RWE has previously acknowledged that the Netherlands application to the German court pertained to EU law,[55] and continues to do so in the Request.[56] Similarly, RWE has noted that a decision by the German court would be made "*as a matter of German and EU law*". It is a matter of interpretation and application of EU law that is before the German court, not one of the ICSID Convention.

49. Third, while Article 41 ICSID Convention grants the Tribunal the authority to decide on its own competence, it does not provide that the Tribunal has the *exclusive* authority to decide on all matters that may be relevant to its decision on competence. This is confirmed by ICSID case law. In *SPP v. Egypt*, the ICSID tribunal found that the question of whether another method of dispute resolution – ICC arbitration – had been agreed on, was a question

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51 Recording of First Session of 30 August 2021, at 15:43.

52 Memorial, para. 406.

53 Request, para. 57.

54 **Exhibit R-0006-ENG**, The Netherlands' submission to the German Court dated 29 September 2021, para.5 "*However, the Senate is not called upon to decide a question of the ICSID Convention, but to clarify a question of Union law and German law*." (**Exhibit R-0006-DE**, The Netherlands' submission to the German Court dated 29 September 2021).

55 Recording of First Session of 30 August 2021, at 06:48, The German Proceedings are "*based on the well-known Achmea objection, and have filed approx. 30 page objection, explaining why under EU law these proceedings are inadmissible and the German court should declare so*". See also Recording of First Session of 30 August 2021, at 14:15 ""*the Netherlands has filed objections against jurisdiction of this tribunal with the domestic court in Germany which are based on intra-EU law*"(emphasis added)

56 Application, para. 96, RWE noted a decision by the German court would be done "*as a matter of German and EU law*"

preliminary to a finding of competence by the ICSID tribunal.[57] The answer to that question was in that case determinative of whether the ICSID tribunal had jurisdiction.

50. The ICC tribunal had previously found that it had jurisdiction. Egypt had subsequently made an application to the French courts for annulment of the ICC award on the basis that the ICC tribunal had incorrectly accepted jurisdiction. The ICSID tribunal found that, although as the judge of its own competence it was competent to resolve such a question, the question was now also *sub judice* at the French Court of Cassation, and was thus confronted with the possibility that the preliminary question would be answered differently by two separate and independent tribunals. The ICSID tribunal thus chose to stay the proceedings until such time as the question of ICC jurisdiction had been finally resolved by the French courts.[58]

51. This decision shows that it is possible and not in contravention of Article 41 ICSID Convention that another judiciary body decides on matters relevant to an ICSID tribunal's decision on its competence. This is also confirmed by Prof. Schreuer in his commentary on Article 41 ICSID Convention: "*Under certain circumstances, a domestic court's decision may be preliminary to an issue of jurisdiction to be decided by an ICSID tribunal*".[59] Similarly, the Tribunal has previously decided that it is "*credible and reasonable*"[60] for the Netherlands to use a decision from the German courts in making a jurisdictional defence before the Tribunal.

52. None of the cases and literature cited by RWE contradict the foregoing. The cases cited in Section D.I.2 of the Request state no more than that the ICSID tribunal has the authority to decide on its competence. The German Proceedings do not purport to decide the Tribunal's competence, as those proceedings are concerned with the interpretation and application of the EU Treaties, not of the ICSID Convention. The quotes in paras. 79 and 80 of the Request from *Perenco v. Republic of Ecuador* are not about the tribunal's *Kompetenz-Kompetenz* (Article 41 ICSID Convention), but about the tribunal's jurisdiction (Article 25 ICSID Convention) and the exclusivity of ICSID arbitration (Article 26 ICSID Convention). Similarly, the reference to

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57 **Exhibit RL-0013**, Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Preliminary Objections to Jurisdiction, 27 November 1985, paras. 79-86.

58 **Exhibit RL-0013**, Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Preliminary Objections to Jurisdiction, 27 November 1985, paras. 79-86.

59 **Exhibit RL-0002**, Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair. The ICSID Convention: A Commentary (2nd ed.), Cambridge: Cambridge University Press, 01 January 2009, p. 522 (emphasis added).

60 Procedural Order no. 2, para. 51.

Holiday Inns v. Morocco pertains to the submission the investor made before the tribunal and was based on an interpretation of the case law of the International Court of Justice. It did not pertain to Article 41 of the ICSID Convention.

53. In a similar vein, the quote from Charles Brower and Ronald Goodman in para. 81 of the Request simply states that if an ICSID tribunal's jurisdiction is established, such jurisdiction is "*hermetically exclusive*", not its "*ability to decide on its own jurisdiction*".[61] This is merely an expression of the principle in Article 26 ICSID Convention that, unless stated otherwise, consent is deemed to be consent to ICSID arbitration to the exclusion of any other remedies. That is not to say, however, that the determination of all matters that may be relevant to its decision on competence is exclusively for the ICSID tribunal to decide.

3.1.2 The German Proceedings, as a matter of German law, have no bearing on the *Kompetenz-Kompetenz* of arbitral tribunals

54. Not only do the German Proceedings not impinge on the Tribunal's authority to decide on its competence under the ICSID Convention or the ECT, its *Kompetenz-Kompetenz* is also left unaffected by virtue of the nature of the German Proceedings.

55. Indeed, Article 1032(2) ZPO, pursuant to which the German Proceedings have been commenced, is designed to co-exist with the *Kompetenz-Kompetenz* of arbitral tribunals.

56. As is clear from the text of Article 1032 ZPO, its scope of application takes into account the *Kompetenz-Kompetenz* of arbitral tribunals:

> "*(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if the respondent raises an objection prior to the beginning of the oral hearing on the substance of the dispute, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.*
> *(2) Prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible.*
> *(3) Where an action or application referred to in subsection 1 or 2 has been brought, arbitral proceedings may nevertheless be commenced*

[61] The full quote from Brower and Goodman reads: "*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* [because] [o]*nly by asserting itself in this way could it effectively protect its ability to decide on its own jurisdiction, which, if established, is hermetically exclusive.*"

or continued, and an arbitral award may be made, while the issue is pending before the court."

57. First, it determines that an application pursuant to Article 1032(2) ZPO is only admissible before the arbitral tribunal has been constituted, which is the case here as the application in the German Proceedings was made before the Tribunal was constituted.[62]

58. Second, Article 1032(3) ZPO expressly provides that "[w]*here an action or application referred to in subsection 1 or 2 has been brought,* ***arbitral proceedings may nevertheless be commenced or continued, and an arbitral award may be made, while the issue is pending before the court***". For the avoidance of doubt, there is also no provision in Article 1032 ZPO (or elsewhere in the ZPO) that either requires the arbitral tribunal to refrain from deciding on its own competence after a final decision has been rendered by the court or that provides that the arbitration should stop. In no way, therefore, do the German Proceedings impinge on the Tribunal's competence to decide on its own competence under Article 41 ICSID Convention, nor do they aim to prevent it from handing down an arbitral award.

3.2 Accordingly, the relationship between Article 1032(2) ZPO and Article 41 ICSID Convention is one of coexistence, not conflict.[63] The German

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62 See **Exhibit R-0005-ENG**, The Netherlands' Application to the German Court dated 10 May 2021, paras. 18-29 (**Exhibit R-0005-DE**, The Netherlands' Application to the German Court dated 10 May 2021).27.

63 See **Exhibit RL-0014-ENG**, German Federal Court of Justice 30 June 2011 (III ZB 59/10), SchiedsVZ 2011, 281, para. 11: "*Die Anträge sind nicht nachträglich unzulässig geworden. Vielmehr geht das Gesetz bei einem zulässig vor Bildung des Schiedsgerichts gestellten Antrag von einem anschließenden Nebeneinander des staatlichen und schiedsrichterlichen Verfahrens aus.*" In English: "*The Requests have not become subsequently inadmissible. In fact, the Code supposes that if an admissible application has been filed before the constitution of the arbitral tribunal the court proceedings and the arbitral proceedings run in parallel subsequently.*" (**Exhibit RL-0014-DE**, German Federal Court of Justice 30 June 2011 (III ZB 59/10), SchiedsVZ 2011, 281)
In that sense also **Exhibit RL-0015**, N. Erk-Kubat, 'Chapter 2: Competence-Competence', in Nadja Erk-Kubat, Parallel Proceedings in International Arbitration: A Comparative European Perspective, International Arbitration Law Library, Volume 30 (Kluwer Law International 2014) p. 37: "[…] *the question as to whether arbitration is admissible may furthermore be determined by a national court prior to the constitution of the arbitral tribunal (§ 1032(2) ZPO); and last but not least, § 1032(3) ZPO holds that, while an action or application as to the arbitral tribunal's authority is pending before the national court, the arbitral proceedings may nevertheless be commenced or continued. Thus, national courts and arbitral tribunals seem more like co-actors in the determination of the arbitrators' jurisdiction.*"
RWE refers to a myriad of provisions under German law that are inapplicable, Request, para. 16. See also **Exhibit RL-0016-ENG**, Beck-Online, die Datenbank, Paragraph 1025 ZPO **(Exhibit RL-0016-DE**, Beck-Online, Die Datenbank, Paragraph 1025 ZPO**)**, the provisions of the tenth book of the ZPO only apply to arbitrations seated in Germany: "*The provisions of the present Book are to be applied if the place of arbitration as defined in section 1043 (1) is located in Germany." There are only limited exceptions to this rule, Section 1032 ZPO being one of them. All these exceptions are mentioned in Section 1025 (2) ZPO: The provisions of sections 1032, 1033 and 1050 are to be applied also in those cases in which the place of arbitration is*

Proceedings are also not contrary to the exclusive remedies clause in Article 26 ICSID Convention

59. The German Proceedings likewise do not engage the exclusive remedy clause in Article 26 ICSID. The clause does not apply to the German Proceedings (Section 3.2.1). It also does not apply by virtue of RWE's conduct (Section 3.2.2). In any event, it does not apply to the interpretation and application of the EU Treaties (Section 3.2.3). Finally, the German Proceedings concern a subject that is not at issue in this arbitration (Section 3.2.4).

3.2.1 The exclusive remedy clause in Article 26 ICSID Convention does not apply to the German Proceedings

60. Article 26 ICSID Convention provides:

> "***Consent of the parties to arbitration*** ***under this Convention shall****, unless otherwise stated,* ***be deemed consent to such arbitration to the exclusion of any other remedy****. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.*"
> (Emphasis added.)

61. First, by its terms, Article 26 ICSID Convention provides that ICSID exclusivity applies only if there is consent to arbitration.[64]

62. Accordingly, the question of whether there is consent to arbitration cannot itself be subject to the exclusive remedies clause. Consent is required *before* there is any ICSID exclusivity. The issue of whether there is consent, and matters preliminary thereto, cannot itself be subject to exclusivity, because consent is required for exclusivity to apply.

63. Similarly, the distinction in Article 26 between *remedies* and consent confirms that any ICSID exclusivity pertains to the merits of the dispute, not to the preliminary issue of consent.

64. The German Proceedings are not concerned with the merits of the investment dispute raised by Claimants, but focus exclusively on the preliminary question of whether the EU Treaties preclude an EU Member State from

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located abroad or has not yet been determined". Hence, Section 1040 ZPO applies only to arbitrations with seat in Germany and Section 1059 ZPO only applies to German arbitral awards.

[64] See, for example, **Exhibit RL-0017**, Iberdrola Energia S.A. v. Republic of Guatemala II, PCA Case No. 2017-41, Final Award, 24 August 2020, para. 342: "*Importantly, the effect of Article 26 only "operates from the moment of valid consent.*""

giving consent to intra-EU investor-State arbitration under Article 26 ECT.[65] Accordingly, the German Proceedings do not fall within the scope of the exclusive remedy clause of Article 26 ICSID Convention.

65. Second, on RWE's analysis the German Proceedings do not implicate Article 26 ICSID Convention. RWE states that the Dutch Proceedings do not contravene Article 26 ICSID Convention as they do not include one of the Claimants as a party to the dispute, relate to different legal questions, have not been submitted under Article 26 ECT, and do not concern questions the Tribunal will have to decide.[66]

66. Therefore even if RWE were correct that Article 26 ICSID Convention were impinged (which it is not), the same applies to the German Proceedings. The second Claimant is not a party to the German Proceedings and neither case has been submitted under Article 26 ECT. Both proceedings concern separate legal questions with separate legal bases, namely EU law and the European Convention on Human Rights ("**ECHR**") respectively. Indeed, both the EU Treaties and the ECHR contain provisions designating the appropriate fora to interpret their provisions. Therefore, if RWE is correct that Article 26 ICSID Convention is not implicated by the Dutch Proceedings, the same must be true for the German Proceedings.

3.2.2 The exclusive remedy clause in Article 26 ICSID Convention does not apply by virtue of Claimants' conduct

67. Even if Article 26 ICSID Convention were presumed to be implicated (which it should not), the exclusive remedy clause in Article 26 ICSID Convention does not apply because Claimants' conduct amounts to consent to non-exclusivity and/or a waiver of such exclusivity.

68. First, the wording of Article 26 ICSID Convention indicates that the exclusivity is not absolute. As noted above, the "*deemed*" consent under Article 26 ICSID Convention is a presumption. Further, the provision stipulates that exclusivity applies "*unless otherwise stated*", thus showing that deviation is possible. Consent to non-exclusivity can be given in a "*tacit*" manner, and it is so given when a party pleads its case on the merits before a non-ICSID forum:

> "***Consent to the jurisdiction of domestic courts*** *in derogation of the exclusive remedy rule of Art. 26* ***need not be given explicitly****.*

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[65] See **Exhibit R-0013**, Letter from the European Commission to the Netherlands dated 22 September 2021, para. 18 "*It is precisely the existence of such consent that is contested in the proceedings brought on the basis of § 1032(2) of the German Code of Civil Procedure.*"

[66] Request, para. 73.

> ***Tacit consent may be seen in pleading on the merits before the non-ICSID forum*** *without invoking ICSID's exclusive jurisdiction."*[67] (Emphasis added.)

69. Here, RWE did not merely plead a case on the merits before a non-ICSID forum. As already mentioned above in para. 12, RWE commenced parallel proceedings on the merits of the dispute before the domestic courts of the Netherlands. In the Dutch Proceedings, the second Claimant is seeking the same relief (monetary damages) from the same counterparty (the Kingdom of the Netherlands) in relation to the same regulatory measure (the Coal Act) in respect of the same purported investment (the Eemshaven Plant), as they are claiming before this Tribunal.

70. Consequently, RWE's actions indicate that it cannot be "*deemed*" to have consented to exclusivity. Further, even if consent to arbitration was presumed to exist, there would not be consent to such arbitration to the exclusion of proceedings before the Parties' domestic courts. RWE's conduct of commencing parallel proceedings before the Dutch courts constitutes consent to derogate from ICSID exclusivity as far as proceedings before the Parties' domestic courts are concerned.

71. Second, Claimants' decision to pursue their claim for monetary compensation both in proceedings before this Tribunal and in the courts of the Netherlands also constitutes a waiver of any exclusivity under Article 26 ICSID Convention.

72. The notion of waiver by conduct is well-accepted under international law. Legal commentators have noted that "[e]*ach party, by performing certain procedural steps*" may "*tacitly waive*" rights within an arbitration.[68] ICSID tribunals have likewise accepted that parties can implicitly waive treaty rights.[69] This includes the right to exclusivity, as "*failure to protest the*

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67 See also **Exhibit RL-0002**, Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair. The ICSID Convention: A Commentary (2nd ed.), Cambridge: Cambridge University Press, 01 January 2009, p. 365.

68 **Exhibit RL-0018**, Bernardo M. Cremades, Ignacio Madalena, "Parallel Proceedings in International Arbitration", Arbitration International (Park edn, 2008), p. 511. See also generally **Exhibit RL-0019**, Luiz Olavo Baptista, "Chapter 5. Parallel Arbitrations – Waivers and Estoppel" in Bernardo M. Cremades and Julian D.M. Lew (eds), Parallel State and Arbitral Procedures in International Arbitration, Dossiers of the ICC Institute of World Business Law, Volume 3; **Exhibit RL-0020**, Fouchard, Gaillard, Goldman on International Commercial Arbitration (1999), 'Waiver', p. 441.

69 See, for example, **Exhibit RL-0021**, TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award dated 19 December 2008, the Tribunal held that for waiver to be possible there had to be "*a clear indication in the contract itself or elsewhere that the Parties to the contract intended in such a manner"*, see para. 58.

institution of domestic proceedings may be interpreted as waiver of the exclusive-remedies rule".[70]

73. In *Euram v. Slovakia*[71] an investor had brought proceedings both before the national courts and an UNCITRAL tribunal. Whereas the investor had claimed that the national proceedings were intended merely to conserve the investor's rights, the *Euram* tribunal concluded that the investor's conduct, which included actively pursuing a "*decision on the merits*", and not informing the court of "*changed circumstances in the arbitration*", exhibited an "*overall pattern of conduct*" that amounted to a waiver of the investor's right to the UNCITRAL arbitration altogether.[72] The arbitral tribunal held that under the circumstances a "*reasonable person would have concluded that* [the investor][…] *was actively pursuing* [the domestic litigation] *with a view to obtaining a judgment in its favour irrespective of whatever might happen in the arbitration*".[73]

74. In the present case RWE waived, without reservation, its alleged right to exclusivity under Article 26 ICSID Convention when it commenced the Dutch Proceedings roughly one month after it commenced these arbitral proceedings, in derogation of the exclusive remedy clause in Article 26 ICSID Convention. RWE did so without making any reservation with respect to its alleged rights under the ICSID Convention.[74] On the contrary, RWE withheld the initiation of the present arbitration proceedings from the Dutch court and has instead argued extensively why the Dutch civil courts are the appropriate forum to decide the matter. In similar fashion, it has also withheld the commencement of the Dutch Proceedings from this Tribunal for months. Accordingly, RWE cannot be said to have retained any alleged right to exclude proceedings before the Parties' domestic courts.

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70 **Exhibit RL-0022**, Daniel Robert Kaldemiris, Noah Rubins, et. al, "ICSID Convention, Chapter II, Article 26 (Exclusive Remedy), in Loukas A. Mistelis (ed), Concise International Arbitration, 2nd edition, 2015, p. 84

71 **Exhibit RL-0023**, European American Investment Bank AG (EURAM) v. Slovak Republic, UNCITRAL (1976), Second Award on Jurisdiction dated 4 June 2014.

72 **Exhibit RL-0023**, European American Investment Bank AG (EURAM) v. Slovak Republic, UNCITRAL (1976), Second Award on Jurisdiction dated 4 June 2014, para. 264.

73 **Exhibit RL-0023**, European American Investment Bank AG (EURAM) v. Slovak Republic, UNCITRAL (1976), Second Award on Jurisdiction dated 4 June 2014, para. 264.

74 **Exhibit RL-0023**, European American Investment Bank AG (EURAM) v. Slovak Republic, UNCITRAL (1976), Second Award on Jurisdiction dated 4 June 2014, para. 205: "[…] *the claimants, despite having the option of commencing arbitration under the contract, deliberately chose to pursue their claims through summary court proceedings based on bills of exchange without making any reservation with regard to the arbitration agreement or having any other compelling reason for doing so*."

3.2.3 The exclusive remedy clause in Article 26 ICSID Convention does not apply to the interpretation and application of rights and obligations of EU Member States under the EU Treaties

75. The Netherlands reserves the right to address this issue in more detail in its jurisdictional objections. For now, it suffices to say that the exclusive remedy clause in Article 26 ICSID Convention cannot apply to proceedings that seek to determine the rights and obligations of EU Member States under the EU Treaties, such as the German Proceedings. There can be no "*consent to arbitration*" to decide those matters in this or any other arbitration, much less consent to the exclusion of the jurisdiction of the EU courts.[75] Indeed, RWE does not claim that there is exclusive consent for this Tribunal to resolve issues of interpretation and application of the EU Treaties.

76. First, as the CJEU has confirmed in the *Achmea* Decision, the EU Treaties provide that the courts of the EU Member States and ultimately the CJEU are the only bodies competent to decide on the interpretation and application of EU law:[76]

> "*In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved,* ***the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law*** *(Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 174).*
>
> *In that context, in accordance with Article 19 TEU,* ***it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law*** *in all Member States and to ensure judicial protection of the rights of individuals under that law."* (Emphasis added.)

77. If other bodies than the courts of the EU Member States decide on matters pertaining to the interpretation and application of EU law, the consistency of EU law can no longer be ensured because these bodies cannot refer such matters to the CJEU.

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75 That the German Proceedings pertain to EU law is recognized by RWE, see Recording of First Session of 30 August 2021, at 06:48, Recording of First Session of 30 August 2021, at 14:15, Claimants' Application for Bifurcation and Expedition dated 28 January 2022, paras. 9 and 24.

76 **Exhibit RL-0003**, Slovak Republic v. Achmea BV, CJEU, Case C-284/16, ECLI:EU:C:2018:158, Judgment dated 6 March 2018, paras. 35, 36. See also **Exhibit CL-0012**, ECJ, Judgment of 2 September 2021, Komstroy, ECLIEUC2021655, 02 September 2021, para. 45. "[…] *it is for the national courts and tribunals and the Court to ensure the full application of that law in all the Member States and to ensure effective judicial protection of the rights of individuals under that law* […]". *The autonomous nature of EU the legal order is a long standing principle of EU law that flows from Articles 2, 4(3) and 19 of the Treaty on the European Union and Articles 267 and 344 of the Treaty on the Functioning of the European Union.*"

78. Second, the CJEU has moreover confirmed in the *Achmea* Decision that EU Member States are under an obligation not to submit a dispute concerning the interpretation or application of EU law to any method of dispute settlement other than those provided for in the EU Treaties – i.e. to submit such disputes only to the courts of EU Member States and the CJEU:[77]

> "[…] *according to settled case-law of the Court,* ***an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court.*** *That principle is enshrined in particular in Article 344 TFEU, under which the* ***Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties*** *(Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 201 and the case-law cited).* […]"
> (Emphasis added.)

79. The appropriate forum to decide whether the EU Treaties preclude or permit an EU Member State to give a particular consent to intra-EU investor-State arbitration is therefore the courts of the EU Member States under the supervision of the CJEU. In this case, the German courts in RWE's own jurisdiction.

80. Third, EU Member States like the Netherlands and Germany are under an obligation to ensure that issues of interpretation and application of EU law, are put before the EU courts.[78] They are under the duty of loyal cooperation and must take "*any appropriate measure*" to ensure fulfilment of their obligations arising out of the EU Treaties.[79]

81. The CJEU has confirmed in *PL Holdings* that this includes the obligation to challenge before the competent courts any attempt to remove disputes

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77 **Exhibit RL-0003**, Slovak Republic v. Achmea BV, CJEU, Case C-284/16, ECLI:EU:C:2018:158, Judgment dated 6 March 2018, paras. 32, 35, 36. See also **Exhibit CL-0012**, ECJ, Judgment of 2 September 2021, Komstroy, ECLIEUC2021655, 02 September 2021, para. 42.

78 Including Article 4(3) Treaty on the European Union; and Articles 260, 288, 291. 344 of the Treaty on the Functioning of the European Union.

79 **Exhibit RL-0003**, Slovak Republic v. Achmea BV, CJEU, Case C-284/16, ECLI:EU:C:2018:158, Judgment dated 6 March 2018, para. 34. "*It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 168 and 173 and the case-law cited).*"
(Emphasis added.)

regarding the interpretation or application of EU law from the judicial system of the EU.[80]

82. Accordingly, the Netherlands' application to the German courts to decide whether the EU Treaties preclude a purported offer of intra-EU investor-State arbitration is mandated by the EU Treaties. Nothing in the ICSID Convention precludes the Netherlands from complying with its obligation under the EU Treaties to ensure that issues of interpretation and application of those treaties are put before the EU courts.

83. Indeed, RWE fails to provide any authority for the proposition that the exclusive remedy clause in Article 26 ICSID Convention could be stretched to apply to another treaty, such as the EU Treaties, in a way that it deprives adjudicative bodies specifically designated by another treaty to interpret that treaty from exercising their jurisdiction. This is all the more so in relation to the EU Treaties as they expressly designate other bodies than an ICSID tribunal (namely the EU courts) as having *exclusive* jurisdiction to decide on the interpretation and application of EU law as far as it concerns obligations of EU Member States.

84. Article 26 ICSID Convention is not a means to deprive bodies expressly designated by another treaty from their exclusive jurisdiction to resolve issues of interpretation and application of that other treaty.

3.2.4 The German Proceedings concern issues not before the Tribunal

85. In any event, the issue of interpretation and application of the EU Treaties that is currently before the German courts is not before the Tribunal. Where parallel proceedings do not involve the same issues before an arbitral tribunal, provisional measures which halt the parallel proceedings are not justified.[81]

86. RWE does not invoke or mention the EU Treaties in its application for Arbitration. The Netherlands has yet to make a proper submission to the Tribunal on the matter of jurisdiction or the merits of RWE's case by reference to the EU Treaties. As noted in para. 31, the Netherlands has stated that it would make this submission by reference to a decision from the German courts. Until the Netherlands makes its submission, the matter that is before

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80 **Exhibit CL-0150**, ECJ, C-109/20, Judgment of 26 October 2021 (*Republiken Polen v. PL Holdings Sàrl*), 26 October 2021, para. 52-54.

81 **Exhibit CL-0160**, Plama v. Bulgaria, ICSID Case No. ARB/93/24, Order of 6 September 2005, paras. 44-45.

the German courts cannot be said to be before this Tribunal – much less exclusively.

3.3 The German Proceedings do not affect the integrity of the arbitral proceedings

87. RWE invokes the integrity of the arbitral proceedings as a separate right for which it seeks protection through provisional measures. It argues that without the provisional measures, it would not be able to participate meaningfully in these arbitral proceedings. This claim is without merit.

88. First, the right to integrity of the arbitral proceedings as a ground for granting provisional measures has only been accepted in exceptional circumstances where a party had been obstructed in its ability to present its case in the arbitral proceedings or denied justice. The cases cited by RWE, similarly, concern persons and entities associated with claimants who individually faced *criminal* prosecutions and even physical detention by host states. Such circumstances clearly do not arise here.

89. For example, in *Quiborax v. Bolivia*, the Bolivian government had used criminal proceedings against the claimant's former business partner to pressure him into confessing in exchange for leniency. The confession would effectively prevent the former business partner from testifying in favour of the claimant in the arbitral proceedings. The German Proceedings are not criminal proceedings, nor do they obstruct witnesses or involve confiscation of documents.

90. Second, RWE fails to provide any meaningful explanation, much less proof, for the suggestion that the German Proceedings would affect the integrity of this arbitration. The German Proceedings result in a declaratory judgment. That judgment – being a declaration of law – expresses what applies under EU law in any event, regardless of the German courts affirming such through a declaration. Similarly, the Tribunal has previously decided that RWE's "*concerns about procedural integrity* […] *do not appear justified*".[82]

[82] Procedural Order No. 2, para. 51(b).

3.4 RWE's claims in relation to the right of access to arbitration are without merit

91. Finally, RWE argues that the German Proceedings deprive it of an alleged general right of access to arbitration provided under the ECT, which purportedly requires preservation by means of provisional measures.

92. With this claim, RWE is effectively trying to relitigate issues that have already been addressed and decided by the Tribunal in its decision on RWE's bifurcation request. The Request is an attempt to compel the Tribunal to hear the Netherlands' intra-EU objections on an expedited basis, even though the Tribunal has already determined that separate preliminary resolution of the intra-EU objection (as well as RWE's ancillary claim) need not be heard on an expedited basis.[83]

93. Despite referring to numerous cases that mention access to arbitration, RWE does not cite a case in which provisional measures were awarded on this basis. Consequently, these decisions do not set a precedent, nor serve as an appropriate basis, for the alleged grounds for provisional measures. Instead, RWE relies on tribunal decisions which relate to questions of jurisdiction. In fact RWE's submission reads more like argumentation on jurisdiction, and in particular the intra-EU objection, than a provisional measures application. RWE even frames the 'right of access to arbitration' that it claims is at risk by reference to dictum on the EU Treaties.[84]

94. Further support can be found in RWE's contention that its right of access to arbitration "*is equally the subject of Claimants' ancillary claim*".[85] It is this same ancillary claim that was the subject of RWE's bifurcation request on the basis that it was "*inextricably linked both factually and legally*" to the intra-EU objection.[86] The Tribunal has denied dealing with these arguments on an expedited basis.

95. Even if RWE was able to establish that a general right of access to arbitration could generally constitute appropriate basis for provisional measures (*quod non*), such right would not be impinged by the German Proceedings. As set out above in Section 2.2.3, the German Proceedings do not preclude these arbitral proceedings. Moreover, the declaratory judgment that ends the German proceedings states what the law is and does not create obligations.

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83 Procedural Order No. 2.
84 Request, para. 99.
85 Request, para. 103.
86 Claimants request for bifurcation, para. 6.

4 REQUIREMENTS FOR PROVISIONAL MEASURES ARE NOT MET

96. Article 47 ICSID Convention and Article 39 ICSID Arbitration Rules provide that provisional measures may be recommended to preserve rights only where there are circumstances that "*require*" that such measures are taken before the final award.

97. Tribunals have repeatedly held that provisional measures should be granted only in exceptional circumstances.[87] The burden of proof of establishing such circumstances lies with the party seeking such an exceptional intervention.[88] Tribunals are expected to exercise rigorous caution and restraint in granting provisional measures.[89] Provisional measures are awarded only in situations of *necessity* and *urgency* to avoid actual and imminent harm, and where the measure requested does not impose a disproportionate burden on the other party.[90]

98. This is not only because of the ability of provisional measures to affect States. It is also because they can be given at a time when an arbitral tribunal cannot yet benefit from a complete record of submissions on the factual and legal matters required to ascertain that it has jurisdiction over the disputed claim and that the disputed claim has a basis in law and in fact.[91]

99. Moreover, RWE AG approaches the Tribunal with the extraordinary request to stay proceedings in its own jurisdiction before the courts of the Contracting State – the Federal Republic of Germany – that it alleges to derive its ECT rights from.

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87 **Exhibit RL-0024**, Emilio Augustín Maffezini v. Spain, ICSID Case No. ARB/97/7, Procedural Order No. 2 dated 28 October 1999, para. 10.

88 *Ibid.*

89 **Exhibit RL-0025**, ICSID, History of the ICSID Convention, Vol. II-1, Doc. 31, Consultative meeting of legal experts, Summary record dated 20 July 1964, p. 616. Chairman Aron Broches stated: "[…] *experience indicated that arbitral tribunals were extremely loath to order provisional or interim measures and one should have some confidence in the self-restraint which tribunals would impose upon themselves*." (Emphasis added.) **Exhibit RL-0026**, Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on provisional measures dated 17 August 2007, para. 59.

90 **Exhibit RL-0026**, Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on provisional measures dated 17 August 2007, para. 59.

91 **Exhibit CL-0134**, Perenco Ecuador Ltd. v. Ecuador, ISCID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, 08 May 2009, par. 43: "*But the Article* [Article 47] *and the Rule* [Rule 39] *also recognise that a Tribunal must be slow to grant to a party, before a full examination of the merits of the case, a remedy to which, on such examination, the party may be found to be not entitled. The Tribunal must be even slower where, as here, the jurisdiction of the tribunal to entertain the dispute has not been established.*"; **Exhibit RL-0025**, ICSID, History of the ICSID Convention, Vol. II-2, Doc. 45, Comments and observations of member governments on the draft convention dated 23 November 1964, p. 655: Chairman Aron Broches stated that provisional measures "*deal with matters not yet certain*".

100. The Netherlands further notes that RWE decided to bring this Request almost a year after the facts that it claims gave rise to its Request.

101. As will be set out in this Section, there is no necessity or urgency to grant the provisional measures sought by RWE because there is no threat of actual and imminent harm. The provisional measures would also impose a disproportionate burden on the Netherlands by forcing it to breach its obligations under the EU Treaties.

4.1 There is no *necessity and urgency* to grant the provisional measures requested

102. Arbitral tribunals have consistently held that provisional measures can be recommended only where they are *necessary* to preserve rights and doing so is *urgently* required.[92] Provisional measures can only be considered "*necessary*" and "*urgent*" when there is an imminent threat of actual harm to the rights invoked by the applicant[93] that cannot be met with meaningful relief in the award.[94] RWE fails to establish any such necessity and urgency.

103. First, RWE fails to provide an explanation for how the German Proceedings would obstruct the first Claimant from participating in this arbitration. Indeed in the Request any negative impact is phrased in the conditional as a harm that *could* occur if subsequent actions were taken. As RWE puts it, the "*risk for Claimants stems from the possibility that a German court* […] *could form the basis* "[95] of follow-on proceedings. This does not provide a basis for granting an exceptional remedy like a provisional measure. To the contrary, RWE's resort to inferences about alleged future intentions confirms that there is no imminent harm let alone one that warrants provisional measures. As the tribunal in *Occidental v. Ecuador* stated:

> "*In other words,* ***the Claimants are seeking a provisional measure in order to prevent an action which they are not even sure is***

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92 **Exhibit RL-0026**, Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on provisional measures dated 17 August 2007, para. 59 "[…] *In other words, the circumstances under which provisional measures are required under Article 47 of the ICSID Convention are those in which the measures are necessary to preserve a party's rights and where the need is urgent in order to avoid irreparable harm*. […]"

93 **Exhibit RL-0026**, Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on provisional measures dated 17 August 2007, para. 89.

94 **Exhibit CL-0160**, Plama v. Bulgaria, ICSID Case No. ARB/93/24, Order of 6 September 2005, para. 46: "*Even the urgency of the need for provisional measures and the 'irreparable' nature of the harm invoked to justify such measures appear to the Tribunal unfounded* […] *The Tribunal accepts Respondent's argument that harm is not irreparable if it can be compensated for by damages, which is the case in the present arbitration and which, moreover, is the only remedy Claimant seeks*." (Emphasis added.)

95 Request, para. 37. See also Request, paras. 33, 42, 43, 56, 97 and 115.

> ***being planned.*** *This is not the purpose of a provisional measure.* ***Provisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions. Rather, they are meant to protect the requesting party from imminent harm.***"[96]
> (Emphasis added.)

104. Second, RWE's conduct further confirms that there is no necessity or urgency for the requested provisional measures. As noted above in Section 2.2.1, RWE was informed of the start of the German Proceedings as early as 21 May 2021.[97] The position taken by RWE thereafter was that it "*fully believe*[s] *and ha*[s] *reason to believe that the decision of the German court is of no relevance for these proceedings*".[98] If RWE actually believed that the commencement of the German Proceedings threatened actual and imminent harm that necessitated urgent relief, RWE would have promptly submitted a request for provisional measures and detailed the exact harm that would purportedly result from the German Proceedings. RWE did nothing of the sort.

105. Third, RWE has taken the position that the purported breaches of the ICSID Convention *can* be accommodated for in a final award. In its Memorial, RWE added an additional claim based on purported breaches of the ICSID Convention.[99] This was accompanied by a change in the relief sought. In particular, RWE seeks a declaration under the ICSID Convention and compensation for the damages suffered as a result of the German Proceedings. Consequently, even if there were any harm from the German Proceedings, this can be catered for in the Award and is therefore not urgent.

4.2 Provisional measures would be disproportionate

106. A tribunal must weigh not only the potential harm to the claimant but also the harm caused to the respondent if the provisional measure were granted, so as to ensure that the provisional measure would not be disproportionate.[100]

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96 **Exhibit RL-0026**, Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on provisional measures dated 17 August 2007, para. 89.

97 **Exhibit R-0001**, Letter from the Netherlands to the ICSID Secretariat dated 21 May 2021.

98 Recording of First Session of 30 August 2021, at 26:01.

99 Memorial, Chapter F.

100 **Exhibit RL-0026**, Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on provisional measures dated 17 August 2007, para. 93; **Exhibit RL-0027**, Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Procedural order no. 1 dated 29 June 2009, para. 81, ; **Exhibit RL-0028**, 'Chapter 5 Arbitral Provisional Measures', in Ali Yesilirmak, Provisional Measures in International Commercial Arbitration, Volume 12, Kluwer Law International 2005, p. 159-236 and 336-337; and **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 dated 29 March 2017, para. 242.

Here, RWE has failed to indicate or support any detriment it would suffer. The German Proceedings will result in a declaratory judgment that confirms the content of existing EU law.

107. By contrast, if the provisional measures were granted it would result in a recommendation that would call on the Netherlands to breach its obligations under the EU Treaties.[101] As noted in Section 3.2.3 above, the Netherlands is required by the EU Treaties to ensure that issues of interpretation and application of those treaties are put before the EU courts, and to challenge before those courts any attempt to remove disputes regarding the interpretation or application of the EU Treaties from the judicial system of the EU.

108. Importantly, the European Commission has communicated that if the Netherlands were to "*cease the German proceedings, the* [European] *Commission could open a procedure pursuant to the* [EU] *Treaties in order to assess the compatibility of such an action with EU law*".[102]

109. In contrast to the harm that would be suffered by the Netherlands, RWE has failed to identify any burden it would suffer as a result of the German Proceedings. The German Proceedings will result in a declaratory judgment. That declaration affirms obligations as they have always existed under the EU Treaties. RWE cannot possibly suffer any harm from such a decision. The alleged harm that RWE claims to exist relates to purported follow-on proceedings that have not been instigated and of which the Netherlands has stated it has no intention to instigate.[103]

5 REQUEST FOR RELIEF

110. In light of the foregoing, the Netherlands respectfully requests that the Tribunal:

(a) REJECT the Request; and

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101 **Exhibit R-0013**, Letter from the European Commission to the Netherlands dated 22 September 2021 and **Exhibit R-0012**, Letter from the European Commission to the Netherlands dated 4 March 2022.

102 **Exhibit R-0012**, Letter from the European Commission to the Netherlands dated 4 March 2022, para. 13. The Netherlands had sought clarification from the European Commission in relation to the arbitration initiated by Uniper. The cited statement is equally applicable to these proceedings.

103 **Exhibit C-0131**, Respondent's answer to Claimants' letter of 23 February 2022 concerning the German Proceedings dated 22 March 2022.

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

Respectfully submitted on behalf of the Kingdom of the Netherlands,

De Brauw Blackstone Westbroek N.V.