

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

**International Centre for
Settlement of Investment Disputes**

Washington, D.C.

between

RWE AG
RWE Eemshaven Holding II BV
(Claimants)

and

The Kingdom of the Netherlands
(Respondent)

**CLAIMANTS' REPLY RELATING TO THEIR
REQUEST FOR PROVISIONAL MEASURES**

7 June 2022

Luther.

Luther Rechtsanwaltsgesellschaft mbH
Gänsemarkt 45, 20354 Hamburg, Germany

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A. Introduction

- 1 Claimants hereby submit their Reply to the Netherlands' Response (the **Response**) to Claimants' Request for Provisional Measures (the **Request**).
- 2 Even though the Netherlands has spilled much digital ink with its submission, it failed to provide any convincing argument as to why the German Proceedings are not concerned with this Tribunal's *Kompetenz-Kompetenz*. It also failed to address the elephant in the room: that a decision in the German Proceedings would be the basis for an anti-arbitration injunction. Claimants have given Respondent ample opportunity, before and during these provisional measures proceedings, to confirm it would not request such an injunction. But even in its Response, the Netherlands failed to do so. It merely (and incompletely) refers to its stated intentions,¹ which are legally irrelevant.
- 3 Instead, Respondent's defense rests on several pillars, which even upon cursory examination reveal themselves as misrepresentations and strawman debates:
- 4 First, Respondent continues to mischaracterize the German Proceedings. Its main three contentions are that the issue before the Cologne Court would be one of "*interpretation and application of EU law*"², that the German Proceedings are "*intended to address a question of EU law*"³ to then brief the Tribunal, and that they would only result in a declaratory decision pronouncing "*what already applies under EU law*"⁴. Consequently, Respondent argues, the German Proceedings would have no impact on this arbitration, since the arbitration does not concern EU law.
- 5 These contentions misrepresent the German Proceedings. Respondent has not launched a general declaratory action asking the Cologne Court to pronounce upon EU law. Instead, it has launched an action under Section 1032 (2) of the German ZPO. This provision allows a German court to determine "*the admissibility or*

¹ See further below, **Section B**.

² Response, para. 5.

³ Response, **Section 2.2.2**.

⁴ Response, para. 7.

inadmissibility of arbitral proceedings."⁵ Respondent's own prayers for relief necessarily mirror this⁶ and request the Court to declare

*"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."*⁷

- 6 That is it. Respondent correctly describes this as an action to "*seek clarification as to an arbitration agreement's validity*".⁸ The Cologne Court is asked to determine whether there is a valid arbitration agreement between the Parties. This interferes with the Tribunal's *Kompetenz-Kompetenz*. Such a decision's effect is not limited by the reasons which the Cologne Court might or might not give. In particular, its effect will not be limited to an invalidity under EU law. Under German law (which should be undisputed between the Parties), only the operative part of the Cologne Court's decision will have binding effect. And it can only correspond to (or remain within the boundaries of) the relief requested.
- 7 It is therefore also incorrect when Respondent suggests that the Cologne Court would render a "*legally binding interpretation of EU law*".⁹ The only court which can deliver a binding interpretation (!) of EU law is the European Court of Justice (**ECJ**).
- 8 Secondly, and as a consequence, it is also clear that the Cologne Court has not been asked to decide questions that are merely a "*preliminary*"¹⁰ matter to the Tribunal's determinations on jurisdiction, or one that would not be exclusively¹¹ covered by the Tribunal's authority. This Tribunal's jurisdiction is based on consent. The Netherlands has asked the Cologne Court to find that no consent exists, and thus no valid arbitration agreement. That is a decision on this Tribunal's jurisdiction, nothing else. If it finds the arbitration to be inadmissible, for whatever reason, this

⁵ [Exhibit C-0118: Sections 1025 and 1032 of the German ZPO \(Code of Civil Procedure\)](#).

⁶ Claimants note that it is an agreed fact between the Parties that German procedural law does not even allow Respondent to seek any relief specifically tailored to achieve the goal Respondent continues to purport to achieve before the Cologne Court, i.e. a declaration against the background of EU law. Cf. Response, para. 29.

⁷ [Exhibit C-0117: Petition by the Netherlands to the Cologne Court of 10 May 2021](#), para. 1 lit. 1.

⁸ Response, para. 26.

⁹ Response, para. 4.

¹⁰ Response, paras 49, 65.

¹¹ Response, paras 4, 49 et seq. Claimants note that, therefore, also Respondent's references to the *SPP v. Egypt* case (Response, paras 49 et seq.) fail.

means that under German law it is considered inadmissible. Once that decision becomes final, it would bind Claimants.

- 9 It is indeed true that “*the Netherlands has only raised arguments in relation to EU law.*”¹² Respondent thereby mixes up the procedural and substantive points of the German Proceedings. The EU law arguments relate only to the substance of the German Proceedings, not the issue of jurisdiction of German courts. There, Respondent argues – like in this arbitration – that the exclusive jurisdiction of the Tribunal only applies if and once valid consent exists.¹³ The German Proceedings and this arbitration thus involve the same questions.
- 10 In any case, any EU law argument does not turn the German Proceedings into proceedings about the interpretation and application of EU law. They remain proceedings concerned with the admissibility of this arbitration. Respondent even alleges that the inadmissibility of this arbitration under EU law would be an “*acte clair*” scenario – a clear-cut case from the EU law perspective which does not require interpretation.¹⁴ And Claimants do not dispute that the ECJ in *Komstroy* extended its *Achmea* rationale to the ECT, and that the ECJ considers Article 26 (2) (c) ECT to be inapplicable under EU law.¹⁵ The German Proceedings will therefore not “*provide clarity*”¹⁶ on EU law beyond what is in any event undisputed between the Parties.
- 11 Thirdly, it is incorrect when Respondent argues that the Cologne Court would not “*pass judgment on the Tribunal’s power and competence under the ICSID Convention and the ECT*”¹⁷. If the Cologne Court accepts jurisdiction, it will determine the validity of the Netherlands’ consent under Article 26 (2) (c) ECT and decide on

¹² Response, para. 29 (emphasis in the original). Claimants note that the Netherlands repeatedly seeks to derive some sort of argument from the fact that Claimants acknowledged that its arguments in the German Proceedings are based on EU law (see e.g. Response, fn. 3, para 27 and fn. 31, para. 48). These references are simply besides the point. The Netherlands’ arguments in the German Proceedings and its purported intentions (see the heading of Section 2.2.2.) are irrelevant. What is relevant is the relief it seeks.

¹³ [Exhibit R-0006-ENG: The Netherlands’ submission to the German Court dated 29 September 2021](#) and [Exhibit R-0006-DE: The Netherlands’ submission to the German Court dated 29 September 2021](#), paras 4, 79 et seq.

¹⁴ [Exhibit R-0007-ENG: The Netherlands’ submission to the German Court dated 21 January 2022](#) and [Exhibit R-0007-DE: The Netherlands’ submission to the German Court dated 21 January 2022](#), Section B.

¹⁵ See already Claimants’ Memorial, paras 391, 397.

¹⁶ Response, paras 5, 46.

¹⁷ Response, para. 46.

this arbitration's inadmissibility. That decision passes judgment on the Tribunal's competence, would bind RWE AG once final, and serve as a basis for an injunction. This violates the *Kompetenz-Kompetenz* of the Tribunal.

- 12 It is equally misleading when Respondent contends the German Proceedings' purpose would be to present to the Tribunal its (not yet filed) intra-EU objection by reference to a German court decision.¹⁸ Respondent has to file its Counter-Memorial, including its jurisdictional objections, by 26 August 2022. Yet, any decision by the Cologne Court will not immediately become binding, as the losing party will most probably appeal to the Federal Supreme Court, the *Bundesgerichtshof*. The Tribunal may already know of Germany's lost Section 1032 (2) application in the *Mainstream Renewables* proceedings, and that Germany already appealed to the *Bundesgerichtshof*.¹⁹ Proceedings there might very well take a year or longer, in particular if the *Mainstream* proceedings and the German Proceedings will be consolidated. And the *Bundesgerichtshof* might refer questions to the ECJ, which will lead to a further delay. Thus, the legal or informative value of a Cologne decision to explain the jurisdictional objections would also be extremely limited, while the risk of an injunction on the basis of or irrespective of a first instance decision remains.²⁰ It is a pretext for attacking this Tribunal's *Kompetenz-Kompetenz* in a different forum.
- 13 Fourthly, another strawman argument is that Claimants would have waived the exclusivity of ICSID arbitration when instituting the Dutch litigation. This argument is, on the one hand, difficult to understand, since Respondent from the outset of the dispute even disputed the applicability of the ECT.²¹ It is, on the other hand, also without merit. Claimants have launched a litigation based on Dutch law and the European Convention of Human Rights (the **ECHR**) before the Dutch courts. Respondent has never objected to this parallel litigation. Given that it involves different parties and a different legal basis, however, the proceedings do not even implicate the exclusivity rule. By contrast, Claimants have from the outset objected

¹⁸ Response, para. 35.

¹⁹ [Exhibit C-0133: Lisa Bohmer, 'Revealed: Berlin Court dismisses Germany's request for anti-arbitration declaration directed at ICSID case', International Arbitration Reporter \(24 May 2022\)](#).

²⁰ Request, **Section B.II.2**. See further [Exhibit CL-0149: Maxian Rusche, 6 EILA Review 310 \(2021\)](#), p. 314 et seq.

²¹ [Exhibit C-0101: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019](#), p. 14: "The consequences of this ruling is that investors in the European Union, such as the owners of the coal-fired power plants, can no longer rely on the arbitration clause in the intra-EU investment treaties".

to the German Proceedings,²² which concern one of the core questions before this Tribunal, namely its jurisdiction under the ECT.

- 14 *Finally*, the Netherlands misrepresents EU law to contend that it would be obliged to pursue the German Proceedings, and that therefore an order of provisional measures would be disproportionate.²³ Any such alleged violation would be irrelevant. A violation of the ICSID Convention cannot be justified with the purported need not to violate other obligations under international law. However, the Tribunal need not decide on this aspect, since Respondent's contention is also flatly incorrect: EU law merely requires the Netherlands to file objections with this Tribunal – something it so far has steadfastly refused to do – or with the competent local courts – which, as even the ECJ acknowledges, do not exist for ICSID cases.²⁴
- 15 Claimants' maintain all their positions and arguments as presented in their Request. However, in the interest of efficiency, and to avoid repetition of essentially unchallenged arguments, Claimants have the following additional comments on the Netherlands' Response:

B. The Netherlands does not deny it will seek an injunction against Claimants and refuses to make any meaningful representations

- 16 The German Proceedings only make sense if Respondent wants to use a decision in its favor to stop Claimants from further pursuing this ICSID arbitration. Claimants have explained that there is a playbook for this published by an EU Commission officer, and that so far Respondent follows this playbook.²⁵
- 17 Respondent has not denied this. It has also not made any meaningful representations in that respect.

²² See Claimants' letter to ICSID of 27 May 2021. See also Claimants' Memorial, para. 360; Claimants' Request for Bifurcation and Expedition, para. 12.

²³ Response, paras 108-109 (based on arguments raised in Section 3.1.5.).

²⁴ [Exhibit CL-0174: ECJ, C-638/19 P, Judgment of 25 January 2022, ECLI:EU:C:2022:50 \(Commission v. European Food SA and others\)](#), para. 142. Claimants note that the ECJ specifically referred to the non-reviewability of ICSID awards by domestic courts under the ICSID Convention. By implication, this acknowledges the self-contained nature of ICSID proceedings generally.

²⁵ Request, **Section B.II.**

- 18 It would have been easy for Respondent to finally confirm in its submission that it will not seek any injunction or similar measure against Claimants on the basis of a decision in the German Proceedings. But Respondent has done nothing of this sort.
- 19 Instead, Respondent merely alleges it had “*stated it has no intention to instigate*”²⁶ any such action. This is an incomplete – and in this way simply false – restatement of what Respondent actually had written in its letter of 22 March 2022.²⁷ Respondent has made its stated intentions “*subject to*” what it perceives as “*its obligations under EU law*”²⁸. Claimants already had set this out²⁹ – and Respondent conveniently left it out when quoting from its letter³⁰. Further, the Netherlands considers itself bound under EU law to use “*any possible means*”³¹ to challenge the validity of the arbitration clause in this case. The possibility of injunctions was proposed by a senior member of the European Commission’s Legal Service, and presented as part of the “*effective weapons that EU Member States may deploy prior to, during, and after the arbitration procedure, in order to enforce effectively the judgment in Achmea*.”³²
- 20 The only logical inference to be drawn from the Netherlands’ failure to address these matters – and from its failure to deny it – is that it is committed to follow through with the strategy to use a decision by the Cologne Court as a basis for an injunction. What had been Respondent’s purported intentions in March is irrelevant. Intentions can change, intentions are not binding, and Respondent in any event specifically subjects its intentions to what it perceives as its EU law obligations.
- 21 Additionally, the proceedings instituted on the basis of Section 1032 (2) of the German ZPO by Germany in relation to its *Mainstream Renewables* ICSID arbitration before the Higher Regional Court of Berlin (the ***Kammergericht***) show that the Netherlands’ petition in fact forms part of a broader concerted effort. Germany and the Netherlands even use the same counsel, German law firm *Noerr*, in all of the Section 1032 (2) petitions. While the *Kammergericht* has meanwhile

²⁶ Response, para. 110. See also Response, para. 34.

²⁷ [Exhibit C-0131: Respondent's answer to Claimants' letter of 23 February 2022 concerning the German Proceedings dated 22 March 2022.](#)

²⁸ [Exhibit C-0131: Respondent's answer to Claimants' letter of 23 February 2022 concerning the German Proceedings dated 22 March 2022.](#)

²⁹ Request, paras 54-56.

³⁰ See Response, para. 34.

³¹ Response, para. 23.

³² [Exhibit CL-0149: Maxian Rusche, 6 EILA Review 310 \(2021\)](#), p. 310.

dismissed Germany's Section 1032 (2) petition³³, its is completely unforeseeable whether the Cologne Court will follow suit.

- 22 Also irrelevant are Respondent's statements that it will continue to participate in this arbitration irrespective of the outcome of the German Proceedings.³⁴ As Claimants outlined at length in their Request, the risk posed by the German Proceedings is not that Respondent would no longer appear in this arbitration, but that Claimants will be forced to discontinue it.³⁵

C. The German Proceedings violate the exclusivity of ICSID arbitration

- 23 In their Request, Claimants explained why the German Proceedings violate the exclusive jurisdiction of this Tribunal, Articles 26 and 41 of the ICSID Convention. The Netherlands raises several arguments why the exclusivity of ICSID arbitration would not apply to the German Proceedings. None of them has any merit. Exclusivity of ICSID arbitration also applies where jurisdiction is contested **(I.)**, and is also not affected by the parallel Dutch litigation **(II.)**. The alleged exclusive jurisdiction of EU courts over the interpretation and application of EU law is equally irrelevant **(III.)**, as the argument that the questions before the Cologne Court were not before this Tribunal is desperate **(IV.)**.

I. Exclusivity of ICSID arbitration also applies where jurisdiction is contested

- 24 Respondent denies that the exclusivity of ICSID arbitration also applies where ICSID jurisdiction is contested. It argues that the matter of whether consent exists "*cannot itself be subject to exclusivity*".³⁶
- 25 That has no merit. The exclusive jurisdiction also covers the issue of whether the Tribunal has jurisdiction. This has been set out by Professor Schreuer in his expert report in the German Proceedings. As he explained in that opinion:

"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

³³ See [Exhibit C-0133: Lisa Bohmer, 'Revealed: Berlin Court dismisses Germany's request for anti-arbitration declaration directed at ICSID case', International Arbitration Reporter \(24 May 2022\)](#).

³⁴ Response, paras 10, 33.

³⁵ Request, paras 32-43.

³⁶ Response, para. 63.

*exists falls within the exclusive competence of the arbitral tribunal (see also Article 41(1)).*³⁷

- 26 Respondent relies on the award in *Iberdrola v. Guatemala (II)* to argue that Article 26 applies only where there is “*valid consent*”, but only presents an incomplete quote from that award, disregarding its context. The full quote confirms that the Tribunal understood “*valid consent*” as meaning that – like in the case at hand - a request for arbitration was registered by the ICSID Secretary-General:

“Importantly, the effect of Article 26 only ‘operates from the moment of valid consent.’ In the context of a treaty arbitration, this requires an offer of arbitration from the respondent State contained in the relevant treaty, and an acceptance from the claimant investor, usually given when filing for arbitration with ICSID. That said, as Schreuer comments, consent will only be deemed valid if the Secretary-General does not refuse to register the request for arbitration because it is manifestly outside the Centre’s jurisdiction or if the arbitral tribunal does not render a decision of lack of jurisdiction:

*Art. 26 applies from the moment of consent [...]. 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.”*³⁸

- 27 Beyond its misleading reference to the *Iberdrola II* award, however, the Netherlands does not provide any further support for the contention that the exclusivity rule does not cover situations of disputed jurisdiction. It also does not offer any actual arguments as to the merits of its position, which rests on a purely literal interpretation of the ICSID Convention’s Article 26.
- 28 It is evident that the Netherlands’ interpretation is untenable. Indeed, if the Tribunal were to follow the Netherlands on this point, the delocalization of ICSID arbitration, which primarily is ensured by its Articles 26, 41, 52, 53 and 54, could not be maintained. If exclusivity of ICSID arbitration would only apply if jurisdiction was not disputed, then such exclusivity would cease to have any meaningful application. This conclusion was also reached by the tribunal in *Ipek v. Turkey*. There, when the tribunal restrained the Respondent from further pursuing a domestic proceeding

³⁷ [Exhibit CL-0148: Expert Opinion by Professor Schreuer in the German Proceedings dated 7 July 2021](#), p. 4.

³⁸ [Exhibit RL-0017: Iberdrola Energia S.A. v. Republic of Guatemala II, PCA Case No. 2017-41, Final Award, 24 August 2020](#), para. 342.

involving matters relating to its determination on jurisdiction, it noted 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*”.³⁹

29 In vain does Respondent seek to disqualify Claimants' references to the *IPEK* decision by contending that “[u]nlike the *Ipek v. Turkey* case, the German Courts have been posed a question pursuant to a different law than the one the Tribunal will apply.”⁴⁰ As explained above, this is not true.⁴¹ Respondent in the German Proceedings argues that no valid consent to ICSID arbitration exists and that thus this arbitration is inadmissible. In any case, this is also contrary to Article 41 of the ICSID Convention.

30 And as much as the *IPEK* tribunal restrained Turkey from pursuing the domestic arbitration, this Tribunal also should put an end to Respondent's pursuit of the German Proceedings and its continuous misrepresentations about them.

II. The parallel Dutch litigation does not affect the exclusivity of this ICSID arbitration

31 Respondent also argues that Article 26 of the ICSID Convention would not apply due to one of the Claimants having started the parallel litigation in Dutch courts.

32 That argument is misguided in several respects.

33 The Dutch litigation does not violate the exclusivity of ICSID arbitration as it does not concern the same legal dispute in the sense of Article 25 of the ICSID Convention. The Dutch claimant has not resubmitted the Claimants' case under Article 26 ECT to domestic courts. Instead, the Dutch claimant is pursuing the domestic litigation on the basis of Dutch law and the ECHR. This is not only a different dispute, but at the same time and without doubt also a matter outside the jurisdiction of this Tribunal. As it deals with matters this Tribunal could not even rule on, the Dutch litigation thus cannot implicate the exclusivity rule.

34 But even if the two proceedings were considered to be similar, Respondent could still not succeed with its argument. Claimants have neither waived exclusivity nor

³⁹ [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.

⁴⁰ Response, para. 29.

⁴¹ See above, paras 4-7.

consented to non-exclusivity. If initiating the Dutch litigation would be considered to be in breach of exclusivity, then it is Respondent which has waived its right to insist on such exclusivity for that particular parallel proceeding. It is Respondent which "*pleads its case on the merits*" in the Dutch courts and did not object to its initiation. And initiating one case before a different forum cannot be construed as a general waiver of exclusivity. There can be no room for misunderstandings. Claimants have from the outset objected to the German Proceedings on the grounds of the exclusive *Kompetenz-Kompetenz* of this Tribunal.⁴²

- 35 Finally, when Respondent argues that the German Proceedings did not implicate the exclusive remedy rule given they do not address the Tribunal's jurisdiction under the ECT and the ICSID Convention, but are concerned with EU law,⁴³ this argument remains equally without any merit. As Claimants have set out in the introduction, the German Proceedings are not concerned with EU law matters only, but with this arbitrations admissibility and thereby this Tribunal's jurisdiction. The Netherlands' constant repetitions of this initially highlighted misrepresentation do not change the fact that it is false.⁴⁴

III. The alleged exclusive jurisdiction of EU courts over the interpretation and application of EU law is irrelevant

- 36 Respondent further argues that the exclusive jurisdiction of this Tribunal would not be infringed since it has no such exclusive jurisdiction to apply and interpret matters arising under EU law. Since the German Proceedings would involve issues of EU law, the German proceedings could not be in breach of the exclusive jurisdiction of the Tribunal.⁴⁵
- 37 This argument combines a correct and an incorrect premise, and reaches naturally an incorrect conclusion.
- 38 The Tribunal indeed does not have exclusive jurisdiction over matters of EU law. EU law is not even part of the applicable law in this arbitration. EU law does not form part of the "*applicable rules and principles*" under Article 26(6) of the ECT, which refers to general principles of law and rules of customary international law.⁴⁶

⁴² See Claimants' letter to ICSID of 27 May 2021.

⁴³ Response, para. 67.

⁴⁴ See above, paras 4-7.

⁴⁵ Response, paras 76-85.

⁴⁶ See already Claimants' Memorial, para. 393.

39 However, the Tribunal has exclusive jurisdiction to determine its own jurisdiction. And at issue here is not the substantive question pending before the Cologne Court – whether this arbitration is admissible or not – but the procedural question whether the German courts can decide this question at all.

IV. The matters before the Cologne Court are also before this Tribunal

40 Respondent also cannot succeed with its argument that the matters before the Cologne Court were not (yet) before this Tribunal and that thus the exclusivity rule would not apply.⁴⁷

41 That argument evidently has not fully been thought through by Respondent. It implies that states would be free to contest the jurisdiction of an ICSID tribunal before national courts as long as they had not yet done so before the ICSID tribunal. That would be an incentive to delay proceedings, deprive Article 26 of the ICSID Convention of most of its application and be an absurd result incompatible with the rules of treaty interpretation.

42 Also, the purpose of these provisional measures is to ensure that the Tribunal will be in a position to hear Respondent's arguments and to decide on them. If Respondent succeeds with its German Proceedings and obtains an anti-arbitration injunction, these proceedings might stop before Respondent submit its jurisdictional objections with its Counter-Memorial. The Tribunal will recall that this has been Respondent's officially stated goal.⁴⁸

43 In any case, this new argument has no merit since it rests on the initially identified misrepresentation about the scope of the German Proceedings. As illustrated in the introduction,⁴⁹ the Cologne Court will not issue an interpretation of EU law questions only. It will apply EU law – as part of German law – to determine whether there is a valid arbitration agreement. And that is a determination of this Tribunal's jurisdiction, which quite definitely is a matter that is before this Tribunal – and which is only for this Tribunal to decide.

⁴⁷ Response, paras 86-87.

⁴⁸ In his May 2021 letter to the Lower House, Dutch Minister van 't Wout noted that, only "*if it proves impossible to avert the [ICSID] proceedings, a defence on the merits will then be put forward.*" ([Exhibit C-0113: Letter from Minister Bastiaan van Wout to the Lower House 17 May 2021](#), p. 2). As set out in the Request, para. 35, Claimants respectfully submit that this has also been Respondent's position in this arbitration, contrary to the Tribunal's assessment in Procedural Order No. 2.

⁴⁹ See above, paras 4-7.

D. Despite the Netherlands' misguided attacks at the Request, the requirements for the grant of provisional measures are met

44 As far as the Netherlands addresses the requirements for the grant of provisional measures, it does not contest that *prima facie* jurisdiction has been established and that Claimants' have presented a tenable case on the merits. It concentrates itself on the necessity and urgency requirement, as well as on the proportionality of the requested measures. Yet, none of these arguments has any merit.

I. The requested provisional measures are necessary and urgent

45 Relying on the decision in *Occidental v. Ecuador*, Respondent suggests that Claimants' Request related solely to hypothetical future actions the Netherlands might take.⁵⁰

46 Already with their Request, however, Claimants have shown that the risk posed by the German Proceedings is not merely theoretical.⁵¹ Indeed, Respondent's actions conform to the strategy outlined by Mr. Rusche for EU member states to avert intra-EU investment arbitrations.⁵² In light of the circumstances, it would be for the Netherlands to show that it will not take further actions in line with said playbook. But the Netherlands – despite many chances – failed to do so. Instead, it makes any statements in that respect “*subject to*” what it perceives as “*its obligations under EU law*”⁵³.

47 It cannot be the correct approach for this situation, which is brought about by the Netherlands' gamesmanship, to ask Claimants to wait until the Netherlands indeed applies for an injunction on the basis of a decision from the Cologne Court. In such a scenario, Claimants may not even have sufficient time to ask this Tribunal for urgent interim relief. Additionally, as noted already in the Request, the Tribunal will not be in a position anymore to fashion appropriate relief in relation to a decision

⁵⁰ Response, para. 104.

⁵¹ Request, paras 32 et seq.

⁵² Request, **Section B.II.** Mr. Rusche specifically speaks of “*effective weapons that EU Member States may deploy prior to, during, and after the arbitration procedure, in order to enforce effectively the judgment in Achmea.*” ([Exhibit CL-0149: Maxian Rusche, 6 EILA Review 310 \(2021\)](#), p. 310).

⁵³ [Exhibit C-0131: Respondent's answer to Claimants' letter of 23 February 2022 concerning the German Proceedings dated 22 March 2022.](#)

once it is rendered by the Cologne Court.⁵⁴ The Tribunal must therefore act before a (first) decision is rendered that sets follow-on actions in motion.

48 Further, and contrary to what Respondent says,⁵⁵ urgency is not impacted by the fact that Claimants have not immediately requested provisional measures. Claimants have attempted to find an amicable solution for the situation. They have given Respondent and the Cologne Court sufficient time to end the violation of the ICSID Convention. Indeed, the Request only became urgent once it became clear that the situation could not be resolved without the Tribunal's intervention.⁵⁶

49 Finally, the fact that Claimants have made the German Proceedings subject to their ancillary claim with their Memorial does not imply that any damage caused by these proceedings could be compensated in monetary terms by an award. The German Proceedings bring about the risk that this arbitration has to be stopped by Claimants. Then the Tribunal would never render an award.⁵⁷ If there is no award, compensating Claimants in that non-existing award is no solace.

II. EU law does not require the Netherlands to continue the German Proceedings

50 Respondent's argument on proportionality rests on the basis that the requested provisional measures would require it to violate EU law.⁵⁸ This, however, is false.

51 While the Netherlands insinuates that the present Request puts it somewhat between a rock and a hard place in terms of competing international legal obligations, such insinuation is without merit. There can be no question that an order by the Tribunal would put Respondent in a place where it would need to "*choose between complying with the Tribunal's recommendations and its obligations under the EU Treaties to put EU law questions before the EU courts.*"⁵⁹ The petition before the Cologne Court is not, as the Netherlands alleges, "*mandated by the EU*

⁵⁴ Request, para. 120. As Claimants also noted (Request, para. 132), the case of *SGS v. Pakistan* is also particularly instructive here, given that tribunal highlighted its discomfort with the fact that a first domestic decision had already been taken by Pakistan's courts in disregard of ICSID's exclusivity rule, which it had no possibility to alter.

⁵⁵ Response, para. 105.

⁵⁶ See Request, **Section B.III.**

⁵⁷ Request, paras 3, 117-120.

⁵⁸ Request, paras 106 et seq.

⁵⁹ Response, para. 9.

Treaties."⁶⁰ In particular, Respondent has not, as it claims, "*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*"⁶¹.

- 52 As the ECJ held in *PL Holdings*, under EU law, EU member states are required to challenge the "*validity of the arbitration clause or the ad hoc arbitration agreement on the basis of which the dispute was brought*" before the arbitral tribunal, i.e. presently this Tribunal, or a competent court of a member state.⁶² The Netherlands, however, continuously postpones its jurisdictional objections in this arbitration. What is more, it has brought the matter before a member state court that indeed *lacks* competence – not only under the ICSID Convention but also under German law – to address it. Even the ECJ confirmed in its January 2022 *Micula* judgment that ICSID proceedings are not subject to the control of EU member state courts.⁶³
- 53 In fact, what the Netherlands does before the Cologne Court is to ask the court to further extend the competences it has under the German ZPO to allegedly give full effect to EU law. The ECJ has been clear in its constant jurisprudence, however, that EU law does not require member state courts to exceed their competences beyond what national (procedural) law foresees in such cases. Already in its 1978 *Simmenthal* judgment, the ECJ made clear "*that a national court which is called*

⁶⁰ Response, para. 83.

⁶¹ Response, para. 24 (emphasis added).

⁶² See also Response, para. 82. See already Request, fn. 31. The exact wording used by the ECJ is the following: "*Lastly, it follows both from the judgment of 6 March 2018, Achmea (C-284/16, EU:C:2018:158), and from the principles of the primacy of EU law and of sincere cooperation [...] also that, where such a dispute is brought before an arbitration body on the basis of an undertaking which is contrary to EU law, they are required to challenge, before that arbitration body or before the court with jurisdiction, the validity of the arbitration clause or the ad hoc arbitration agreement on the basis of which the dispute was brought before that arbitration body.*" ([Exhibit CL-0150: ECJ, C-109/20, Judgment of 26 October 2021 \(Republiken Polen v. PL Holdings Sàrl\)](#)), para. 52, emphasis added). Claimants note that Respondent's Response, in para. 23, rephrases this dictum by the ECJ again in a misleading way, stating that the ECJ required member states to challenge the validity of intra-EU arbitration clauses "*before the respective arbitration body by any possible means, including before a national court with jurisdiction.*" (emphasis added) This is not what the ECJ held.

⁶³ [Exhibit CL-0174: ECJ, C-638/19 P, Judgment of 25 January 2022, ECLI:EU:C:2022:50 \(Commission v. European Food SA and others\)](#), para. 142. Claimants note again that the ECJ specifically referred to the non-reviewability of ICSID awards before domestic courts under Articles 53 and 54 of the ICSID Convention. By implication, however, this also acknowledges the self-contained nature of ICSID proceedings generally.

upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions"⁶⁴.

- 54 The petition before the Cologne Court is consequently not, as the Netherlands alleges, "mandated by the EU Treaties."⁶⁵ This is confirmed also by the recent *Kammergericht* decision in *Germany v. Mainstream Renewables*, which rejected Germany's petition.⁶⁶ There simply is no competent EU court to address Respondent's purported concerns. Indeed, the lack of recourse to domestic adjudication in relation to investment arbitration was one of the main reasons leading to the *Achmea* and subsequent rulings in the first place. What would have been mandated by EU law, if anything, was to raise jurisdictional objections before this Tribunal as soon as possible, including by applying for or agreeing to bifurcation.
- 55 This assessment is also not changed by the EU Commission's letter to the Netherlands, threatening EU law infringement proceedings in case the Netherlands was to discontinue the German Proceedings.⁶⁷ The EU Commission is acting in an executive capacity, and its political crusade against intra-EU investment arbitration is well known. It is, however, not the EU Commission that decides on the legality of member state actions under EU law. This falls to the ECJ pursuant to Article 19 (1) of the Treaty on the European Union (TEU).⁶⁸
- 56 By contrast, the fact that the German Proceedings would only result in a declaratory decision restating a position under EU law does not reduce the burden Claimants would suffer if their Request were to be rejected. Indeed, that proposition is, on the one hand, flatly wrong given that the Cologne Court is asked to rule on this Tribunal's jurisdiction.⁶⁹ On the other hand, it ignores the risk to the enforcement of a potential

⁶⁴ [Exhibit CL-0175: ECJ, C-106/77, Judgment of 9 March 1978, ECLI:EU:C:1978:49 \(Simmenthal\)](#), para. 24 (emphasis added).

⁶⁵ Response, para. 83.

⁶⁶ [Exhibit C-0133: Lisa Bohmer, 'Revealed: Berlin Court dismisses Germany's request for anti-arbitration declaration directed at ICSID case', International Arbitration Reporter \(24 May 2022\)](#).

⁶⁷ Response, para. 109.

⁶⁸ Article 19 (1) of the TEU reads: "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed." The treaty text is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016M019>.

⁶⁹ See above, paras 4-7. See already Request, paras 28-30.

award as well as, above all, the risk of a follow-on injunction seeking to restrain Claimants from further pursuing this arbitration.

E. Relief requested

57 For these reasons, Claimants maintain their requests for relief as of 29 April 2022.

Hamburg, 7 June 2022

Luther Rechtsanwaltsgesellschaft mbH

