

ICSID

Case number: ARB/21/4

Date: 14 June 2022

**REJOINDER ON THE REQUEST FOR PROVISIONAL MEASURES**

*in the matter of:*

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

Claimants,

counsel: Luther Rechtsanwaltsgesellschaft mbH

*against:*

**THE KINGDOM OF THE NETHERLANDS,**

Respondent,

counsel: De Brauw Blackstone Westbroek N.V.

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## 1 INTRODUCTION

1. The Kingdom of the Netherlands respectfully submits this Rejoinder in relation to RWE's Request for Provisional Measures dated 29 April 2022 and the Reply relating to the Request for Provisional Measures dated 7 June 2022 (the "**Reply**").<sup>1</sup>
2. From the Reply it follows that there is agreement between the Parties on a number of key issues.
3. First, it is common ground that the interpretation of EU law does not fall within the Tribunal's exclusive jurisdiction.<sup>2</sup> Second, the Parties agree that the Netherlands has only raised issues of EU law before the German court.<sup>3</sup> Third, it is agreed that the relief sought in the German Proceedings is declaratory in nature only.<sup>4</sup>
4. The Netherlands submits that these agreed positions confirm that the German Proceedings do not violate Articles 26 and 41 of the ICSID Convention. The Tribunal's *kompetenz-kompetenz* and ICSID exclusivity are not violated if an issue over which the Tribunal has no jurisdiction (the interpretation of EU law) is put to the body that does have such jurisdiction (the EU courts). The EU courts exclusively empowered to interpret EU law can (and should be permitted to) exercise that jurisdiction, just as the Tribunal can (and is permitted to) exercise its *kompetenz-kompetenz* under the ICSID Convention.
5. Similarly, these agreed positions confirm that there is no necessity or urgency to order the requested measures. In view of their declaratory nature, the German Proceedings do not impose an obligation on RWE (or the Netherlands) beyond what already applies under EU law.
6. RWE's main response is that the request for relief in the German Proceedings does not make explicit that the German Proceedings are limited to an issue of EU law. This is misguided. As RWE agrees, the sole issue raised before the German courts is an issue of EU law. Like any court or tribunal, the

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<sup>1</sup> Unless stated otherwise, capitalised terms in this Rejoinder shall have the meaning attributed to them in the Netherlands' Response to the Request for Provisional Measures dated 31 May 2022 (the "**Response**").

<sup>2</sup> Reply, para. 38 ("*The Tribunal indeed does not have exclusive jurisdiction over matters of EU law.*").

<sup>3</sup> Reply, para. 9 ("*It is indeed true that 'the Netherlands has only raised arguments in relation to EU law.'*").

<sup>4</sup> Reply, para. 56 (referencing "*the fact that the German Proceedings would only result in a declaratory decision restating a position under EU law*"). It is further not in dispute that there is no concept of contempt of court under German law.

German court cannot make determinations on issues that have not been brought before it. Its decision will therefore necessarily be limited to (and should not be taken to go beyond) the issue brought before it, which – being an issue of EU law – will be decided in accordance with EU law.

7. RWE's other main contention is that the outcome of the German Proceedings, if adverse to RWE, could be used to initiate yet other legal proceedings. RWE ignores that the Netherlands has repeatedly confirmed that it has no intention to preclude RWE from continuing to participate in this arbitration. Moreover, any issue that RWE takes with other hypothetical future proceedings provide no basis for a provisional measure in respect of the German Proceedings, and certainly do not render a provisional measure in respect of the German Proceedings urgent.
8. In the following sections, the Netherlands takes the opportunity to briefly reply to the following points:
  - The German Proceedings concern EU law;
  - There is no necessity and urgency to grant the provisional measures requested; and
  - The Netherlands' EU law obligations require initiation of the German Proceedings.

## 2 THE GERMAN PROCEEDINGS CONCERN EU LAW

9. In the Reply RWE again attempts to argue that the question of the Tribunal's jurisdiction has been put to the German court. This framing is incorrect.
10. First, RWE has previously acknowledged that the Netherlands has only put a question of EU law before the German court,<sup>5</sup> and recognises this again in the Reply.<sup>6</sup> The German court decision will therefore necessarily be limited to issues of EU law, as the German court (like any court) does not decide issues that have not been brought before it. Similarly, a decision by the German court only extends to the issues brought before and decided by the court.<sup>7</sup>

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<sup>5</sup> See in particular Response, para. 27.

<sup>6</sup> Reply, para. 9, "It is indeed true that *"the Netherlands has only raised arguments in relation to EU law."*

<sup>7</sup> Section 322 para. 1 ZPO "Judgments become *res judicata* in so far as the claim made by ways of the complaint or a counterclaim has been ruled upon."

11. Second, not only has the Netherlands limited its claim before the German courts to arguments based on EU law, but there also is a variety of jurisdictional matters – *ratione personae* (whether RWE is an investor), *ratione materiae* (whether there is an investment and a legal dispute) and *ratione temporis* (whether the investment and claim fall within the relevant temporal scope) – which are not before the German court but the Netherlands will address in its Counter-Memorial. These issues all feed into the question of whether there is valid consent to arbitrate and whether the Tribunal has jurisdiction. One of the core principles of German procedural law is the so-called *Beibringungsgrundsatz*, anchored in Sec. 139 ZPO.<sup>8</sup> According to this principle, it is upon the parties to submit all facts pertinent to a case to the court. A German court will not investigate whether specific facts are present. Since the Netherlands have not submitted any facts regarding the other jurisdictional requirements, the German court will not investigate or assess whether the other jurisdictional requirements have been met.
12. Third, RWE suggests that the EU law question put before the German courts is theoretical rather than practical. This is incorrect: the EU law question put before the German courts is the subject of a live debate between the Parties. Although in the Reply RWE accepts that "*the ECJ in Komstroy extended its Achmea rationale to the ECT*"<sup>9</sup>, RWE does not clarify what this means for this (or any other) ICSID arbitration(s). In fact, before the German courts RWE is contesting the application of *Komstroy* to ICSID arbitrations such as the present one:<sup>10</sup>

*"Even if one were to affirm the applicability of the Komstroy ruling beyond the limited effect described above (quod non), the application of § 1032 (2) ZPO to ICSID proceedings would violate the obligations of the Federal Republic of Germany vis-à-vis the 154 other contracting states to the ICSID Convention. European law does not oblige the Senate to act in this way."*<sup>11</sup>

*"Against this background, all his references to ECJ case law do not help the applicant [...] the ICSID proceedings that are the subject*

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<sup>8</sup> See further **Exhibit RL-0003-ENG**, *Beibringungsgrundsatz*, Musielak in Musielak und Voit ZPO 19th ed. 2022 para. 37 (**Exhibit RL-0003-DE**, *Beibringungsgrundsatz*, Musielak in Musielak und Voit ZPO 19th ed. 2022 para. 37).

<sup>9</sup> Reply, para 10.

<sup>10</sup> **Exhibit R-0010-ENG**, RWE's submission to the German Court dated 21 January 2022, Section A.I.3. (**Exhibit R-0010-DE**, RWE's submission to the German Court dated 21 January 2022) and **Exhibit R-0008-ENG**, RWE's submission to the German Court dated 18 March 2022, Section A.I.3. (**Exhibit R-0008-DE**, RWE's submission to the German Court dated 18 March 2022).

<sup>11</sup> **Exhibit R-0010-ENG**, RWE's submission to the German Court dated 21 January 2022, para. 102 (**Exhibit R-0010-DE**, RWE's submission to the German Court dated 21 January 2022).

*matter of the application are neither subject to the ZPO nor to European law."*<sup>12</sup>

*"The applicant's attempt to demonstrate that the ECJ's case law also applies in ICSID proceedings by referring to the ECJ's European Foods ruling is also misguided."*<sup>13</sup>

13. RWE has further contested whether the Netherlands' EU law obligations extend to initiating the German Proceedings.<sup>14</sup> It does so on the basis of the same arguments it puts before the Tribunal.<sup>15</sup>
14. These are questions to be addressed by the courts designated to do so. The treaties from which EU law stems empower and require the courts of the EU Member States – under the supervision of the CJEU – to address questions of interpretation of EU law exclusively as far as it concerns obligations of EU Member States.<sup>16</sup> RWE acknowledges that the interpretation of EU law does not fall within the Tribunal's jurisdiction.<sup>17</sup> Nevertheless, it seeks to use the provisional measures process to remove questions of EU law from the courts that have jurisdiction to decide upon them. That is exactly an approach that the ECJ has repeatedly stated is contrary to EU law.<sup>18</sup> Provisional measures are not meant for or suitable to deal with such fundamental legal issues.
15. The Netherlands has taken the view that the Tribunal would be served by having a decision from the German courts. This was a position with which RWE previously agreed,<sup>19</sup> and that has been found to be "*credible and reasonable*" by the Tribunal.<sup>20</sup>

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<sup>12</sup> **Exhibit R-0008-ENG**, RWE's submission to the German Court dated 18 March 2022, para. 25 (**Exhibit R-0008-DE**, RWE's submission to the German Court dated 18 March 2022).

<sup>13</sup> **Exhibit R-0008-ENG**, RWE's submission to the German Court dated 18 March 2022, para. 26 (**Exhibit R-0008-DE**, RWE's submission to the German Court dated 18 March 2022).

<sup>14</sup> **Exhibit R-0008-ENG**, RWE's submission to the German Court dated 18 March 2022, Section A.I.5.c). (**Exhibit R-0008-DE**, RWE's submission to the German Court dated 18 March 2022) Reply, Section D.II.

<sup>15</sup> Response, Section 3.2.3.

<sup>16</sup> Reply, para. 38.

<sup>17</sup> **Exhibit CL-0123**, Achmea B.V. v. Slovak Republic, PCA Case No. 2008-13, Final Award, 7 December 2012, 07 December 2012, **Exhibit CL-0012**, ECJ, Judgment of 2 September 2021, Komstroy, ECLI:EU:C:2021:655, 02 September 2021 and **Exhibit CL-0150**, ECJ, C-109/20, Judgment of 26 October 2021 (*Republiken Polen v. PL Holdings Sàrl*), 26 October 2021.

<sup>18</sup> Recording of First Session of 30 August 2021, at 15:19. RWE confirmed that it had "*no plan whatsoever to deprive [the Tribunal] of learning what the German courts will say*".

<sup>19</sup> Procedural Order No. 2, paras. 50 and 51.

**3 THERE IS NO NECESSITY AND URGENCY TO GRANT THE PROVISIONAL MEASURES REQUESTED**

16. In the Reply RWE has not shown that provisional measures are necessary and urgent.

17. First, as an initial matter, RWE's argument that the burden of proof to show necessity and urgency has reversed is incorrect.<sup>21</sup> RWE provides no substantiation or support for this contention and it is contrary to settled law. The applicant bears the burden of proof. As the Tribunal in *Maffezini v. Spain* stated:<sup>22</sup>

*"There is no doubt that the applicant [...] has the burden to demonstrate why the Tribunal should grant its application."*

18. Second, RWE continues to describe the purported harm as "*the risk of a follow-on injunction*".<sup>23</sup> This shows that there is no imminent harm as a consequence of the German Proceedings. Instead, RWE is raising a hypothetical risk of harm that could result from other future proceedings. As has been held by the Tribunal in *Occidental v. Ecuador*, "[p]rovisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions".<sup>24</sup>

19. Third, RWE asks the Tribunal to grant its request on the basis of an inference as to what RWE believes the Netherlands' intentions are.<sup>25</sup> Not only does this conflict with RWE's argumentation – RWE has stated the Netherlands' intentions are "*legally irrelevant*"<sup>26</sup> – it requires the Tribunal to infer an intention that is the exact opposite of the Netherlands' intention, as stated in writing.

20. Upon RWE's request, the Netherlands confirmed on 22 March 2022 that it "*has no intention to preclude the RWE Claimants from continuing to*

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<sup>21</sup> Request, para. 46.

<sup>22</sup> **Exhibit RL-0024**, Emilio Augustín Maffezini v. Spain, ICSID Case No. ARB/97/7, Procedural Order No. 2 dated 28 October 1999, para. 10 (emphasis added).

<sup>23</sup> Reply, para. 56. See also, Reply paras. 2 "*would be the basis for an anti-arbitration injunction*" and 42 "*Respondent succeeds with its German Proceedings and obtains an anti-arbitration injunction*".

<sup>24</sup> **Exhibit RL-0026**, Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on provisional measures dated 17 August 2007, para. 89.

<sup>25</sup> Reply, para. 20.

<sup>26</sup> Reply, para. 2.

*participate in the arbitration*".<sup>27</sup> RWE did not respond at the time stating the representation was insufficient.

21. RWE now interprets the fact that this representation is subject to the Netherlands' obligations under EU law as a threat.<sup>28</sup> However, it is no more than a statement of fact. The Netherlands cannot waive its legal obligations as an EU Member State under EU law in favour of RWE. Indeed, the Netherlands has already indicated that it plans to present an intra-EU objection when addressing the Tribunal's jurisdiction,<sup>29</sup> and that it is required by EU law to make such an argument to contest the validity of the arbitration agreement. It was clear to RWE that the Netherlands has and always will be subject to EU law obligations as long as it remains a member State of the EU and that it could not waive those obligations.
22. Fourth, RWE's contention that the application became urgent because the German Proceedings were not stayed is self-serving.<sup>30</sup> As RWE's submissions show, it took no steps to seek a stay of the German Proceedings until 22 December 2021,<sup>31</sup> some eight months after the German Proceedings were initiated. Moreover, RWE's position in this arbitration was that it "*fully believe[s] and ha[s] reason to believe that the decision of the German court is of no relevance for these proceedings*".<sup>32</sup> In other words RWE recognised from the start that there was no urgency that warranted provisional measures. As the Netherlands has pointed out there are no new facts or circumstances that would warrant deviation from that position.<sup>33</sup>
23. Finally, RWE notes in the Reply that "*any decision by the Cologne Court will not immediately become binding*" on RWE and that it may "*very well take a year or longer*"<sup>34</sup> before a decision is binding, following appeal procedures with the Federal Supreme Court and a potential preliminary reference proceeding with the CJEU, "*which will lead to a further delay*".<sup>35</sup> The Tribunal may, therefore, have already decided upon its jurisdiction before a decision

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<sup>27</sup> **Exhibit C-0131**, Respondent's answer to Claimants' letter of 23 February 2022 concerning the German Proceedings dated 22 March 2022, 22 March 2022.

<sup>28</sup> Reply, paras. 19 and 46.

<sup>29</sup> The Netherlands letter to the Tribunal dated 14 January 2022.

<sup>30</sup> Request, para. 48.

<sup>31</sup> **Exhibit C-0126**, Claimants' letter to Respondent's counsel in the German Proceedings dated 22 December 2021, 22 December 2021.

<sup>32</sup> Recording of First Session of 30 August 2021, at 26:01.

<sup>33</sup> **Exhibit R-0025**, The Netherlands' letter to the Tribunal dated 3 May 2022

<sup>34</sup> Reply, para. 12.

<sup>35</sup> Reply, para. 12.



from the German court becomes final. This yet further supports the lack of urgency.

#### **4 THE NETHERLANDS' EU LAW OBLIGATIONS REQUIRED INITIATION OF THE GERMAN PROCEEDINGS**

24. RWE contends that EU law does not mandate the German Proceedings. To that end, it selectively cites CJEU jurisprudence, specifically *Poland v. PL Holdings*<sup>36</sup> (hereinafter "*PL Holdings*"), in support. RWE's arguments fail.
25. First, RWE incorrectly represents the content of EU law. For the convenience of this Tribunal, the relevant paragraph from *PL Holdings* has been set out below.<sup>37</sup>

*"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, not only that the Member States cannot undertake to remove from the judicial system of the European Union disputes which may concern the application and interpretation of EU law, but 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."*

26. The obligation on the Netherlands is therefore twofold:
- i) it must not remove a question of EU law from the EU judicial system; and
  - ii) it must challenge an arbitration clause where that is the case.

As this Tribunal is not empowered to interpret EU law, placing an EU law question before this Tribunal would not, in the Netherlands' view, be in compliance with its obligation not to remove a question of EU law from the EU judicial system.

27. Second, the European Commission has taken the same view. After citing *PL Holdings* and other case law of the CJEU, the Commission confirmed in response to a query from the Netherlands as to the extent of its EU law obligations that those obligations "*include challenging, before the court with*

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<sup>36</sup> **Exhibit CL-0150**, ECJ, C-109/20, Judgment of 26 October 2021 (*Republiken Polen v. PL Holdings Sàrl*), 26 October 2021.

<sup>37</sup> **Exhibit CL-0150**, ECJ, C-109/20, Judgment of 26 October 2021 (*Republiken Polen v. PL Holdings Sàrl*), 26 October 2021, para. 52.

*jurisdiction (in casu, the German Courts), the validity of the arbitration clause".<sup>38</sup>*

28. Further the European Commission has indicated, and RWE has acknowledged in the Reply,<sup>39</sup> that if the Netherlands were to "cease the German proceedings, the [European] Commission could open a procedure pursuant to the [EU] Treaties in order to assess the compatibility of such an action with EU law".<sup>40</sup>
29. Third, if there were a question as to the content of the Netherlands' obligations under EU law, it is for the competent EU courts to decide on that question. RWE has made the same arguments as to the scope of the Netherlands' EU law obligations before the German court.<sup>41</sup>
30. In the Reply,<sup>42</sup> RWE refers to the CJEU's decision in *European Commission v. European Foods ("European Foods")*<sup>43</sup> to argue that the German court lacks competence, since the CJEU held that ICSID proceedings are not subject to the control of the national courts of the EU Member States. If RWE's reasoning were followed, it would mean that the only opportunity the Netherlands has to fulfil its obligations under EU law would be to seek clarification as to the validity of the arbitration agreement before an award is rendered in an ICSID procedure. That is precisely what the Netherlands has done by way of article 1032 ZPO in the German Proceedings. Regardless, RWE has made the exact same argument with references to *European Foods* before the German court.<sup>44</sup> Similarly, the Netherlands has also made submissions as to the effect of *European Foods*.<sup>45</sup> This confirms that the question of EU law put before the German court is a valid question for the EU courts to clarify.

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<sup>38</sup> **Exhibit R-0012**, Letter from the European Commission to the Netherlands dated 4 March 2022, para. 11.

<sup>39</sup> Reply, para. 55.

<sup>40</sup> **Exhibit R-0012**, Letter from the European Commission to the Netherlands dated 4 March 2022, para. 13.

<sup>41</sup> **Exhibit R-0008-ENG**, RWE's submission to the German Court dated 18 March 2022, Section A.I.5.c). (**Exhibit R-0008-DE**, RWE's submission to the German Court dated 18 March 2022). Further arguments on EU law have been made in **Exhibit R-0010-ENG**, RWE's submission to the German Court dated 21 January 2022, Section A.I.3. (**Exhibit R-0010-DE**, RWE's submission to the German Court dated 21 January 2022).

<sup>42</sup> Reply, para. 52.

<sup>43</sup> **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*).

<sup>44</sup> **Exhibit R-0008-ENG**, RWE's submission to the German Court dated 18 March 2022, Section para. 26 (**Exhibit R-0008-DE**, RWE's submission to the German Court dated 18 March 2022).

<sup>45</sup> **Exhibit R-0017-ENG**, The Netherlands' Submission to the German Court dated 31 January 2022 (**Exhibit R-0017-DE**, The Netherlands' Submission to the German Court dated 31 January 2022).

31. The EU Treaties empower the courts of Member States under the supervision of the CJEU to interpret and apply EU law. This is acknowledged by RWE.<sup>46</sup> However, with its application RWE tries to remove the debate as to those EU law obligations from the courts specifically empowered to decide upon it.
32. Finally, it should be noted that EU law, which comprises the EU Treaties and regulation based on those treaties, is part of international law. It is binding as between the Netherlands and Germany (and as between other EU Member States) as a matter of national law, but also of international law, and the Netherlands must comply with EU law as a matter of international law.
33. In short, the negative impact of granting the provisional measures far outweighs the impact of not granting them. If the request were granted then:
- The Tribunal is deprived of guidance on EU law issued by the competent court.
  - The Tribunal assumes the position of having to interpret treaties (the EU Treaties) that do not fall within its jurisdiction, to the exclusion of the judicial body designated by those treaties to interpret them.
  - The Netherlands will be placed in a situation where it would be required to violate its obligations under the EU Treaties and could become the subject of infringement proceedings under EU law.
  - An EU Member State is denied access to the EU courts to resolve an issue of interpretation of EU law.
  - The EU courts are precluded to decide on EU law (and are even precluded to decide on their own jurisdiction).
  - While RWE has started and continues to litigate the same merits of the dispute before another EU court (the Dutch Proceedings).
34. By contrast if the request were rejected then:
- A declaration is issued by an EU court in RWE's home jurisdiction stating what applies under EU law in any event.

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<sup>46</sup> Reply, paras. 7 and 38.

**5 REQUEST FOR RELIEF**

35. In light of the foregoing, the Netherlands respectfully maintains its prayer for relief and respectfully requests that the Tribunal:

- (a) REJECT the Request; and
- (b) ORDER Claimants to bear the costs incurred in connection with the Request.

Respectfully submitted on behalf of the Kingdom of the Netherlands,

A handwritten signature in black ink, consisting of a stylized, cursive letter 'A' followed by a long horizontal stroke that extends to the right.

**De Brauw Blackstone Westbroek N.V.**