INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V.

v.

Kingdom of the Netherlands

(ICSID Case No. ARB/21/22)

PROCEDURAL ORDER NO. 2
DECISION ON THE CLAIMANTS' REQUEST FOR PROVISIONAL MEASURES

Members of the Tribunal
Ms. Tina Cicchetti, President of the Tribunal
Ms. Jean Kalicki, Arbitrator
Mr. D. Brian King, Arbitrator

Secretary of the Tribunal
Dr. Jonathan Chevry

May 9, 2022

CONTENTS

I. INTRODUCTION AND PARTIES

1. The present dispute has been submitted to arbitration under the auspices of the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Energy Charter Treaty (the "**ECT**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**" or the "**Convention**").

2. The Claimants are: (i) Uniper SE, a public limited liability company incorporated in Germany with its registered address in Düsseldorf, Germany ("**Uniper SE**"), (ii) Uniper Benelux Holding B.V., a *Besloten Vennootschap* (or limited liability) company incorporated under the laws of the Netherlands with its registered address in Rotterdam, the Netherlands ("**Uniper Benelux Holding**"); and (iii) Uniper Benelux N.V., a *Naamloze Vennootschap* (or public) company incorporated under the laws of the Netherlands with its registered address in Rotterdam, the Netherlands ("**Uniper Benelux NV**"). For the purposes of the present decision, Uniper SE, Uniper Benelux Holding and Uniper Benelux NV are collectively referred to as the "**Claimants**" or "**Uniper**," and Uniper SE as the "**First Claimant**."

3. The Respondent is the Kingdom of the Netherlands ("**the Netherlands**" or the "**Respondent**").

4. The Claimants and the Respondent are collectively referred to as the "**Parties**."

5. This order sets out the Tribunal's analysis of and decision on the Claimants' Request for Provisional Measures submitted on December 3, 2021 (the "**Claimants' Request**").

II. THE RELEVANT PROCEDURAL STEPS

6. On April 22, 2021, the Claimants filed a Request for Arbitration against the Netherlands (the "**Request for Arbitration**" or "**RFA**"), together with Factual Exhibits C-1 through C-60 and Legal Authority CLA-1.

7. On April 30, 2021, the Acting Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration.

8. On December 2, 2021, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), the Secretary-General notified the Parties that Ms. Tina Cicchetti, appointed by the Chairman of the ICSID Administrative Council, Ms. Jean Kalicki, appointed by the Respondent, and Mr. D. Brian King, appointed by the Claimants, had all accepted their appointments and that the Arbitral Tribunal (the "**Tribunal**") was deemed to have been constituted on that date. Dr. Jonathan Chevry, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

9. On December 3, 2021, the Claimants filed their Request for Provisional Measures (the "**Claimants' Request**"), accompanied by Factual Exhibits C-61 to C-69 and Legal Authorities CL-2 to CL-34. As further elaborated below, the Claimants' Request aimed to obtain provisional measures directing the Respondent to discontinue proceedings initiated before local courts in Germany in relation to the present arbitration (the "**German Proceedings**"). With their Request, the Claimants also asked the Tribunal to set a briefing schedule for the Request and made a proposal in this respect.

10. By letter of December 5, 2021, the Tribunal invited: (i) the Respondent to comment on the Claimants' proposal; and (ii) the Parties to confer and provide their comments on the possibility to combine the Tribunal's first session to be held pursuant to ICSID Arbitration Rule 13(1) (the "**First Session**") with a possible hearing on the Claimants' Request.

11. By letters of December 7 and 8, 2021, respectively, the Claimants and the Respondent commented on the Tribunal's letter of December 5, 2021. While the Parties failed to agree on a briefing schedule, both indicated a willingness to confer and to further discuss the issue along with the possibility of combining the First Session and a hearing on the Claimants' Request. The Tribunal acknowledged the Parties' responses on December 9, 2021 and invited them to revert the next day. The Tribunal also requested the Parties to provide the Tribunal with any information they may have on the projected timetable for the remaining steps in the German Proceedings.

12. On December 10, 2021, the Respondent wrote to the Tribunal indicating that the Parties had agreed to a procedural calendar for the briefing of the Claimants' Request and that a hearing combining the First Session and oral arguments on the Claimants' Request could be held on February 3, 2022. The Respondent further provided information on the status of the German Proceedings. On the same date, the Claimants confirmed the Parties' agreement referred to in the Respondent's communication and provided additional information on the German Proceedings.

13. By letter of December 13, 2021, the Tribunal took note of and approved the Parties' agreement on: (i) the timetable for the submission of observations on the Claimants' Request; and (ii) the organization of a hearing on this Request in combination with the First Session on February 3, 2022 (the "**Hearing on the Claimants' Request**" or "**Hearing**"). The Tribunal further instructed the Parties to comply with this timetable and made additional recommendations with respect to the agreed timetable and the organization of the Hearing on the Claimants' Request.

14. On December 21, 2021, the Tribunal sent a draft protocol for the organization of the First Session and Hearing on the Claimants' Request and invited the Parties to comment on this draft. On January 13, 2022, the Parties sent their joint proposal on the draft hearing protocol. On January 19, 2022, the Tribunal issued the Protocol for the First Session and Hearing on the Claimants' Request (the "**Hearing Protocol**" or "**Protocol**"). Among other

things, this Protocol provided that the First Session and Hearing would be held *via* videoconference.

15. On January 21, 2022, and in accordance with the Tribunal's instructions of December 13, 2022, the Respondent submitted its observations on the Claimants' Request (the "**Respondent's Observations**"), together with Factual Exhibits R-1 to R-21 and Legal Authorities RL-1 to RL-15.

16. On January 31, 2022, and likewise in accordance with the Tribunal's instruction of December 13, 2022, the Respondent submitted additional legal authorities into the record (RL-16 to RL-19).

17. On February 1, 2022, the Claimants informed the Tribunal that they had submitted to ICSID's *Box* platform new Legal Authorities CL-35 to CL-42. The Claimants also requested leave to submit new factual exhibits C-70 to C-73. The Parties exchanged comments on the Claimants' submission and request of February 1, 2022, and on February 2, 2022, the Tribunal ruled that the Claimants' new Legal Authorities and Factual Exhibits were admitted into the record.

18. On February 3, 2022, the Tribunal held the First Session and Hearing on the Claimants' Request. The following persons attended the Hearing:

Tribunal:

Ms. Tina Cicchetti	President of the Tribunal
Ms. Jean Kalicki	Co-arbitrator
Mr. D. Brian King	Co-arbitrator

ICSID Secretariat:

Dr. Jonathan Chevry	Secretary of the Tribunal
Mr. Nicolas Jelonek	Intern

Counsel for the Claimants:

Mr. Jeffrey Sullivan QC	Gibson, Dunn & Crutcher

Ms. Stephanie Collins	Gibson, Dunn & Crutcher
Mr. E. Jin Lee	Gibson, Dunn & Crutcher
Mr. Ryan Butcher	Gibson, Dunn & Crutcher
Ms. Anna Masser	Allen & Overy
Mr. Holger Jacobs	Allen & Overy

Party Representatives (Claimants):

Ms. Dyonne Rietveld	Uniper
Ms. Stefanie Alexander	Uniper
Dr. Jens Werner	Uniper
Mr. Edgar Smallegange	Uniper
Mr. Philipp-Alexander Schütter	Uniper

Counsel for Respondent:

Mr. Albert Marsman	De Brauw Blackstone Westbroek N.V.
Mr. Abdel Zirar	De Brauw Blackstone Westbroek N.V.
Mr. Alessio Gracis	De Brauw Blackstone Westbroek N.V.
Mr. Johan den Breems	De Brauw Blackstone Westbroek N.V.
Ms. Iulia-Georgiana Croiteru	De Brauw Blackstone Westbroek N.V.

Party Representatives (Respondent):

[redacted]	Ministry of Foreign Affairs
	Ministry of Foreign Affairs
	Ministry of Economic Affairs and Climate
	Ministry of Economic Affairs and Climate
	Ministry of Economic Affairs and Climate

Court Reporter:

Ms. Diana Burden	Diana Burden Limited

19. On February 3, 2022, after the conclusion of the Hearing and as agreed between the Tribunal and the Parties during this Hearing, the Tribunal sent a letter to the Parties asking a further question regarding the German Proceedings.

20. In accordance with the Hearing Protocol, the transcripts and recordings of the Hearing were transmitted to the Parties and the Tribunal after the Hearing.

21. On February 4, 2022, the Parties submitted their respective responses to the Tribunal's question of February 3, 2022.

22. By letter of February 17, 2022, the Tribunal transmitted a letter to the Parties: (i) recording that the Parties had agreed that the Tribunal issue its decision on the Claimants' Request in two stages, first the operative part of the decision, and second the full decision with the Tribunal's reasoning; and (ii) including the Tribunal's decision on the Claimants' Request (without reasons).

III. BACKGROUND TO THE CLAIMANTS' REQUEST

23. To the extent required for the Tribunal to address the Claimants' Request, and for this limited purpose only, **Section A** below briefly summarizes the factual background to the Parties' underlying dispute in the present arbitration (the "**Arbitration**") as pleaded in the Claimants' Request for Arbitration. This summary does not constitute any finding by the Tribunal on any facts pertaining to the jurisdiction of the Tribunal or the merits of the case. **Section B** provides a short overview of the factual background specific to the Claimants' Request. This overview is not intended to be an exhaustive description of all facts considered relevant by the Tribunal. Further factual material will be addressed in the context of the Tribunal's analysis below.

A. THE PARTIES' UNDERLYING DISPUTE

24. The dispute, as described in the Claimants' Request for Arbitration, relates to the Claimants' alleged investment in the Maasvlakte Power Plant 3 ("**MPP3**"),[1] a coal-fired power station located in the port area of Rotterdam, whose construction started in mid-2008 and which commenced operation in 2016.[2]

[1] RFA, ¶ 7.
[2] RFA, ¶ 7.

25. In brief, the Claimants submit that the Netherlands' 2019 decision to prohibit the production of electricity by burning coal (the "**2019 Coal Ban Act**" or "**Ban**") is contrary to the commitments that the Dutch government allegedly made when Uniper decided to invest in the Netherlands.[3] According to the Claimants, the 2019 Coal Ban Act will force MPP3 to close at the end of 2029,[4] resulting in substantial deprivation of Uniper's investment in the Netherlands.[5]

26. The Claimants indicate in their RFA that the 2019 Coal Ban Act establishes a transition period, the stated objective of which is to allow coal electricity production operators to "mitigate their losses."[6] However, the Claimants argue that this mechanism is not adequate and, in any event, provides no compensation for the damages caused to them by the 2019 Coal Ban Act.[7]

27. Based on the above, the Claimants argue that the Netherlands, through the Ban and the measures it took to implement it, breached several investment guarantees contained in the Energy Charter Treaty (the "**ECT**"). In particular, the Request invokes ECT Articles 10 (Promotion, Protection and Treatment of Investments) and 13 (Expropriation).[8]

B. THE BACKGROUND TO THE CLAIMANTS' REQUEST

28. The Netherlands commenced proceedings in the German Courts in May 2021. The Claimants' Request seeks to require the Netherlands to discontinue the German Proceedings. Both the Claimants' Request and the Respondent's Observations contain descriptions of the factual background of the German Proceedings.[9]

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3 RFA, ¶ 8.

4 RFA, ¶ 9.

5 RFA, ¶ 136.

6 RFA, ¶ 81.

7 RFA, ¶¶ 10, 81 – 82.

8 RFA, ¶¶ 130 – 135.

9 In the course of their submissions, the Parties also referred to other proceedings in the Dutch courts commenced by the Claimants challenging the 2019 Coal Ban Act.

(1) The German Proceedings

29. On May 10, 2021, the Netherlands filed a legal action before the Higher Regional Court of Cologne (the "**German Court**") against Uniper SE, the First Claimant.[10] This action is based on Article 1032(2) of the German Code of Civil Procedure (also known as "ZPO"), which provides as follows:

> (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.[11]

30. Relying on this provision and on judgments of the Court of Justice of the European Union (the "**CJEU**"), including in the *Slovak Republic v. Achmea BV* case ("***Achmea***"),[12] the Netherlands seeks from the German Court a declaration that the Claimants' claims in this Arbitration are inadmissible because of the alleged incompatibility of intra-EU ECT arbitration with EU law.[13]

31. On May 21, 2021, the Netherlands informed the ICSID Secretariat of the initiation of the German Proceedings and said that it would continue to participate diligently in the present arbitral proceedings.[14] The Parties exchanged further correspondence on the German Proceedings and on the consequences of the possible outcomes of the German Proceedings.[15]

32. On September 15, 2021, Uniper SE filed its defence before the German Court.[16] Uniper SE and the Netherlands also filed additional comments at the end of January 2022,[17] and to date, the German Court has yet to issue its decision.

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10 Exhibit C-64.

11 Respondent's Observations, ¶ 63.

12 Exhibit CL-30, *Slovak Republic v. Achmea BV*, CJEU Case C-284/16, Judgment dated 6 March 2018 ("***Achmea***").

13 Claimants' Request, ¶ 16.

14 Claimants' Request, ¶ 19; Respondent's Observations, ¶ 41; Exhibit R-1.

15 Claimants' Request, ¶¶ 23-29. *See* also, Exhibits C-66 and C-67.

16 Claimants' Request, ¶ 30.

17 Claimants' Opening Presentation, p. 35. *See* also, Exhibit C-72.

33. The Parties' positions differ on the Netherlands' underlying motivations and objectives regarding the German Proceedings. The Claimants argue that the Netherlands' objective is to preclude the First Claimant from participating in the present Arbitration and, more generally, to put a stop to this Arbitration.[18] The Claimants point in this regard to statements made by the Dutch Minister in his letter to Parliament reporting on the initiation of the German Proceedings. The Respondent, on the other hand, argues that it was compelled to initiate the German Proceedings in order to comply with its EU law obligations,[19] that the German Proceedings concern the interpretation and application of EU law only, and that the integrity of this Arbitration is not at issue.[20]

(2) Other Related Proceedings

34. In their written and oral submissions on the Claimants' Request, the Parties have referred to other proceedings which are directly or indirectly related to this Arbitration.

35. First, the Parties have referred to the ICSID proceedings between RWE AG and RWE Eemshaven Holding II BV and the Kingdom of Netherlands (the "**RWE Case**"), which concerns similar issues to this Arbitration.[21] The Netherlands has also initiated an action before the German courts against the German claimant in the RWE Case based on Article 1032(2) of the German Code of Civil Procedure.[22] According to the Claimants, the German Court in the Uniper proceedings indicated that it would enter into deliberations together with the RWE Case. According to the Claimants, this means that the Uniper and RWE proceedings in Germany have "effectively […] been joined."[23] The Respondent challenges this affirmation and notes the RWE and Uniper proceedings in Germany are "separate cases."[24] The Claimants also indicated, and the Respondent acknowledged, that the

18 Claimants' Request, ¶¶ 17, 28; Hearing Transcript, p. 83, lines 21 – 22.

19 Respondent's Observations, ¶ 39.

20 Respondent's Opening Presentation, p. 14; and Respondent's Observations, ¶ 46.

21 *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of Netherlands* (ICSID Case No. ARB/21/4).

22 Claimants' Opening Presentation, p. 11.

23 Hearing Transcript, p. 88, lines 11 – 12.

24 Hearing Transcript, p. 208, line 7.

Netherlands had asked the German Court in the RWE Case to rule before February 25, 2022.[25] In addition, the Respondent notes that the claimants in the RWE case have not brought an application for provisional measures in the corresponding ICSID arbitration based on the corresponding German proceedings against RWE.[26]

36. Second, the Respondent indicated in its Observations on the Claimants' Request that the second and third Claimants in this case (*i.e.*, the two Dutch companies) initiated domestic proceedings against the Dutch Government before the district court of The Hague (the "**Dutch Proceedings**") a week after the commencement of the Arbitration.[27] According to the Respondent, these Dutch Proceedings involve the same factual matrix as the present case, and Uniper seeks essentially the same remedies as it seeks in this Arbitration.[28] The Respondent submits that the Dutch Proceedings constitute a waiver of any Article 26 exclusivity to the extent it exists in the present circumstances. To date the Dutch Proceedings are still pending (as are the German Proceedings).[29] During the Hearing, the Claimants acknowledged the existence of the Dutch Proceedings but submitted that those proceedings did not implicate Article 26 of the ICSID Convention because they were separate claims that could only be brought in the Dutch court.[30]

IV. THE PARTIES' POSITIONS

37. The presentations of the Parties' positions in the sections below are not meant to serve as an exhaustive review of the Parties' submissions on the Claimants' Request, but rather as summaries of those arguments that are relevant to the Tribunal's analysis and findings at

25 Claimants' Opening Presentation, p. 11.
26 Hearing Transcript, p. 185, lines 1 – 6.
27 Respondent's Observations, ¶ 34. *See* also, Exhibits R-17 and C-70.
28 Respondent's Observations, ¶ 34; Respondent's Opening Statement, p. 13.
29 Hearing Transcript, p. 208, lines 12 – 13.
30 Hearing Transcript, p. 97, lines 3 – 22.

this initial stage. Regardless and as further indicated below,[31] the Tribunal has carefully considered all the submissions made by the Parties.

A. THE CLAIMANTS' POSITION AND REQUEST FOR RELIEF

(1) The Tribunal's Authority to Grant Provisional Measures and the Rights Sought to be Preserved

38. Relying on Article 47 of the ICSID Convention and on ICSID Arbitration Rule 39(1), the Claimants submit that ICSID tribunals have broad authority to issue provisional measures. The Claimants submit that through their Request they seek to preserve three independent rights, each of which is sufficient on its own to warrant a grant of provisional measures: the Parties' right to the exclusivity of ICSID arbitration as guaranteed in Article 26 of the ICSID Convention; the Tribunal's exclusive competence to determine its own jurisdiction as guaranteed in Article 41 of the ICSID Convention; and the integrity of this Arbitration, including the right of the Claimants to participate fully.[32]

39. According to the Claimants, the exclusivity of ICSID jurisdiction and the *kompetenz-kompetenz* principles are guaranteed in Articles 26 and 41 of the Convention. The Claimants submit that, in accordance with these principles, domestic courts should automatically defer to ICSID tribunals on questions relating to the latter's jurisdiction.[33] Hence, the Claimants argue that the very initiation of the German Proceedings by the Netherlands constitutes a violation of Articles 26 and 41 of the ICSID Convention,[34] as well as a threat to the integrity of this Arbitration.[35]

40. The Claimants further argue that ICSID tribunals commonly enforce the principles codified in Articles 26 and 41 of the Convention by recommending provisional measures to enjoin

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31 *See* below, Section V.A on the Tribunal's Analysis.

32 Claimants' Request, ¶ 35; Hearing Transcript, p. 89, line 19 – p. 90, line 10.

33 Claimants' Request, ¶ 43, citing Exhibit CL-4, Christoph Schreuer, The ICSID Convention: A Commentary, p. 393 (2009).

34 Claimants' Request, ¶ 35.

35 Claimants' Request, ¶ 62.

participation in related domestic proceedings.[36] According to the Claimants, ICSID tribunals even have the duty to protect their jurisdiction by granting provisional measures when the guarantees offered by Articles 26 and 41 risk being jeopardized due to parallel domestic proceedings.[37]

41. In the Claimants' view, there is an established practice of ICSID tribunals recommending provisional measures to enjoin domestic proceedings, which otherwise would constitute violations of the exclusivity of ICSID arbitration or the *kompetenz-kompetenz* principle, or that risk undermining the integrity of the arbitral proceedings.[38]

42. In particular, the Claimants rely on two ICSID precedents, namely *Ipek Investment Limited v. Republic of Turkey* ("***Ipek v. Turkey***") and *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* ("***SGS v. Pakistan***"). In *Ipek v. Turkey*, the tribunal issued provisional measures to enjoin domestic litigation where that litigation purported to decide the validity of the contract upon which the jurisdiction of the ICSID tribunal was based.[39] In *SGS v. Pakistan*, the tribunal issued provisional measures to prevent the enforcement of a ruling by the Pakistani Supreme Court, further to domestic proceedings in which Pakistan had sought a declaration that the claimant did not have standing to bring the ICSID arbitration.[40] According to the Claimants, these two cases are "on all fours" with the present Arbitration,[41] and this Tribunal should follow the solutions adopted in them.

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36 Claimants' Request, ¶¶ 40, 55, 60.

37 *See e.g.* Claimants' Request, ¶ 34 and ¶ 55, citing Exhibit CL-21, *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009 ("***Perenco***"), ¶ 64. *See* also, Hearing Transcript, p. 124, lines 19-23, where counsel for the Claimants argued that not issuing provisional measures in this case would result in turning a "blind eye" to a violation of Article 26 of the ICSID Convention.

38 Claimants' Request, ¶ 84, citing Exhibit CL-2, Gabrielle Kaufmann-Kohler and Michele Potestà, *The Interplay Between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework*, IN INVESTOR-STATE DISPUTE SETTLEMENT AND NATIONAL COURTS, European Yearbook of International Economic Law (2020), at ¶ 129 ("**Kaufmann-Kohler and Potestà**").

39 Claimants' Request, ¶ 85, referring to Exhibit CL-32, *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 5, 19 September 2019 ("***Ipek v. Turkey***").

40 Claimants' Request, ¶ 86, referring to Exhibit CL-14, *SGS Société Générale v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/03, Procedural Order No. 2, 16 October 2002 ("***SGS v. Pakistan***").

41 Hearing Transcript, p. 93, line 19.

(2) Applicable Standard of Decision

43. The Claimants submit that there are four criteria for the grant of provisional measures under ICSID case law: (a) *prima facie* jurisdiction and establishment of the case; (b) urgency; (c) necessity; and (d) proportionality.[42] The Claimants note that the first criterion is not disputed by the Respondent,[43] and argue that the three others are satisfied.[44]

44. Regarding urgency, the Claimants argue that this criterion is satisfied when there is a need to safeguard rights that are in danger of irreparable harm before a decision is made on the merits.[45] According to the Claimants, ICSID tribunals have found that there is inherent urgency when there is a threat to the procedural integrity of the arbitration, or when the tribunal's jurisdiction is jeopardized. Based on this case law, the Claimants submit that the German Proceedings indisputably represent a threat to the Claimants as well as to "the Tribunal's ability to carry out its own obligation to determine jurisdiction itself."[46] The Claimants also insist on the imminent nature of the threat, given that the Netherlands had requested a ruling in the German Proceedings by February 25, 2022.[47]

45. On necessity, the Claimants explain that the test is articulated as follows: provisional measures are necessary when the harm could not be adequately repaired by an award of damages. The Claimants also rely on ICSID precedents to explain that "[a]ny harm caused to the integrity of the ICSID Proceedings, particularly with respect to a party's access to evidence or the integrity of evidence could not be remedied by an award of damages."[48] The Claimants argue that this test is satisfied in the present case, as the First Claimant

42 Claimants' Opening Presentation, p. 32.

43 Claimants' Opening Presentation, p. 32.

44 Claimants' Request, ¶ 65.

45 Claimants' Request, ¶ 69; Hearing Transcript, p. 127, lines 11-14.

46 Claimants' Request, ¶ 74.

47 Hearing Transcript, p. 130, lines 11-15.

48 Hearing Transcript, p. 132, lines 15-20, citing Exhibit CL-23, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010 ("***Quiborax***"), ¶ 157.

might effectively be prevented from participating in this Arbitration, and because the German Proceedings constitute a threat to the Claimants' ability to present their case.[49]

46. Finally, on proportionality, the Claimants submit that the test implies "a balance of harm" analysis.[50] According to the Claimants, the risk presented by the German Proceedings "outweighs any burden to the Respondent of discontinuing them."[51] In fact, the Claimants argue that the Respondent does not need the German Proceedings to move further because the EU law issue that it has raised in the German Proceedings has already been decided by the CJEU. As a result, the Respondent would suffer no harm if requested to discontinue the German Proceedings.[52]

(3) Request for Relief

47. In their Request, the Claimants ask the Tribunal to:

(a) Declare that the Respondent's initiation and continued participation in the German Proceedings is a breach of Articles 26 and 41 of the ICSID Convention;

(b) Declare that the Tribunal has exclusive *kompetenz-kompetenz* and that the only forum to hear and resolve any objections to the Tribunal's jurisdiction is before this Tribunal;

(c) Order the Respondent to withdraw the German Proceedings with prejudice immediately or otherwise cause them to be discontinued with prejudice;

(d) Order that the Respondent refrain from initiating any other proceedings seeking to challenge this Tribunal's jurisdiction or otherwise restrain any of the Claimants from participating in this Arbitration through any other forum;

(e) Order the Respondent to pay the full costs of this Request; and

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49 Claimants' Request, ¶ 77.

50 Hearing Transcript, p. 136, lines 7 – 8.

51 Claimants' Request, ¶ 80.

52 Hearing Transcript, p. 136, lines 8 – 12.

(f) Provide such other relief as the Tribunal may deem appropriate.[53]

B. THE RESPONDENT'S POSITION

(1) The Nature of the German Proceedings

48. The Respondent contends that, in light of its treaty obligations under the Treaty for the Functioning of the European Union (the "**TFEU**") and the jurisprudence of the CJEU, including the *Achmea* decision, it is under an EU law obligation to submit the question of whether the EU Treaties preclude intra-EU investor-State arbitration based on the ECT to a competent EU court.[54] The Respondent submits that in this case the competent EU court is the German Court, noting that this is the jurisdiction in which the First Claimant is seated [and whose arbitration law provides a mechanism for obtaining a court ruling on the validity of an arbitration agreement].[55]

49. In the Respondent's view, the German Proceedings seek only declaratory relief (as opposed to an injunction), and therefore they have no real impact on the Tribunal's jurisdiction or its ability to decide as to its jurisdiction.[56] The Respondent submits that the German Proceedings do not relate to the Tribunal's competence to decide on its own competence or to proceed with the Arbitration.[57] They are solely concerned with the interpretation and application of the EU Treaties and EU law, and not of the ICSID Convention.[58]

50. The Respondent further contends that Article 26 of the ICSID Convention does not apply to the German Proceedings, because the latter merely deal with the question of whether there is consent to arbitration and not with the merits of the dispute.[59] The Respondent also

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53 Claimants' Request, ¶ 90.

54 Respondent's Observations, ¶¶ 38 – 41; Hearing Transcript, p. 232, line 18 – p. 233, line 11.

55 Respondent's Observations, ¶¶ 37 – 40.

56 Respondent's Observations, ¶¶ 48, 52 – 53, 96.

57 Respondent's Observations, ¶¶ 61 – 66.

58 Respondent's Observations, ¶¶ 54 – 55, 59; Hearing Transcript, p. 147, lines 12 – 17.

59 Respondent's Observations, ¶¶ 69 – 72.

asserts that Article 26 of the Convention does not apply to proceedings that seek to determine the rights and obligations of EU Member States under the EU Treaties, such as the German Proceedings, given that these are the preserve of the courts of EU Member States and ultimately of the CJEU.[60]

51. In any event, the Respondent argues that the German Proceedings are not encumbered by Article 26 of the ICSID Convention, because the Claimants' conduct can be construed as consent to non-exclusivity and/or a tacit waiver of such exclusivity, in view of the fact that the Claimants mounted a defence in the German Proceedings and initiated the Dutch Proceedings.[61]

52. Finally, the Respondent submits that it had no choice but to put this issue to a court of an EU Member State, given that it is bound by an international law obligation to ensure that issues of interpretation and application of EU law are put to EU courts.[62]

(2) The Claimants' Failure to Meet the Requirements for Provisional Measures

53. The Respondent notes that provisional measures should only be granted in exceptional circumstances.[63] The Respondent claims that there is no necessity or urgency to grant the requested provisional measures, because the Claimants have not established (and there is no) imminent threat of actual harm.[64] The Respondent submits that the German Proceedings do not prevent the First Claimant from participating in or presenting evidence in the present Arbitration; nothing suggests that the Respondent will use the German Proceedings as a means to prevent the Claimants from pursuing their ICSID claims; and the Claimants' delayed request for provisional relief is indicative of a lack of necessity and urgency.[65] The Respondent adds that RWE, which finds itself in the same circumstances

60 Respondent's Observations, ¶¶ 81 – 85, citing Exhibit CL-30, *Achmea*, ¶¶ 35 – 36.
61 Respondent's Observations, ¶¶ 73 – 80.
62 Respondent's Observations, ¶¶ 86 – 90.
63 Respondent's Observations, ¶¶ 97 – 99.
64 Respondent's Observations, ¶ 105.
65 Respondent's Observations, ¶¶ 106 – 111.

as the Claimants, did not request provisional measures from the tribunal empanelled in that case.[66]

54. The Respondent also argues that an order of provisional measures would be disproportionate in that it would cause the Netherlands to breach its international obligations under the EU Treaties.[67]

55. Finally, the Respondent asserts that the measures requested by the Claimants would not be provisional in nature and are thus not capable of being granted.[68]

(3) Request for Relief

56. The Respondent requests that the Tribunal:

(a) Reject the Application; and

(b) Order the Claimants to bear the costs incurred in connection with the Application.[69]

V. THE TRIBUNAL'S CONSIDERATIONS

A. THE TRIBUNAL'S ANALYSIS

57. In order to arrive at its decision, the Tribunal reviewed and considered all the arguments of the Parties and the documents submitted by them in this phase of the proceedings. The fact that the Tribunal does not specifically mention a given argument or document does not mean that it has not considered it. In their submissions, the Parties produced and cited numerous awards and decisions dealing with matters that they consider relevant to the presently sought provisional measures. The Tribunal has carefully considered the reasoning and findings of these and other tribunals. However, in coming to a decision on

66 Respondent's Observations, ¶¶ 112 – 113.
67 Respondent's Observations, ¶ 115.
68 Respondent's Observations, ¶¶ 117 – 119.
69 Respondent's Observations, ¶120.

the matter of the provisional measures requested by the Claimants, the Tribunal must perform, and in fact has performed, an independent analysis of the ICSID Convention, the Arbitration Rules, and the particular facts of this case.

58. The Claimants' Request comes early in the proceedings and has been considered without prejudice to the Tribunal's future consideration of the Respondent's jurisdictional objections, which have been signalled but not yet made. Those objections will be considered in due course in accordance with the procedural calendar established in consultation with the Parties and set out in Procedural Order No. 1.

B. THE LEGAL FRAMEWORK

(1) The Basis for Provisional Measures

59. As a preliminary matter, before considering any request for provisional measures, the Tribunal must be satisfied that it has *prima facie* jurisdiction over the case that has been brought. The Tribunal is so satisfied here. The Claimants have established that they have a *prima facie* right to seek access to international arbitration under the ICSID Convention. Both Germany (the First Claimant's home State) and the Netherlands are signatories to the ICSID Convention and have duly ratified it. The same is true for the ECT, which is the instrument the Claimants invoke as the basis for the Respondent's consent to bring this case to ICSID arbitration. For their part, the Claimants have consented to submit their claims to arbitration pursuant to Article 26(4)(a)(i) of the ECT[70] and have alleged breaches of obligations under the ECT and customary international law.[71] As already noted, on April 30, 2021, the Acting Secretary General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention. In any event, the Respondent does not challenge the Tribunal's *prima facie* jurisdiction to decide both its objections to jurisdiction (*i.e.,* the Tribunal's *kompetenz-kompetenz*) and, if applicable, the merits of the asserted claims.

70 Claimants' Request for Arbitration, ¶ 1.

71 Claimants' Request for Arbitration, ¶ 3.

60. Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules apply to an application for provisional measures. Through Article 47 of the ICSID Convention, State parties to that Convention have granted arbitral tribunals the authority to issue recommendations to sovereign States while proceedings are pending. On its face, the authority granted to tribunals appears broad. However, as other tribunals have noted, this authority is an exception to the general principle of State sovereignty.[72] Tribunals should thus exercise the granted discretion as an exceptional remedy.[73] Further, tribunals should limit their recommendations to the minimum steps necessary to preserve the rights at issue.[74]

61. Article 47 of the ICSID Convention provides as follows:

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

62. The Claimants bring their claims in this Arbitration pursuant to the ECT. The ECT is silent as to provisional measures and thus does not restrict or condition the Tribunal's power to recommend provisional measures pursuant to the ICSID Convention. Further, no other agreement that limits the Tribunal's discretion to recommend provisional measures has been alleged.

63. Accordingly, the Tribunal has the discretion (as indicated by the use of "may") to recommend provisional measures if it considers that the circumstances so require. This suggests that the Tribunal must review the specific circumstances to determine whether they require provisional measures in order to preserve the Claimants' rights, which "must exist at the time of the request, [and] must not be hypothetical."[75] As indicated by the use

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72 *See e.g* Exhibit CL-29, *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7, 29 March 2017, ("***Nova Group***"), ¶ 227.

73 Exhibit CL-13, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999 ("***Maffezini***"), ¶ 10.

74 Exhibit CL-29, *Nova Group*, ¶ 227 ("this means that tribunals should recommend only the *minimum steps necessary* to meet the objectives set out in the Convention") (emphasis in the original).

75 Exhibit CL-13, *Maffezzini*, ¶ 13.

of the word "provisional," the Tribunal should not grant any measures that amount to final relief pursuant to an application under Article 47.

64. Rule 39 of the ICSID Arbitration Rules reads in relevant part as follows:

> (1) 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.
>
> (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
>
> (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
>
> (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

65. ICSID tribunals applying Rule 39 have consistently approached the analysis by first identifying the right to be preserved and then confirming that any provisional measures recommended are necessary, urgently required and do not impose a disproportionate burden on one party.[76]

(2) The Rights at Issue

66. The rights invoked in this case are the right to ICSID arbitration as the exclusive forum for the dispute (Article 26), the Tribunal's competence to determine its own competence (Article 41) and the integrity of the proceedings.

67. Article of 26 of the ICSID Convention provides as follows:

[76] Exhibit CL-21, *Perenco*, ¶ 43.

> 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.

68. Article 41 of the ICSID Convention states in relevant part that:

> 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 […].

69. It is likewise well established that Tribunals have the ability and duty to protect the procedural integrity of an arbitration. ICSID tribunals have exercised this power and granted provisional measures when circumstances so require.[77] Circumstances found to support the need for provisional measures to protect the procedural integrity of the arbitration include preserving a party's opportunity to present its case,[78] its ability to pursue and litigate its claim,[79] or to avoid aggravation of the dispute.[80]

70. There is no disagreement between the Parties that these rights exist and that they are capable of protection by provisional measures. The dispute is instead centred on whether there is a need to issue provisional measures to preserve these rights in the circumstances of this case.

71. In a provisional measures application, the notion of the rights to be protected is fundamentally related to the integrity of the specific proceeding:

> The rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out. Thus the rights to be preserved by provisional measures are circumscribed by the requesting party's claims and requests for relief. They may be general

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77 Exhibit CL-23, *Quiborax*, ¶ 141.

78 Exhibit CL-23, *Quiborax*, ¶ 153.

79 Exhibit CL-29, *Nova Group,* ¶ 240.

80 *See e.g. Caratube International Oil Co. LLP v. Kazakhstan*, ICSID Case No. ARB/13/13, 4 December 2014 ("***Caratube II***"), ¶ 121. *See* also, Exhibit CL-21, *Perenco*, at ¶¶ 55 – 56 and the sources cited therein; Exhibit CL-15, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1, 1 July 2003 , ¶ 2.

> rights, such as the rights to due process or the right not to have the dispute aggravated, but those general rights must be related to the specific disputes in the arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date.[81]

72. Where the provisional measures requested will affect a party's right to avail itself of other judicial processes or to meet international obligations, care must be taken to ensure that the duties owed to the Tribunal, in particular those of good faith and non-aggravation of the dispute, are balanced against the State's other obligations, whether these are to act in the public interest (in the case of criminal proceedings) or to meet other international law obligations.

73. The mere existence of proceedings before another judicial body does not necessarily threaten the exclusivity of ICSID proceedings. There are many situations where there may be concurrent jurisdiction between domestic courts and international investment tribunals.[82] In order to constitute a threat to exclusivity, the other proceedings must relate to issues within the Tribunal's competence and purport to decide, or hinder the Tribunal's freedom to decide, those issues.[83]

74. Further, in order to meet the test for provisional measures to protect the integrity of the proceedings, there must be a link between the other proceedings and the party's ability to assert or pursue its claims in the arbitration. If established, this situation would necessarily give rise to irreparable and imminent harm requiring urgent relief.[84] Even in these circumstances, however, the Tribunal must weigh the proportionality of granting the

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81 *Caratube II*, ¶ 121.

82 Exhibit CL-2, Kaufmann-Kohler and Potestà, ¶¶ 58 – 66.

83 Both Parties' submissions were consistent on this point. The Claimants argued that the Dutch Proceedings did not engage Article 26 of the ICSID Convention because the claims in those proceedings were brought under the ECHR and only the Dutch courts were competent to hear those claims. The Respondent argued that the German Proceedings do not engage Article 26 of the ICSID Convention because only the competent EU court can make a declaration of EU law.

84 Exhibit CL-27, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016, ¶ 235.

measure to protect the right against the potential harm to the other party resulting from the measure.

75. The principles set out above have been considered and applied by a number of ICSID tribunals in various circumstances. However, the particular circumstances of this case are somewhat unique and will be considered in the following section.

C. THE TRIBUNAL'S REASONING AND DECISION

(1) The Nature of the Relief Sought

76. As noted at paragraph 47 above, the Claimants have requested that the Tribunal make the following recommendations pursuant to Article 47 of the ICSID Convention and Arbitration Rule 39:

> (a) Declare that the Respondent's initiation and continued participation in the German Proceedings is a breach of Articles 26 and 41 of the ICSID Convention;
>
> (b) Declare that the Tribunal has exclusive *kompetenz-kompetenz* and that the only forum to hear and resolve any objections to the Tribunal's jurisdiction is before this Tribunal;
>
> (c) Order the Respondent to withdraw the German Proceedings with prejudice immediately or otherwise cause them to be discontinued with prejudice;
>
> (d) Order that the Respondent refrain from initiating any other proceedings seeking to challenge this Tribunal's jurisdiction or otherwise restrain any of the Claimants from participating in this Arbitration through any other forum;
>
> (e) Order the Respondent to pay the full costs of this Request; and
>
> (f) Provide such other relief as the Tribunal may deem appropriate.[85]

77. At the outset, the Tribunal notes that the Claimants' request that the Tribunal declare that the Respondent has breached Articles 26 and 41 of the ICSID Convention is a request for

[85] Claimants' Request, ¶ 90.

final relief and therefore not appropriate for the Tribunal to grant in a provisional measures application.[86] Similarly, the Claimants' request that the Tribunal order the Respondent to withdraw the German Proceedings with prejudice is also in the nature of final relief, and the Tribunal declines to make this recommendation on that basis.

78. Nevertheless, the Tribunal considers that the Claimants' Request raises very serious issues. The Tribunal has carefully considered the circumstances to determine whether, pursuant to Rule 39(3), it should recommend any of the requested measures, or measures other than those sought. On their face, the German Proceedings implicate Articles 26 and 41 of the ICSID Convention and appear to be a collateral attack on this Tribunal's jurisdiction. Indeed, the relief sought by the Respondent in the German Proceedings is a declaration that this Tribunal lacks jurisdiction over the Claimants' claims. Coupled with the related statements of the Dutch Minister,[87] it was entirely reasonable for the Claimants to be concerned that the Respondent through the German Proceedings sought to prevent the Claimants from bringing their claims before this Tribunal. Further, it is possible that, if successful in the German Proceedings, the Respondent might take further steps that could affect the integrity of the arbitration proceedings and potentially aggravate the dispute.

79. For these reasons, the Tribunal has considered carefully whether the circumstances require the recommendation of provisional measures at this time and what specific relief is appropriate, in light of the grave concerns raised by the Respondent's commencement and prosecution of the German Proceedings. Rather than consider each of the Claimants' requests for relief individually, the Tribunal has proceeded holistically to consider the rights at issue and the provisional measures warranted in the circumstances.

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86 This is without prejudice to the Claimants' ability to renew this request for relief if the circumstances support it for determination at an appropriate stage of the Arbitration when an award of final relief can be granted by the Tribunal.

87 *See* above, ¶33.

(2) Necessity

80. In order to establish that provisional measures are necessary to protect the rights of exclusivity of ICSID arbitration and *kompetenz-kompetenz*, those rights must be engaged in these circumstances and there must be a material risk of harm should measures not be granted.

81. The Claimants argue that the German Proceedings are in violation of Articles 26 and 41 of the ICSID Convention. In the circumstances of this case, it is the same right at issue under both Articles – the Tribunal's exclusive competence to determine its own jurisdiction. Unlike the ICSID cases cited by the Claimants, the German Proceedings do not engage the merits of Claimants' claims in the arbitration or require the German Court to assess any evidence that will eventually be before the Tribunal. As noted, the German Court has been asked to make a declaration "that the arbitration proceedings brought by [the First Claimant] against [the Netherlands] before the *International Centre for Settlement of Investment* Disputes, which is conducted under file no. ICSID ARB/21/22, is [*sic.*] inadmissible" and "that any arbitration proceedings between [the First Claimant] and [the Netherlands] on the basis of Art. 26 para. 3 and 4 Energy Charter Treaty of 17.12.1994 are inadmissible"[88] on the basis that intra-EU arbitration proceedings contradict mandatory fundamental EU law and that consequently Article 26 of the ECT is contrary to EU law in an intra-EU scenario.[89] According to the Claimants, the admissibility (jurisdiction) of this Arbitration is an issue that only this Tribunal, empowered under the ICSID Convention, may decide. According to the Respondent, however, it has "expressly stated to the German court that the decision it seeks from the German court is limited to the application of EU law, and that it is not seeking determinations under the ICSID Convention".[90]

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88 Exhibit C-72, ¶ 2 correcting the typographical error in the original request for relief set out at Exhibit C-64, ¶ 1.

89 *See,* Exhibit C-64, ¶¶ 42 – 126.

90 Respondent's letter to the Tribunal of February 4, 2022 at p. 2 citing, for example, Exhibit C-72 (T-ENG): "the Senate is not called upon to decide a question of the ICSID Convention, but to clarify a question of EU law and German law."

82. It is well established that Article 41 of the ICSID Convention confers on the Tribunal the competence and authority to hear and resolve any objections to its jurisdiction. This is neither controversial nor in controversy between the Parties. The Respondent has confirmed that it will participate in these ICSID proceedings and has expressly acknowledged that this Tribunal has the exclusive competence to determine its jurisdictional objections based on the ICSID Convention, the ECT and international law.

83. The question in this case is instead whether Article 26 of the ICSID Convention precludes the Respondent from asking the German Court to make a declaration as to the validity of the arbitration agreement as a matter of EU law only.

84. The crux of the Claimants' application is that the Respondent has commenced "identical and parallel proceedings" with the intent of having the German Court declare that no arbitration agreement exists under the ECT, thereby usurping the Tribunal's jurisdiction to determine the case put before it. Further, the Claimants submit that the Respondent's intent in doing so is to prevent the First Claimant from advancing its claims in the Arbitration. The Claimants' interpretation of the Respondent's statements to the Dutch Parliament and the ICSID Secretariat is that the Respondent is "seeking to use the German Proceedings to put a stop to this Arbitration."[91] The Claimants ask the Tribunal to draw this inference based on the facts before it.

85. Regarding Article 26, the Respondent makes two main submissions. *First*, it says that the exclusivity protected by Article 26 is conditioned upon valid consent to arbitration. In this case, the Respondent's consent is based on Article 26 of the ECT, which the Respondent says forms part of EU law. 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.[92] The Respondent says that for this reason,

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91 Claimants' Request, ¶ 58.

92 The Respondent refers to Article 344 of the TFEU, Articles 4 and 19 of the Treaty on the European Union and the *Achmea* Judgment of the CJEU. In addition, the Respondent notes that the EU has raised the possibility of enforcement proceedings to ensure that these obligations are respected by EU Member States.

it has asked the German Court to clarify whether the EU Treaties preclude intra-EU investor-state arbitration under the ECT. *Second*, if the exclusivity principle does apply at this stage, then the Respondent argues that the Claimants waived exclusivity by commencing the Dutch Proceedings, which seek the same relief based on the same measures complained of in the Arbitration.

86. In response to the first point, the Claimants submit that the Respondent is not just seeking an interpretation of EU law before the German Court; the Respondent has asked the German Court to decide whether the arbitration agreement that forms the basis of this Tribunal's jurisdiction is valid. In response to the second, the Claimants say that Article 26 of the ICSID Convention is not engaged by the Dutch Proceedings. Those Proceedings could only be brought before the Dutch Court, because they are based on alleged violations of the ECHR. Since this Tribunal does not have jurisdiction to hear claims for violations of the ECHR, the Dutch Proceedings do not offend the exclusivity principle.

87. By taking these positions, the Parties have implicitly agreed that Article 26 exclusivity is necessarily limited to the particular dispute that has been put before an ICSID tribunal and to matters which ultimately fall within that tribunal's jurisdiction. This accords with a common sense reading of Article 26, as ICSID cannot be the exclusive forum for a dispute over which it does not have competence. For this reason, the Claimants cannot have waived the right to exclusivity through the pursuit of the Dutch Proceedings, which fall to be determined under a legal instrument different and distinct from the ECT and the ICSID Convention. Also for this reason, the Respondent would not offend the principle of exclusivity by requesting the German Court to make a declaration as to EU law alone.

88. Just as this Tribunal has the exclusive competence to hear and resolve any objections to its jurisdiction, the EU courts correspondingly have the competence to determine their own jurisdiction and to issue interpretations of the EU Treaties and accordingly of EU law. These competencies exist in parallel and are independent of each other, each arising out of its own constitutive instrument(s). They do not overlap. It is not for this Tribunal to

determine the competence of the German Court any more than it is for the German Court to determine the competence of this Tribunal.[93]

89. The Respondent takes the position that the German Proceedings do not pass judgment on this Tribunal's powers and competence under either the ICSID Convention or the ECT such that Article 41 is engaged. This must necessarily be the case, because the EU courts do not have the authority to decide upon the jurisdiction of an ICSID tribunal. However, by seeking an interpretation of EU law from the German Court, which is framed expressly in terms of a statement on the admissibility of this Arbitration, the Respondent has created the perception of an apparent competency of the German Court to validly determine this Tribunal's jurisdiction.

90. In the German Proceedings, the Respondent has made "[an] application according to § 1032 para. 2 ZPO (German Code of Civil Procedure)"[94] and, in accordance with that provision,[95] did so before the constitution of the Tribunal. Specifically, the Respondent requested the German Court to declare "that the arbitration proceedings brought by [the First Claimant] against [the Netherlands] before the *International Centre for Settlement of Investment* Disputes, which is conducted under file no. ICSID ARB/21/22 is [*sic*.] inadmissible," and "that any arbitration proceedings between [the First Claimant] and [the Netherlands] on the basis of Art. 26 para. 3 and 4 Energy Charter Treaty of 17.12.1994 are inadmissible."[96]

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93 The Tribunal notes that the First Claimant has raised jurisdictional objections in the German Proceedings, arguing that the provisions of the German Civil Code relied upon by the Respondent are not available in relation to ICSID arbitrations. The Claimants argue that Article 26 of the ICSID Convention imposes a "negative" obligation on the courts of a contracting party to the ICSID Convention. These arguments are supported by the expert opinion of Professor Christoph Schreuer. The Tribunal simply notes here that the Claimants' jurisdictional objections fall to be determined by the German Court.

94 Exhibit C-64, p. 5.

95 Section 1032 para. 2 of the German Code of Civil Procedure provides as follows: "Prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible." *See* Respondent's Observations, ¶ 63.

96 Exhibit C-72, ¶ 2 restating the request for relief sought to correct the typographical error in the original request for relief found in Exhibit C-64, p. 5.

91. It was common ground between the Parties that "inadmissible," as used in § 1032 ZPO, means without jurisdiction. Further, it was agreed that the Respondent's request for relief tracked the wording of § 1032 ZPO, as was required by the pleading rules of the German Court. In response to an inquiry from the Tribunal, the Parties confirmed that it was not possible for the Respondent to amend its request for relief in the German Proceedings to clarify that the declarations it sought related solely to EU law. However, the underlying pleadings themselves confirm that the German Court has been asked to clarify a question of EU law and German law arising from the *Achmea* judgment,[97] and to find that Article 26 of the ECT is contrary to European law and cannot serve as a basis for intra-EU investor-state arbitration as a matter of EU law.[98]

92. The Claimants say that by asking the German Court to declare that the Tribunal has no jurisdiction to hear the pending dispute on the basis that no agreement to arbitrate exists between the Claimants and the Respondent under the ECT, the Respondent has manifestly violated Articles 26 and 41 of the ICSID Convention. Further, the Claimants point to statements made by a Dutch Minister to Parliament when reporting on the commencement of the German Proceedings to support their position that the Respondent intends the German Court to rule upon the Tribunal's jurisdiction. The Claimants submit that the Dutch Minister's statements confirm that the Respondent has gone "forum shopping" to seek a favourable ruling on its jurisdictional objection. In his letter to Parliament, the Minister described the German Proceedings as "anti-arbitration proceedings" and asserted that they were "primarily aimed at averting the arbitration."[99]

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97 Exhibit C-64.

98 Exhibit C-64, p. 6. The CJEU's decision in *Republic of Moldova v. Komstroy LLC* was issued after the initiation of the German Proceedings and the first exchange of submissions in that case. *See* Exhibit CL-33, *Republic of Moldova v. Komstroy LLC, successor in law to the company Energoalians*, Case C-741/19, Judgment dated 2 September 2021 ("***Komstroy***")

99 Exhibit C-65.

93. In response to these arguments and to questions from the Tribunal, the Respondent's representatives made a number of representations to the Tribunal during the Hearing on Provisional Measures. In particular, the Respondent made the following representations:

- That the Kingdom of the Netherlands intends to comply with all of its obligations under international law, including the ICSID Convention and the ECT;[100]

- That it is under an obligation to question the validity of the arbitration agreement contained in Article 26 of the ECT before an EU court, as this is mandatory and required by the Respondent's EU law obligations stemming from Article 344 of the TFEU, the Treaties more generally, the jurisprudence of the CJEU and the direct obligations imposed by the European Commission;[101]

- That in the German Proceedings,

  i. It seeks only a declaration as to EU law, as required by its understanding of its EU Treaty obligations;

  ii. It does not seek determinations under the ICSID Convention; and

  iii. As noted above, it has expressly advised the German Court of this position, specifically stating to the German Court that the Court "is not called upon to decide a question of the ICSID Convention, but to clarify a question of EU law and German law";[102]

- That the ECT is a source of international law and identifies the body competent to determine jurisdiction under that treaty;[103]

100 Hearing Transcript, p. 232, lines. 18 – 22.

101 Hearing Transcript, p. 232, line 23 – p. 233, line 11.

102 Respondent's letter to the Tribunal of February 4, 2022 at p. 2 citing Exhibit C-72 (T-ENG).

103 Hearing Transcript, p. 233, lines 12 – 17.

- That this Tribunal is the body competent to determine its own jurisdiction under the ICSID Convention and that it may take into consideration the forthcoming judgment of the German Court and judgments of the CJEU;[104]

- That it will not argue before any forum that any decision that might be rendered by the German Court constitutes anything other than a declaration under EU law;[105] and

- That the declaration if granted, in and of itself, will not have any effect on any of the Claimants' ability to continue participating in the ICSID proceedings, as there is neither a concept of contempt of court under German law, nor is the Respondent seeking any injunctive or similar relief.[106]

94. The Tribunal is given comfort by these express and binding representations of the Respondent, in circumstances where, without them, a *prima facie* violation of Articles 26 and 41 of the ICSID Convention might well have been established and a recommendation to withdraw the German Proceedings could have been justified. On this basis, the Tribunal finds that despite the apparent challenge to the Tribunal's jurisdiction posed by the relief sought in the German Proceedings, any ruling the German Court may issue on the question of the Tribunal's jurisdiction does not impact the Tribunal's authority to determine its own jurisdiction under the ICSID Convention and the ECT. Importantly, the Respondent does not challenge this proposition and in fact has expressly endorsed it. Similarly, the statements of the Dutch Minister, though possibly reflecting a misunderstanding of Article 26 of the ECT and the ICSID Convention, do not have any effect on this Tribunal's jurisdiction or the Claimants' ability to pursue their claims in these ICSID proceedings. In addition, the Tribunal has considered the Claimants' argument made at the Hearing that allowing the German Proceedings to continue inflicts serious reputational harm and risk on the First Claimant as a German entity subject to German and EU law and is an attempt by

104 Hearing Transcript, p. 233, lines 19 – 25.
105 Hearing Transcript, p. 221, lines 15 – 18.
106 Hearing Transcript, p. 164, lines 14 – 15.

the Respondent to put pressure on the First Claimant to drop its claims in the Arbitration and/or amounts to a serious aggravation of the dispute for which provisional measures are an appropriate remedy.[107] The Tribunal is not persuaded that the mere potential of a ruling by the German Court results in a material impediment to the Claimants' ability to bring their claims in the Arbitration or the infliction of significant reputational harm, nor that these theoretical risks, on their own, amount to aggravation of the dispute sufficient to require provisional measures at this stage.

95. Accordingly, at this stage, the Tribunal is not persuaded that there is a need for immediate injunctive relief to protect the rights contained in Articles 26 and 41 of the ICSID Convention. However, the Tribunal defers for later consideration the question of whether the Respondent's initiation and continuation of the German Proceedings was a breach of Articles 26 and 41 of the ICSID Convention.

96. Furthermore, the Tribunal underscores that in the event the Respondent takes additional steps that actually (as opposed to hypothetically) engage the Claimants' right to bring their case, call into question this Tribunal's authority, threaten the integrity of these proceedings or risk exacerbating the Parties' dispute, the Tribunal expressly reserves the right to revisit its determinations, on the request of a Party or *sua sponte*, and to issue such further measures as it deems appropriate.

97. For the avoidance of doubt, in arriving at this conclusion the Tribunal has considered carefully the two cases relied upon by the Claimants as being factually similar to this case and in which the respective tribunals granted provisional measures.

98. In *SGS v. Pakistan*, the merits of the dispute were put before an arbitration tribunal in Islamabad pursuant to the arbitration agreement contained in the contract between the parties, which was also at issue in the ICSID arbitration. The Supreme Court of Pakistan granted a motion by the respondent State that the claimant in the ICSID proceedings be

[107] Hearing Transcript, and p. 191, lines 1 – p. 192, line 9.

permanently enjoined from taking any steps to participate in those international proceedings. The government also sought an order of contempt of court against the claimant for participating in the international proceedings. In those circumstances, the ICSID tribunal recommended that no further steps be taken in the contempt of court proceedings and that the Islamabad-based arbitration be stayed pending the ICSID tribunal's determination of its jurisdiction. Therefore, in *SGS v. Pakistan* there was a legal impediment to SGS continuing to participate in the ICSID proceedings, and the local arbitration, if continued, would have resulted in the domestic tribunal making a determination as to the validity of the arbitration agreement under the same law as would be applied by the ICSID tribunal to the contractual claims.

99. Thus, the situation in *SGS v. Pakistan* can be distinguished from the current case. The German Proceedings in and of themselves cannot result in any legal prohibition on the Claimants' participation in the ICSID arbitration, as the application is for a declaration and not an injunction. Even if the German Court makes the declaration sought, there is no concept of contempt of court in German law such that there might be any legal impediment to the Claimants' continued participation in these proceedings. In addition, in this case the German Court is not being asked the same jurisdictional question that this Tribunal is required to resolve, as it is only being asked to determine a question as to EU law, whereas this Tribunal will determine its jurisdiction based upon the dictates of the ECT and the ICSID Convention.

100. In *Ipek v. Turkey*, the claimants sought provisional measures directed at a number of actions taken by Turkey, including threatened extradition proceedings, criminal proceedings, two civil proceedings, and the potential loss of documentary evidence. The most relevant aspect of the case to these proceedings relates to the request for a recommendation that "Turkey … suspend and/or refrain from initiating any legal proceedings in which [it] seeks the determination of issues by the Turkish court that fall to be determined exclusively in this Arbitration." In one of these proceedings (referred to as the SPA Proceeding), Turkey requested the Turkish court to declare the contract, which formed the basis of the claimants'

arbitration agreement in the ICSID proceeding, invalid under Turkish law. The ICSID tribunal had to determine the same issue: whether the arbitration agreement contained in the SPA was valid under the governing law. In doing so, the tribunal would have to assess the same factual evidence as was before the Turkish court. The tribunal considered that in those circumstances, there was a "*relevant relationship or nexus*" between the two proceedings and the issues raised in them that threatened the integrity of the ICSID proceedings.[108]

101. Thus, *Ipek v. Turkey* can also be distinguished from this case, as the question asked of the German Court is pursuant to a different law than the one this Tribunal will apply, and the respondent there had made none of the binding representations as to its intentions that the Respondent here has made. There is, accordingly, not a sufficient nexus between the two proceedings and the issues raised so as to threaten the integrity of the present proceedings.

102. In light of the Tribunal's conclusion that the necessity of the requested injunctive relief to protect the rights contained in Articles 26 and 41 of the ICSID Convention has not been established, the Tribunal does not need to consider the urgency or proportionality of those measures.

(3) Continuation of the German Proceedings

103. In the course of their submissions, the Claimants contended that if the Respondent accepted the Tribunal's jurisdiction to determine its own jurisdiction, then the German Proceedings served no purpose other than to increase the costs to the Parties and aggravate the dispute. The Respondent maintained its position that the German Proceedings were necessary for it to meet its obligations as an EU Member State and noted that the Claimants disputed the relief sought in the German Court, indicating that there was a legitimate controversy for the German Court to resolve as to the content of EU law.

[108] Exhibit CL-32, *Ipek v. Turkey,* ¶ 89.

104. Although the Claimants take the position that the German Court does not have the jurisdiction to make the requested declaration in the context of an ICSID proceeding, the Claimants do not dispute in the German Proceedings that the CJEU has determined that, as a matter of EU law, Article 26 of the ECT should be interpreted so as not to apply to intra-EU disputes.[109] The Claimants stipulated this for the purposes of the Arbitration, and they submit that this removes any purported obligation on the Respondent's part to pursue the German Proceedings in order to resolve a disputed issue of EU law.[110]

105. The Tribunal accepts the Respondent's representation that it submitted the question of whether Article 26 of the ECT should be interpreted so as not to apply to intra-EU disputes to the German Court to meet its good faith understanding of its obligations as an EU Member State (albeit without making any finding as to the correctness of that understanding). At the time that the Netherlands commenced the German Proceedings, the question of whether Article 26 of the ECT applied to intra-EU disputes, as a matter of EU law, was an open question. Since then, however, the CJEU decision in *Komstroy* has settled this EU law question. Accordingly, it appears that the continuation of the German Proceedings no longer serves any legitimate purpose, as there seems to be no dispute between the Parties concerning the relevant content of EU law.

106. As noted above, the mechanism engaged by the Respondent in the German Proceedings requires an application to be made to the German Court before the constitution of this Tribunal in order to obtain a declaration as to the validity of the arbitration agreement which is relied upon as the basis for this Tribunal's jurisdiction. Although the German Court does not have the competence to determine this Tribunal's jurisdiction under the ICSID Convention (or at all), the relief sought in the German Proceedings and the result of granting that relief would be to create the appearance of this authority. The remaining dispute between the Parties in the German Proceedings seems to be whether the German

[109] As noted above, the CJEU's decision in *Komstroy* was issued after the initiation of the German Proceedings and the first exchange of submissions in that case. *See* Exhibit CL-33.

[110] Claimants' letter to the Tribunal of February 4, 2022.

Court has the authority to grant the relief sought in the context of an ICSID arbitration. The Tribunal has serious doubts that it is appropriate for the Respondent to put this question to the German Court, in the absence of the need for a determination of a disputed point of EU law over which the Court would have jurisdiction.

107. As noted above, the German Court is competent to determine its own jurisdiction. However, in light of the Respondent's obligations under the ICSID Convention, the Tribunal will recommend that the Respondent reconsider whether it is appropriate even to put this question before the German Court, now that the formerly disputed issue of EU law has been determined by the CJEU. The Tribunal has further deemed it appropriate to issue the other findings, declarations and recommendations set out in Section VI below.

VI. DECISION

108. Based on the above analysis, and as already determined in its decision of February 17, 2022, the Tribunal DECIDES and ORDERS as follows:

a. The Tribunal declares that pursuant to Articles 26 and 41 of the ICSID Convention, it has exclusive competence and authority to hear and resolve any objections to its jurisdiction.

b. The Tribunal acknowledges that within the EU law system, EU courts correspondingly have exclusive competence to issue interpretations of the EU Treaties and accordingly of EU law. This authority does not, however, extend to valid interpretations of the jurisdiction of an ICSID tribunal.

c. Given these parallel but independent competencies, the Tribunal expresses grave concern regarding the specific mechanism engaged by the Respondent in the German Court to seek an interpretation of EU law, as pursuant to section 1032(2) of the German Code of Civil Procedure (i) the timing of the request must precede the constitution of the Tribunal; and (ii) the request for relief said to be formally required by this mechanism, and in any event sought by the Respondent, could result in a declaration that Claimants' claims in this specific Arbitration are "inadmissible", i.e., without jurisdiction.

d. Notwithstanding this apparent conflict, the Tribunal notes the Respondent's representations to the Tribunal that:

   i. it commenced the German Proceedings in a good faith effort to meet what it views as its obligations under the EU Treaties and not to challenge the *kompetenz-kompetenz* of this Tribunal;

   ii. in the German Proceedings,

      1. it seeks only a declaration as to EU law, as required by its understanding of its EU Treaty obligations;

      2. it does not seek determinations under the ICSID Convention; and

      3. it has expressly advised the German Court of this position, specifically stating to the German Court that it "is not called upon to decide a question of the ICSID Convention, but to clarify a question of EU law and German law";

   iii. it will not argue before any forum that any decision that might be rendered by the German Court constitutes anything other than a declaration under EU law; and

   iv. the declaration if granted, in and of itself, will not have any effect on any of the Claimants' ability to continue participating in the ICSID proceedings, as there is neither a concept of contempt of court under German law, nor is the Respondent seeking any injunctive or similar relief.

e. In these circumstances, it is clear both that any ruling the German Court may issue on a question of the Tribunal's jurisdiction does not impact the Tribunal's authority to determine its own jurisdiction under the ICSID Convention and the ECT, and that the Respondent in turn does not challenge this proposition.

f. Based on these facts, the Tribunal denies the Claimants' request for a provisional measures recommendation that the Respondent immediately withdraw the German Proceedings with prejudice or otherwise cause them to be discontinued with prejudice.

g. The Tribunal nonetheless defers for later consideration the question of whether, notwithstanding the absence of a need for immediate provisional relief, the

Respondent's initiation and continuation of the German Proceedings was a breach of Articles 26 and 41 of the ICSID Convention.

h. Given the seriousness of this issue, the Tribunal recommends that the Respondent reconsider whether it is necessary or appropriate to continue the German Proceedings, as there appears to be no dispute between the Parties concerning the relevant content of EU law: the Claimants have stipulated that, following the CJEU's issuance of the Komstroy Judgment, "the CJEU has determined that, as a matter of EU law, Article 26 of the [ECT] should be interpreted so as to not apply to intra-EU disputes."

i. The Tribunal also recommends that to the extent it maintains the German Proceedings, the Respondent shall provide a copy of this Decision to the German Court.

j. Further, the Tribunal strongly recommends that the Respondent take no further steps that could aggravate the dispute or deter, restrain or preclude any of the Claimants from continuing to participate fully and freely in this Arbitration.

k. The Tribunal expressly reserves the right to revisit these determinations on an expedited basis if evidence is presented that there is a threat to the integrity of this Arbitration.

l. The Tribunal defers the issue of costs of the Claimants' Request to a subsequent decision, order, or the Award.

On behalf of the Tribunal

[redacted]

Ms. Tina Cicchetti
President of the Tribunal
Date: 9 May 2022