

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WOC Photovoltaik Portfolio GmbH & Co. KG and others

v.

Kingdom of Spain

(ICSID Case No. ARB/22/12)

DECISION ON THE CLAIMANTS' APPLICATION FOR PROVISIONAL MEASURES

Members of the Tribunal

Ms. Juliet Blanch, President of the Tribunal
Prof. Dr. August Reinisch, Arbitrator
Mr. Paul Sreenan, Arbitrator

Secretary of the Tribunal

Ms. Anneliese Fleckenstein

Assistant to the Tribunal

Mr. João Vilhena Valério

3 May 2023

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I. INTRODUCTION

1. This Decision addresses the Application for Provisional Measures submitted by WOC Photovoltaik Portfolio GmbH & Co. KG and others (the “**Claimants**”) on 14 February 2023 under ICSID Arbitration Rule 39(1) (the “**Application**”), in which they ask the Tribunal, *inter alia*, to order the Kingdom of Spain (the “**Respondent**”) to withdraw or discontinue with prejudice the proceedings commenced by the Respondent against the Claimants before the Berlin Higher Regional Court (*Kammergericht*) (the “**Berlin Court**”) being a Petition for Declaratory Relief under Section 1032(2) of the German Code of Civil Procedure (*Zivilprozessordnung*) (“**ZPO**”) in docket 12 SchH 9/22 (the “**German Proceedings**”). The Respondent opposes the Application.

2. Unless otherwise defined, the following terms shall bear the following meaning:
 - (a) **Application**: Application for Provisional Measures submitted by the Claimants on 14 February 2023 under ICSID Arbitration Rule 39(1).
 - (b) **Arbitral Tribunal**: the Arbitral Tribunal in ICSID Case No. ARB/22/12.
 - (c) **Berlin Court**: Berlin Higher Regional Court (*Kammergericht*).
 - (d) **Claimants**: WOC Photovoltaik Portfolio GmbH & Co. KG and others.
 - (e) **Consent Act**: Federal Republic of Germany’s consent act dated 25 February 1969, also known as InvStreitObkG, approving the ICSID Convention: Law on the Convention of 18 March 1965 for the Settlement of Investment Disputes between States and Nationals of Other States (25 February 1969) (**Exhibit R-4**).
 - (f) **ECT**: Energy Charter Treaty.
 - (g) **EU Commission Application**: Application for Leave to Intervene as Non-Disputing Party submitted by the European Commission on 3 April 2023.
 - (h) **Gaillard/Penushliski study**: Emmanuel Gaillard and Ilija Mitrev Penushliski, “State Compliance with Investment Awards”, ICSID Review, Vol. 35, No.3 (2020) (15 February 2021) (**Exhibit C-6**).
 - (i) **German Proceedings**: proceedings against the Claimants before the Berlin Court in connection with a Petition for Declaratory Relief under Section 1032(2) of the ZPO in docket 12 SchH 9/22.
 - (j) **ICSID**: International Centre for the Settlement of Investment Disputes.
 - (k) **ICSID Arbitration Rules**: the ICSID Arbitration Rules in force as of April 10, 2006.
 - (l) **ICSID Convention**: Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
 - (m) **Judge Chutkan**: Ms. Tanya S. Chutkan, United States District Judge.
 - (n) **Mr. Rusche**: Mr. Tim Maxian Rusche.
 - (o) **Opposition**: Respondent’s Opposition to Provisional Measures dated 7 March 2023.
 - (p) **Parties**: together the Claimants and the Respondent.
 - (q) **Reply**: Claimants’ Reply on Provisional Measures dated 21 March 2023.
 - (r) **Request for Arbitration**: Request for Arbitration submitted by the Claimants on 18 March 2022.
 - (s) **Respondent**: the Kingdom of Spain.
 - (t) **Response**: Respondent’s further Response on Provisional Measures dated 4 April 2023.

- (u) **Rusche article:** Tim Maxian Rusche, “How to enforce the Achmea Judgment – Tools for EU Member States before, during and after Investment Arbitration Proceedings Brought by an Investor from Another EU Member State” (20 December 2021) (**Exhibit C-3**).
- (v) **TFEU:** Treaty for the Functioning of the European Union.
- (w) **ZPO:** German Code of Civil Procedure (*Zivilprozessordnung*).

II. PROCEDURAL BACKGROUND

A. THE ARBITRAL PROCEEDINGS

3. On 18 March 2022,¹ the Claimants filed their Request for Arbitration with the ICSID Secretariat pursuant to Article 26 of the Energy Charter Treaty (the “ECT”) and Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”) (the “Request for Arbitration”).²
4. On 21 March 2022, the ICSID Secretariat confirmed receipt of an electronic copy of the Request for Arbitration. On that same date, the ICSID Secretariat transmitted an electronic copy of the Request for Arbitration to the Respondent.
5. On 5 April 2022, the ICSID’s Secretary-General registered the Request for Arbitration.³
6. On 22 September 2022, the Parties reached the following agreement with regard to the constitution of this Tribunal:⁴

“The Parties have agreed upon the number of arbitrators and the method of their appointment, as follows:

¹ See Mr. Antonio Delgado’s e-mail to the ICSID Secretariat, dated 18 March; Notice of Registration, dated 5 April 2022; and Reply, para. 41. The Request of Arbitration is, nonetheless, dated 9 March 2022.

² Together with Exhibits C-1 to C-6.

³ Notice of Registration, dated 5 April 2022; and Reply, para. 43.

⁴ Mr. Antonio Delgado’s e-mail to the ICSID Secretariat, dated 21 September 2022, and Letter of the same date; Ms. Elena Oñoro Sainz’s e-mail to the ICSID’s Secretariat, dated 22 September 2022; ICSID’s letter dated 22 September 2022; Reply, para. 23; Letter of 22 September 2022 by ICSID’s Legal Counsel taking note of the agreement of the parties on the method for the constitution of the Tribunal (22 September 2022) (**Exhibit C-24**).

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1) *The Arbitral Tribunal shall consist of three arbitrators.*

2) *The Claimants shall appoint one arbitrator not later than October 3, 2022.*

3) *The Respondent shall appoint one arbitrator by 17 October 2022.*

4) *The parties shall make their best efforts to appoint by agreement the third arbitrator, who shall be the president of the Arbitral Tribunal, before 15 November 2022 or within that other period as may be jointly agreed by the parties. The parties' representatives may communicate with their respective coarbitrators for the purpose of the selection of the presiding arbitrator.*

5) *In case either party has not appointed an arbitrator after the referred dates or no agreement is reached regarding the appointment of the president of the Arbitral Tribunal, the parties agree on the following rules, which expressly exclude the procedure set forth in Article 38 of the Convention:*

1. Either party may request the Secretary-General of ICSID to appoint the arbitrator or arbitrators not yet appointed.

2. The arbitrator or arbitrators appointed by the Secretary-General may be appointed from outside the Panel of Arbitrators and shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

3. The Secretary-General shall make its appointment after having consulted both parties under a ballot procedure with candidates who may be from outside the Panel of Arbitrators and shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

6) The Claimant shall communicate to the Secretary-General of ICSID this agreement on the method for the constitution of the arbitral tribunal, and the Respondent shall promptly confirm its consent to the agreement."

7. On 22 September 2022, the ICSID Secretariat confirmed receipt of the Parties' agreement.⁵ With regard to item 5 of the Parties' agreement, the ICSID Secretariat reminded the Parties that the provisions in the ICSID Convention concerning the constitution of the arbitral tribunal cannot be derogated by agreement of the parties.
8. On 3 October 2022, the Claimants appointed Prof. Dr. Reinisch.⁶ On the same day, the ICSID Secretariat acknowledged receipt of the Claimants' letter and informed the

⁵ ICSID's letter dated 22 September 2022. See Letter of 22 September 2022 by ICSID's Legal Counsel taking note of the agreement of the parties on the method for the constitution of the Tribunal (22 September 2022) (**Exhibit C-24**)

⁶ Mr. Pedro Claros's e-mail to the ICSID Secretariat, dated 3 October 2022; Reply, para. 23.

Parties that it would proceed to seek Prof. Dr. Reinisch's acceptance of his appointment.⁷ Prof. Dr. Reinisch accepted his appointment on 5 October 2022.⁸

9. On 14 October 2022, the Respondent appointed Mr. Sreenan.⁹ On the same day, the ICSID Secretariat acknowledged receipt of the Respondent's letter and informed the Parties that it would proceed to seek Mr. Sreenan's acceptance of his appointment.¹⁰ Mr. Sreenan accepted his appointment on 18 October 2022.¹¹
10. On 11 November 2022, the Parties reached a further understanding based on their agreement to make "*best efforts*" to reach a consensus on the Tribunal's Chair.¹² The understanding as to the method for the constitution of the Tribunal read as follows:

"Pursuant to their agreement on the constitution of the Tribunal of last September 22, the Parties further agree in more detail upon the method for appointment of the President of the Tribunal, as follows:

1) Under paragraph (4) of the previous agreement of September 22, the Parties shall simultaneously exchange next Monday, November 14th, at 13:30 hours (Madrid time), a list of up to three candidates for President of the Tribunal, proposed respectively by each of the Parties without copying or communicating to ICSID on any potential candidates.

2) On the following day, November 15th, both Parties shall simultaneously communicate whether any of the proposed candidates is agreeable, at 17 hours (Madrid time).

⁷ ICSID's letter dated 3 October 2022.

⁸ Prof. Dr. Reinisch's Declaration dated 5 October 2022, together with Statement.

⁹ Ms. Gabriela Cerdeiras Megias's e-mail to the ICSDI Secretariat, dated 14 October 2022, and Letter of the same date; Reply, para. 23.

¹⁰ ICSID's letter dated 14 October 2022.

¹¹ Mr. Sreenan's Declaration dated 18 October 2022. See also ICSID's letter dated 18 October 2022 containing a piece of information provided by Mr. Sreenan with respect to a previous appointment by the Kingdom of Spain.

¹² Mr. Antonio Delgado's e-mail to the ICSID Secretariat, dated 11 November 2022; Ms. Elena Oñoro Sainz's e-mail to the ICSID Secretariat, dated 11 November 2022; Reply, para. 23; Letter of 11 November 2022 by ICSID's Legal Counsel taking note of the agreed method for the appointment of the President of the Tribunal (11 November 2022) (**Exhibit C-25**).

3) *If no agreement is reached on any candidate and both Parties do not agree on an extension of time for a second round of exchange of candidates, any of the Parties may request the Secretary-General of ICSID to initiate the ballot procedure to appoint the President of the Tribunal as foreseen in paragraph (5) of the September 22 agreement. The Secretary-General shall simultaneously notified [sic] to the Parties five candidates to chair the Tribunal. Each Party shall have a right to exclude one candidate. The rest of candidates shall be simultaneously ranked by each of the Parties in a scale from 1 to 5, being 5 the most preferred candidate. The Secretary-General shall appoint as President of the Tribunal the candidate with the highest score. Any of the candidates proposed by the Secretary-General may be from outside of the ICSID Panel of Arbitrators and may also be any of the candidates previously proposed by the Parties under paragraph (1) above.*

4) *The Claimant shall communicate to the Secretary-General of ICSID this agreement on the method for the constitution of the arbitral tribunal, and the Respondent shall promptly confirm its consent to the agreement.”*

11. On 15 November 2022, the Claimants informed the ICSID Secretariat that the Parties had failed to agree on any of the candidates whose names had been exchanged between the Parties and requested the initiation of the ballot procedure under item 3 of the agreement referred to in para. 10 above.¹³
12. On 6 December 2022, ICSID's Secretary-General provided a list of five candidates from which the presiding arbitrator would be selected through a strike-and-rank procedure.¹⁴
13. On 15 December 2022, the Respondent informed the ICSID Secretariat as follows:¹⁵

“In accordance with the Secretary General's Letter, dated December 6th, please find attached the ranking of candidates of the Kingdom of Spain.

Finally, for transparency purposes, the Kingdom of Spain takes the opportunity to communicate that it has filed a request for declaratory relief against the Claimant, before the Berlin Court of Appeal, pursuant to section 1032 (2) of the German ZPO, seeking the following declaratory judgment:

“The Court finds and declares that the arbitration proceedings initiated by the respondents against the applicant by “Request for Arbitration” dated 9 March 2022 before the International Centre for Settlement of Investment Disputes (ICSID Case No ARB/22/12) are inadmissible.”

¹³ Mr. Antonio Delgado's e-mail to the ICSID Secretariat, dated 15 November 2022.

¹⁴ ICSID Secretary-General's letter to the Parties dated 6 December 2022.

¹⁵ E-mail from the Kingdom of Spain to ICSID dated 15 December 2022 (15 December 2022) (**Exhibit R-3**).

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This request was filed before the constitution of the Arbitral Tribunal, as required by section 1032 (2) of the German ZPO.”

14. On 16 December 2022, ICSID informed the Parties that it had received the Parties' completed ballot forms and noted that the Parties had agreed to appoint Ms. Juliet Blanch as the presiding arbitrator in this case.¹⁶ ICSID further informed that it would proceed to seek Ms. Blanch's acceptance of her appointment. Ms. Blanch accepted her appointment on 27 December 2022.¹⁷
15. The Tribunal was constituted on 27 December 2022.¹⁸
16. On 3 January 2023, ICSID sent a communication to the Parties regarding the appointment of Mr. João Vilhena Valério as Assistant to the President of the Tribunal in this case.
17. On 20 January 2023, the Tribunal circulated a draft Procedural Order No. 1, which was intended to facilitate the Parties' discussions on procedural matters. On that occasion, the Tribunal invited the Parties to confer concerning the items addressed in the draft order and to modify the contents as they saw fit and, by 7 February 2023, submit a joint proposal advising the Tribunal of (i) the Parties' agreements on procedural matters, (ii) the Parties' respective positions regarding any items on which they did not agree, and (iii) any additional matters that the Parties would like to discuss during the first session.
18. On 31 January 2023, having received no objections from the Parties as to the appointment of Mr. Vilhena Valério, ICSID informed the Parties that the Tribunal would proceed with the appointment of Mr. Vilhena Valério in accordance with the terms established in the Centre's communication of 3 January 2023.

¹⁶ ICSID's letter to the Parties dated 16 December 2022.

¹⁷ Ms. Blanch's Declaration dated 27 December 2022.

¹⁸ ICSID's letter to the Parties dated 27 December 2022; and Opposition, para. 4.

19. On 6 February 2023, the Parties informed the Tribunal that they had agreed to an extension of 24 hours regarding the deadline originally scheduled for 7 February 2023 and that the Parties would, therefore, submit their proposals on the draft Procedural Order No. 1 by 8 February 2023.
20. On 8 February 2023, the Claimants submitted the following documentation:
- (a) draft Procedural Order No. 1 with the agreements and disagreements of the Parties (blue colour for Claimants' proposals and green colour for Respondent's)¹⁹;
 - (b) Annexes B and C as agreed by the Parties; and
 - (c) Respondent's and Claimants' respective proposals regarding the Procedural Calendar (Annex A).

¹⁹ The Claimants' make reference to paras. 15.2 and 15.3 in the draft Procedural Order No. 1 (see Application, fn. 16.), which provided as follows:

“15.2 Claimant's proposal (Spain disagrees): [Option 1] Upon issuance of the present Procedural Order No. 1, the Respondent shall immediately withdraw any motion that the Respondent had initiated before any national courts with any connection to the present proceeding under the ICSID Convention, including the motion before German courts to have the current arbitration agreement or the submission to the present arbitration declared invalid, as undertaken by Respondent in docket 12 SchH 9/22 before the Kammergericht in Berlin (Germany).”

15.2 Claimant's proposal (Spain disagrees): [Option 2] Upon issuance of the present Procedural Order No. 1, the Respondent shall immediately request and agree before any national court to a suspension of any motion that the Respondent had initiated before any national courts with any connection to the present proceeding under the ICSID Convention, including the motion before German courts to have the current arbitration agreement or the submission to the present arbitration declared invalid, as undertaken by Respondent in docket 12 SchH 9/22 before the Kammergericht in Berlin (Germany). The suspension will be requested and agreed until the ICSID Tribunal has rendered [Option 2.a: its award / Option 2.b: its award on jurisdiction].”

15.3 Claimant's proposal (Spain disagrees): Upon issuance of the present Procedural Order No. 1, the Respondent will refrain from taking any steps outside of this arbitration to prevent Claimants from further pursuing their case at ICSID, in particular from initiating any further judicial proceedings against any of the Claimants or related entities before any national court and aimed at preventing the Claimants from continuing the present ICSID arbitration, including any kind of interim measures, recognition or exequatur requests.”

21. On 14 February 2023, the Claimants filed the Application, together with Exhibits C- 1 to C-23.²⁰
22. On 15 February 2023, the Tribunal acknowledged receipt of the Application and instructed the Respondent to provide its initial comments on the Application during the first session on 20 February 2023.
23. The first session of the Tribunal was held on 20 February 2023 by video conference.
24. On that same day, the Tribunal issued the following directions:

²⁰ Application before the Berlin Court (4 October 2022) (**Exhibit C-1**); Relevant excerpt of the German Civil Code of Procedure (Section 1032) (1950) (**Exhibit C- 2**); Tim Maxian Rusche, “How to enforce the Achmea Judgment – Tools for EU Member States before, during and after Investment Arbitration Proceedings Brought by an Investor from Another EU Member State” (20 December 2021) (**Exhibit C-3**); Greta Niehaus, “First Anti-Anti-Suit Injunction in Germany: The Costs for International Arbitration” (Wolters Kluwer) (28 February 2021) (**Exhibit C-4**); Decision of the Spanish Supreme Court of 12 January 2009 (12 January 2009) (**Exhibit C- 5**); Emmanuel Gaillard and Ilija Mitrev Penushliski, “State Compliance with Investment Awards”, ICSID Review, Vol. 35, No.3 (2020) (15 February 2021) (the “**Gaillard/Penushliski study**”) (**Exhibit C-6**); Press release from the Financial Times: “Nobody expects the Spanish arbitration” (2 February 2023) (**Exhibit C-7**); Press release from *Diario Expansión*: “Government Push to Stop Renewable Energy Awards Worth 700 million euros” (20 January 2023) (**Exhibit C-8**); “Schreuer’s Commentary on the ICSID Convention. A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of other States” (3rd Edition) (22 September 2022) (**Exhibit C-9**); Judgement of the High Court of New Zealand in Mobil Oil Corporation and others vs. New Zealand (1 July 1987) (**Exhibit C-10**); Kingdom of Spain’s instrument of ratification of the Washington Convention (20 June 1987) (**Exhibit C-11**); POs No. 1 and No. 3 in “Tokios Tokelés v. Ukraine” (ICSID Case No. ARB/02/18) (18 January 2005) (**Exhibit C-12**); Decision on the Respondent’s Jurisdictional Objections in “Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia” (ICSID Case No. ARB/17/34) (30 September 2020) (**Exhibit C-13**); Decision on the Claimant’s Request for Provisional Measures in “RWE AG and RWE Eeshaven Holding II BV vs Kingdom of the Netherlands” (ICSID Case No. ARB/21/4) (16 August 2022) (**Exhibit C-14**); Decision by the Cologne Higher Regional Court of 1 September 2022 (1 September 2022) (**Exhibit C-15**); Decision on the Claimants’ Request for Provisional Measures in “Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. vs Kingdom of the Netherlands” (ICSID Case No. ARB/21/22) (17 February 2022) (**Exhibit C-16**); Press release issued by the Cologne Higher Regional Court on 8 September 2022 (8 September 2022) (**Exhibit C-17**); Decision by the Berlin Higher Regional Court of 28 April 2022 (28 April 2022) (**Exhibit C- 18**); PO No. 2 in “Mainstream Renewable Power Ltd and others vs Federal Republic of Germany” (ICSID Case No. ARB/21/26) (1 June 2022) (**Exhibit C-19**); Procedural Order No. 3 and Dissenting opinion of Mr. Antolín Fernández Antuña in “Mainstream Renewable Power Ltd and others vs Federal Republic of Germany” (ICSID Case No. ARB/21/26) (7 June 2022) (**Exhibit C-20**); POs No. 4 and No. 5 in “CSOB vs Slovakia” (ICSID Case No. ARB/97/4) (1 March 2000) (**Exhibit C-21**); POs No. 1 in “Burlington Resources Inc. vs Ecuador” (ICSID Case No. ARB/08/5) (29 June 2009) (**Exhibit C-22**); and Order in “Plama Consortium Limited vs Bulgaria” (ICSID Case No. ARB/03/24) (29 June 2009) (**Exhibit C-23**).

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“The Tribunal thanks the parties for their constructive approach in the first procedural meeting which took place today, 20 February 2023. The Tribunal will issue Procedural Order 1 shortly but first issues the following directions for the hearing of the Claimants’ application for provisional measures (the “Claimants’ Application”):

*1. The Respondent is to provide its written submissions with regard to the Claimants’ Application by **Tuesday 7 March 2023**.*

*2. The Claimants are to provide their reply submissions by **Tuesday 21 March 2023**.*

*3. The Respondent is to provide its further reply submissions by **Tuesday 4 April 2023**.*

4. The Tribunal will then determine the Claimants’ Application on the basis of the parties’ respective written submissions without an oral hearing, issuing its decision on the Claimants’ Application as soon as it reasonably can.”

25. On 21 February 2023, the Respondent requested the Tribunal to reconsider the timetable ordered for filing submissions on the Application, seeking an extension of at least one week to file its written submissions with regard to the Application.
26. On the same day, upon seeking leave from the Tribunal to that effect, the Claimants submitted their objection to the Respondent’s extension request.
27. On 22 February 2023, the Tribunal issued the following directions:

“The Tribunal has carefully considered the Respondent’s request for the Tribunal to reconsider its order of 20 February 2023, and the Claimants’ comments thereon.

The Tribunal first notes that it already considered the arguments of the Respondent in making its order of 20 February. It further notes that the Respondent commenced its proceedings before the Berlin court without notice to the Claimants and that the timing of commencing the Berlin proceedings was solely decided upon by the Respondent. The Tribunal further reminds itself that when the Respondent was asked during the first procedural hearing held on 20 February 2023 whether it would suspend the Berlin proceedings, it declined. A suspension would, of course, enable a less expeditious timetable for the hearing of the Claimants’ application for provisional measures. However, in the absence of such agreement from the Respondent and having weighed up the Parties’ respective positions, and having regard to the requirements of Rule 39.2 of the ICSID Arbitration Rules requiring the Tribunal to give priority to the request for provisional measures, and also having regard to the procedure allowing a further reply by the Respondent by 4 April 2023, the Tribunal finds that it is in the interests of justice to maintain the timetable ordered yesterday.”

28. On 23 February 2023, the Tribunal issued Procedural Order No. 1.

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29. In accordance with the procedural calendar set out in Annex A to Procedural Order No. 1 (which mirrored the timetable enshrined in the Tribunal's directions of 21 February 2023):
- (a) on 7 March 2023, the Respondent filed its Opposition to Provisional Measures (the "**Opposition**"), together with Exhibits R-1 to R-5²¹ and Legal Authorities RL-1 and RL-2²²;
 - (b) on 21 March 2023, the Claimants filed their Reply on Provisional Measures ("**Reply**"), together with Exhibits C-24 to C-30²³ and Legal Authorities CL-1 and CL-2²⁴; and

²¹ Spain's Petition For Declaratory Relief under Sec. 1032 (2) ZPO (4 October 2022) (**Exhibit R-1**); Relevant excerpt of the German Civil Code of Procedure (Section 1032) (1950) (**Exhibit R-2**); E-mail from the Kingdom of Spain to ICSID dated 15 December 2022 (15 December 2022) (**Exhibit R-3**); Law on the Convention of 18 March 1965 for the Settlement of Investment Disputes between States and Nationals of Other States (25 February 1969) (**Exhibit R-4**); and Letter from the Dutch Legal Service to the Parliament of the Netherlands dated 14 November 2022 (14 November 2022) (**Exhibit R-5**).

²² RWE AG and RWE Eeshaven Holding II BV vs Kingdom of the Netherlands (ICSID Case No. ARB/21/4). Decision on the Claimant's Request for Provisional Measures (16 August 2022) (**Legal Authority RL-1**); and Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. vs Kingdom of the Netherlands (ICSID Case No. ARB/21/22). Decision on the Claimant's Request for Provisional Measures (17 February 2022) (**Legal Authority RL-2**).

²³ Letter of 22 September 2022 by ICSID's Legal Counsel taking note of the agreement of the Parties on the method for the constitution of the Tribunal (22 September 2022) (**Exhibit C-24**); Letter of 11 November 2022 by ICSID's Legal Counsel taking note of the agreed method for the appointment of the President of the Tribunal (11 November 2022) (**Exhibit C-25**); Spain's Anti-Suit Injunction against NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. in The Netherlands (22 December 2022) (**Exhibit C-26**); Memorandum in Support of Petitioner's Motion for Preliminary Injunction and Temporary Restraining Order. NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain. Civil Action No. 19-cv-01618 (TSC) (12 January 2023) (**Exhibit C-27**); Memorandum Opinion of Judge Tanya S. Chutkan. NextEra Energy Holdings B.V. and NextEra Energy Spain Holdings B.V. Civil Action No. 19-cv-01618 (TSC) (15 February 2023) (**Exhibit C-28**); Memorandum Opinion of Judge Tanya S. Chutkan. 9REN Holding S.à.r.l. v. Kingdom of Spain. Civil Action No. 19-cv-01871 (TSC) (15 February 2023) (**Exhibit C-29**); and NextEra Energy Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain. ICSID Case No. ARB/14/11, Decision on Annulment (18 March 2022) (**Exhibit C-30**).

²⁴ Schreuer's Commentary on the ICSID Convention. A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of other States (3rd Edition) (4 October 2022) (**Legal Authority CL-1**); and Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, Decision on Jurisdiction (14 April 1998) (**Legal Authority CL-2**).

- (c) on 4 April 2023, the Respondent filed its further Response on Provisional Measures (“**Response**”), together with Exhibits R-6 and R-7²⁵ and Legal Authorities RL-3 and RL-4.²⁶
30. On 3 April 2023, the European Commission submitted an Application for Leave to Intervene as Non-Disputing Party (the “**EU Commission Application**”). Separately, the European Commission provided ICSID with an *amicus* submission for use in the event that the Tribunal decides to accede to the request to intervene and the schedule of the proceedings requires immediate follow-up.
31. On 4 April 2023, the Tribunal acknowledged receipt of the EU Commission Application and invited the Parties to submit their observations on the said application by 24 April 2023.
32. On 21 April 2023, the Tribunal held a deliberations session. On the same day, the Tribunal issued the following directions:
- “The Tribunal notes that pursuant to Annex A to PO 1, the estimated date for the Tribunal’s decision is April 24, 2023. However, and although the Tribunal is well advanced in its deliberations, it estimates that it will need more time to finalize its decision.”*
33. On 24 April 2023, the Parties filed their respective observations on the EU Commission Application.

²⁵ Uniper v. Netherlands arbitration is discontinued | Investment Arbitration Reporter (iareporter.com) (17 March 2023) (**Exhibit R-6**); and United States District Judge S. Richard J. Leon Memorandum Opinion, dated 2023.03.29, in case Case 1:21-cv-03249-RJL (29 March 2023) (**Exhibit R-7**).

²⁶ European Commission C(2021). State Aid SA.54155 (2021/NN) – Arbitration award to Antin – Spain (July 2021) (**Legal Authority RL-3**); and Zhinvali Development Ltd. v. Republic of Georgia (ICSID Case No. Arb/00/1) Award (24 January 2003) (**Exhibit RL-4**).

B. THE GERMAN PROCEEDINGS

34. On 4 October 2022, the Respondent filed a Petition for Declaratory Relief against the Claimant, before the Berlin Court, pursuant to section 1032(2) of the ZPO,²⁷ seeking the following declaratory judgement:

“The Court finds and declares that the arbitration proceedings initiated by the respondents against the applicant by “Request for Arbitration” dated 9 March 2022 before the International Centre for Settlement of Investment Disputes (ICSID Case No ARB/22/12) are inadmissible.”

35. On 15 December 2022, the Respondent sent an e-mail to ICSID informing that it had initiated the said declaratory proceedings.²⁸

III. THE PARTIES' REQUESTS FOR RELIEF

A. THE CLAIMANTS' REQUEST FOR RELIEF

36. In its Application for Provisional Measures, the Claimants requested the Tribunal to:

*“i. **ORDER** the Respondent to withdraw or discontinue with prejudice any Motion initiated before any national courts with any connection to the present ICSID Arbitration, including the Petition for Declaratory Relief under Section 1032(2) of the ZPO filed by the Respondent before the Berlin Higher Regional Court (Kammergericht) in docket 12 SchH 9/22.*

Alternatively, to

***ORDER** the Respondent immediately to request and agree before any national court to a suspension or stay with prejudice of any Motion initiated before any national courts with any connection to the present ICSID Arbitration, including the Petition for Declaratory Relief under Section 1032(2) of the ZPO filed by the Respondent before the Berlin Higher Regional Court (Kammergericht) in docket 12 SchH 9/22, until the present ICSID Tribunal has rendered an award on jurisdiction.*

²⁷ Application before the Berlin Court (4 October 2022) (**Exhibit C-1**). See also Spain's Petition For Declaratory Relief under Sec. 1032 (2) ZPO (4 October 2022) (**Exhibit R-1**). The Tribunal notes that in para. 1 of its Opposition, the Respondent identifies the date of filing to be 14 October, whereas in para 20 of its Reply, the Respondent identifies the date of filing to be 4 October 2022.

²⁸ Opposition, para. 3; E-mail from the Kingdom of Spain to ICSID dated 15 December 2022 (15 December 2022) (**Exhibit R-3**); Reply, para. 21 (“*in passing*”).

Decision on the Claimants' Application for Provisional Measures

*ii. **ORDER** the Respondent to refrain from taking any steps outside the present ICSID arbitration that might alter the status quo and aggravate the dispute; in particular, from initiating any further judicial proceedings against any of the Claimants or related entities before any national court and aimed at preventing the Claimants from continuing the present ICSID arbitration, including requests for any kind of injunctive relief, or recognition or exequatur proceedings.*

Alternatively, to

***ORDER** the Respondent to notify the Claimants and the Tribunal well in advance of any further filing before any national court in domestic proceedings with a connection to the present ICSID Arbitration, so that the Claimants are given an opportunity to further apply for new provisional measures before the Tribunal.*

*iii. **ORDER** the Respondent to pay in full the costs of these proceedings for the issuance of provisional measures under ICSID Arbitration Rule 39(1)."²⁹*

37. In their Reply on Provisional Measures, the Claimants reiterated the relief requested in the Application³⁰ (introducing slight language adjustments), and requested the Tribunal to:

*“i. **ORDER** the Respondent to withdraw or discontinue with prejudice any motion initiated before any national courts, with any connection to the present ICSID Arbitration. This includes the Petition for Declaratory Relief under Section 1032(2) of the ZPO filed by the Respondent before the Berlin Higher Regional Court (Kammergericht) in docket 12 SchH 9/22.*

Alternatively, to

***ORDER** the Respondent to immediately request and agree, before any national court, to a suspension or stay with prejudice of any Motion initiated before it and related to the present ICSID Arbitration, including the Petition for Declaratory Relief under Section 1032(2) of the ZPO filed by the Respondent before the Berlin Higher Regional Court (Kammergericht) in docket 12 SchH 9/22. Such suspension or stay shall remain in effect until the present ICSID Tribunal has rendered an award on jurisdiction.*

*ii. **ORDER** the Respondent to refrain from taking any action outside the present ICSID arbitration that could alter the current situation or exacerbate the dispute. In particular, that the Respondent is prohibited from initiating any further judicial proceedings against any of the Claimants or related entities before any national court that are aimed at preventing the Claimants from continuing the present ICSID arbitration, including requests for any kind of injunctive relief, or recognition or exequatur proceedings.*

Alternatively, to

²⁹ Application, para. 160.

³⁰ Reply, para. 9.

ORDER the Respondent to notify the Claimants and the Tribunal well in advance of any further filing before any national court in domestic proceedings with a connection to the present ICSID Arbitration. This notification shall provide the Claimants with an opportunity to apply for new provisional measures before the Tribunal.

iii. **ORDER** the Respondent to fully bear the costs of these proceedings related to the issuance of provisional measures under ICSID Arbitration Rule 39(1).³¹

B. THE RESPONDENT'S REQUEST FOR RELIEF

38. The Respondent requests that the Tribunal:

“(a) *REJECTS* the Request for provisional measures;

(b) *ORDERS* Claimants to bear the costs incurred in connection with the Request.”³²

IV. THE PARTIES' POSITIONS

A. THE CLAIMANTS' POSITION

1. Applicable standards

39. The Claimants acknowledge that, under Article 47 of the Convention and ICSID Arbitration Rule 39(1), the party applying for provisional measures must satisfy the Tribunal that such measures are necessary, urgent, and proportional.³³

2. The Claimants' rights that require preservation

40. The Claimants call upon the Tribunal to protect not only the Claimants' rights under the ICSID Convention but also the integrity of the ICSID arbitration system, which, according to the Claimants, is premised upon its autonomy (including the principle of

³¹ Reply, para. 158.

³² Opposition, para. 119; Response, para. 136.

³³ Application, para. 139.

competence-competence),³⁴ exclusivity³⁵ and self-contained nature.³⁶ According to the Claimants, the German Proceedings “*directly affect[s] and heavily touch[es] upon the very core of the ICSID Convention, of the present ICSID Arbitration, as well as upon the heart of the authority and jurisdiction of this Tribunal*”.³⁷ The Claimants assert that there are three types of rights that need protection of this Tribunal by way of provisional measures³⁸:

- (a) the right of access to international adjudication of its ECT claims under the ICSID Convention: Article 26(4)(a)(i) of the ECT;³⁹
- (b) the right to have the dispute, including jurisdictional arguments, submitted to the exclusive authority of this Tribunal, under the ICSID Convention, in accordance with Articles 26 and 41;⁴⁰ and
- (c) the right to the preservation of the *status quo* and non-aggravation of the dispute.⁴¹

41. According to the Claimants, such rights have been jeopardised by the initiation, without notice and with blatant abuse of process, of the German Proceedings, where the

³⁴ Application, paras. 53-64, referring to “Schreuer’s Commentary on the ICSID Convention. A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of other States” (3rd Edition) (22 September 2022) (**Exhibit C-9**), p. 752, 754; Judgement of the High Court of New Zealand in *Mobil Oil Corporation and others vs. New Zealand* (1 July 1987) (**Exhibit C-10**), p. 10, where the High Court upheld Article 41 of the ICSID Convention and declined the request to restrain the investor from pursuing an ICSID arbitration (*Mobile Oil Corporation and others vs New Zealand* (ICSID Case No. ARB/87/2)).

³⁵ Application, paras. 65-71, referring to Kingdom of Spain’s instrument of ratification of the Washington Convention (20 June 1987) (**Exhibit C-11**); PO No. 1 in “*Tokios Tokelés v. Ukraine*” (ICSID Case No. ARB/02/18) (1 July 2003) (**Exhibit C-12**), para. 1; “Schreuer’s Commentary on the ICSID Convention. A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of other States” (3rd Edition) (22 September 2022) (**Exhibit C-9**), p. 753; and Decision on the Respondent’s Jurisdictional Objections in “*Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*” (ICSID Case No. ARB/17/34) (30 September 2020) (**Exhibit C-13**), para. 220.

³⁶ Application, paras. 2, 10, 25, 88, 133.

³⁷ Application, para. 25.

³⁸ Application, para. 125.

³⁹ Application, paras. 127-130.

⁴⁰ Application, paras. 131-134.

⁴¹ Application, paras. 135-138.

Respondent is seeking a judgment declaring the present ICSID Arbitration “*inadmissible*”.⁴² The Claimants describe such conduct by the Respondent as “*guerrilla tactics*” under the “*parochial features*” of Section 1032(2) ZPO,⁴³ noting that such provision is unparalleled in comparative arbitration law or in the UNCITRAL Model law on international commercial arbitration.⁴⁴

3. The circumstances that require the requested provisional measures

42. The Claimants allude to a series of circumstances that, in their view, demonstrate the existence of a serious threat to the Tribunal’s ability to render a final judgment and, therefore, sustain the recommendation by the Tribunal of the provisional measures requested by the Claimants.⁴⁵ Such circumstances include:

(a) the initiation of the German Proceedings,⁴⁶ which unduly interferes with the instant arbitration⁴⁷ and in which the Respondent has “*redrafted and misinterpreted*” the ICSID Convention.⁴⁸ The Claimant submits that the German Proceedings are incompatible with the instant arbitration, as the German Proceedings envisage carving out the exclusive competence of this Tribunal under Articles 26 and 41 of the Convention;⁴⁹

(b) the fact that the Respondent is following an “*anti-arbitration cookbook*”⁵⁰ prepared by Mr. Tim Maxian Rusche, (“**Mr. Rusche**”) a member of the European

⁴² Application, paras. 3, 52.

⁴³ Application, para. 87. See Relevant excerpt of the German Civil Code of Procedure (Section 1032) (1950) (**Exhibit C-2**) and the translation available at the German Federal Ministry of Justice’s website (https://www.gesetze-im-internet.de/englisch_zgl_p3545).

⁴⁴ Application, para. 15.

⁴⁵ See Section III-A (The Claimants’ Request for Relief) above.

⁴⁶ Application, paras. 13-25. See Application before the Berlin Court (4 October 2022) (**Exhibit C-1**).

⁴⁷ Application, paras. 16, 42.

⁴⁸ Application, paras. 18, 20-25, 67, 79, 85.

⁴⁹ Reply, paras. 28-36.

⁵⁰ Application, para. 27.

Commission's Legal Service,⁵¹ which, in the Claimants' view, invites Member States to deploy guerrilla tactics against arbitral tribunals that refuse to apply the so-called *Achmea* doctrine (the "**Rusche article**").⁵² The Claimants note that, in this article, Mr. Rusche:

- i. sets out "*effective weapons that EU Member States may deploy prior, during, and after the arbitration procedure, in order to enforce effectively the judgment in Achmea*";⁵³
- ii. strongly recommends the filing of an action with a competent EU court to obtain confirmation that the arbitration agreement is not valid, making specific reference to Section 1032 of the ZPO and to the fact that the latter application to investor-state arbitration had been recognised by the German courts;⁵⁴
- iii. argues that, notwithstanding the delocalised nature of ICSID arbitration, ICSID tribunals can only exercise jurisdiction if the EU courts confirm that the arbitration agreement is valid;⁵⁵ and

⁵¹ In fn. 9, the Claimants note that Mr. Rusche has acted as agent of the European Commission filing applications for leave to intervene as "*amicus curiae*". The Claimants provide a link to the European Commission website: https://ec.europa.eu/competition/court/2018_12_11_eiser_amicus_icsid.pdf.

⁵² Application, paras. 26-42; Reply, paras. 5-6, 69, 129. See Tim Maxian Rusche, "How to enforce the Achmea Judgment – Tools for EU Member States before, during and after Investment Arbitration Proceedings Brought by an Investor from Another EU Member State" (20 December 2021) (**Exhibit C-3**).

⁵³ Application, para. 27, citing to Tim Maxian Rusche, "How to enforce the Achmea Judgment – Tools for EU Member States before, during and after Investment Arbitration Proceedings Brought by an Investor from Another EU Member State" (20 December 2021) (**Exhibit C-3**), pp. 311-312.

⁵⁴ Application, para. 28, citing to Tim Maxian Rusche, "How to enforce the Achmea Judgment – Tools for EU Member States before, during and after Investment Arbitration Proceedings Brought by an Investor from Another EU Member State" (20 December 2021) (**Exhibit C-3**), pp. 313-314.

⁵⁵ Application, para. 29.

- iv. invites EU Member States to apply to the EU courts to seek “a ‘*non-arbitration injunction*’ on the basis of the applicable national provisions of tort law”.⁵⁶
- (c) the fact that, on the basis of the recommendations contained in Mr. Rusche’s article, the Respondent is likely to move to obtain an ‘anti-arbitration injunction’, either before the German or Spanish courts, or, after a Section 1032(2) ZPO declaration is issued, to commence actions for recognition and enforcement of such declaration abroad, or even to refuse recognition and enforcement of possible arbitral awards.⁵⁷ The Claimants note that this would disprove the Respondent’s endeavours to portray the German Proceedings as an innocuous request for declaratory relief and the Claimants further say that, if the German courts grant Spain the requested declaratory relief under Section 1032(2) of the ZPO, the full range of consequences for the present ICSID Arbitration would be very difficult to predict;⁵⁸
- (d) the fact that the risk that the Spanish or German courts might grant an injunction or tort damages barring the Claimants from pursuing the present ICSID arbitration is real and “*not merely theoretical*”;⁵⁹
- (e) the fact that Respondent failed to provide notice to ICSID or to the Claimants regarding the initiation of the German Proceedings, creating a situation of information asymmetry to obtain a procedural advantage under Section 1032(2)

⁵⁶ Application, para. 30, citing to Tim Maxian Rusche, “How to enforce the Achmea Judgment – Tools for EU Member States before, during and after Investment Arbitration Proceedings Brought by an Investor from Another EU Member State” (20 December 2021) (**Exhibit C-3**), pp. 314-315.

⁵⁷ Application, paras. 32, 41, 81-82, 110-114. See also Greta Niehaus, “First Anti-Anti-Suit Injunction in Germany: The Costs for International Arbitration” (Wolters Kluwer) (28 February 2021) (**Exhibit C-4**); and Decision of the Spanish Supreme Court of 12 January 2009 (12 January 2009) (**Exhibit C- 5**).

⁵⁸ Application, paras. 38, 42.

⁵⁹ Application, para. 34, referring to Decision on the Claimant's Request for Provisional Measures in “RWE AG and RWE Eeshaven Holding II BV vs Kingdom of the Netherlands” (ICSID Case No. ARB/21/4) (16 August 2022) (**Exhibit C-14**), para. 81.

ZPO.⁶⁰ In the Claimants' view, on 22 September and 11 November 2022, the Claimants agreed with the Respondent to make "best efforts" to appoint the Tribunal Chair by 15 November 2022, without knowing that the Respondent would make no efforts because it was seeking to meet a deadline under Section 1032(2) of the ZPO;⁶¹

- (f) the fact that the Respondent has failed to provide assurances with regard to the integrity of the instant proceedings.⁶² The Claimants note that the Respondent has carefully avoided making any statement that might be construed as a waiver of injunctive or similar relief, while seeking to create the impression to the Tribunal that it is participating in the proceedings in good faith.⁶³ The Claimants have invited the Respondent to provide an unconditional written waiver of injunctive or any kind of relief outside the ICSID system, in line with its international obligations,⁶⁴ and submit that the onus is on the Respondent to state clearly whether it will refrain from any action that impinges on the Tribunal's exclusive authority and competence.⁶⁵
- (g) the fact that the Respondent is refusing to honour intra-EU ICSID awards, solely on the ground that complying with ICSID awards conflicts with internal EU law obligations and the primacy of EU law, whilst earmarking significant funds (millions) to pay the legal fees required for its guerrilla strategy;⁶⁶

⁶⁰ Application, paras. 36, 43-52, 76, 109 (distinguishing the present case and the *RWE* and *Uniper* cases, where the Netherlands warned ICSID in advance about the German proceedings), 113; Reply, paras. 20-27.

⁶¹ Reply, para. 27.

⁶² Application, paras. 4-5, 36, 51, 94, 109; Reply, paras. 10-19, 98, 101, 120, 124, 140, 148.

⁶³ Reply, para. 11.

⁶⁴ Reply, para. 18.

⁶⁵ Reply, para. 16.

⁶⁶ Application, paras. 24, 39-40, 74, 110-111, referring to the Gaillard/Penushliski study, ([Exhibit C-6](#)); Press release from the Financial Times: "Nobody expects the Spanish arbitration" (2 February 2023) ([Exhibit C-7](#)); and Press release from *Diario Expansión*: "Government Push to Stop Renewable Energy Awards Worth 700 million euros" (20 January 2023) ([Exhibit C-8](#)).

- (h) the “*growing and worrying tendency among EU Member States to exploit domestic courts to challenge ICSID’s exclusive jurisdiction*”⁶⁷ as shown by the *RWE, Uniper* and *Mainstream* cases;⁶⁸
- (i) the fact that the Claimants have already lost their right to litigate exclusively within ICSID;⁶⁹
- (j) the fact that the Respondent’s actions show an intention to disrupt this arbitration in bad faith, creating a jurisdictional conflict between EU courts and the present ICSID Tribunal, that undermines ICSID arbitration and serves the Respondent’s interests, and disregarding *pacta sunt servanda*;⁷⁰
- (k) the fact that the Respondent has strong incentives to weaken the autonomy of ICSID⁷¹ and that the Respondent’s strategy holds a clear advantage over waiting to resist enforcement of ICSID awards, as it opens the door for attacking the Claimants and eventually cutting off the present ICSID Arbitration from the start;⁷²
- (l) the fact that other EU Member States have taken note of Mr. Rusche’s article, having initiated 1032(2) ZPO proceedings before the German courts:
 - i. *RWE vs The Netherlands*: the ICSID Tribunal refused to recommend provisional measures on the basis of the assurances rendered by The Netherlands, but noted that Section 1032(2) ZPO proceedings posed a

⁶⁷ Application, para. 107.

⁶⁸ Decision on the Claimant’s Request for Provisional Measures in “*RWE AG and RWE Eeshaven Holding II BV vs Kingdom of the Netherlands*” (ICSID Case No. ARB/21/4) (16 August 2022) (**Exhibit C-14**); Decision on the Claimants’ Request for Provisional Measures in “*Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. vs Kingdom of the Netherlands*” (ICSID Case No. ARB/21/22) (17 February 2022) (**Exhibit C- 16**); PO No. 2 in “*Mainstream Renewable Power Ltd and others vs Federal Republic of Germany*” (ICSID Case No. ARB/21/26) (1 June 2022) (**Exhibit C-19**).

⁶⁹ Application, paras. 115-117.

⁷⁰ Application, paras. 69, 72-73, 77; Reply, paras. 100, 129.

⁷¹ Application, para. 110.

⁷² Application, para. 75.

“clear threat” to ICSID arbitration.⁷³ On 1 September 2022, the Cologne Higher Regional Court declared the ICSID proceedings inadmissible pursuant to Section 1032(2) ZPO.⁷⁴ The ICSID proceedings are currently suspended, waiting for the decision in an appeal to the German Federal Court of Justice;⁷⁵

- ii. *Uniper vs The Netherlands*: the ICSID Tribunal refused to recommend provisional measures on the basis of the assurances rendered by The Netherlands, but noted that pursuant to Articles 26 and 41 of the ICSID Convention it had “exclusive competence and authority to hear and resolve any objections to its jurisdiction”.⁷⁶ On 1 September 2022, the Cologne Higher Regional Court declared the ICSID proceedings inadmissible pursuant to Section 1032(2) ZPO.⁷⁷ Shortly thereafter, the parties suspended the ICSID proceedings;⁷⁸
- iii. *Mainstream vs Germany*: on 28 April 2022, the KG Berlin denied Germany’s Section 1032(2) ZPO proceedings, finding that the ICSID tribunal had exclusive authority to rule on its competence under Article 41 of the Convention and was a “closed legal system”,⁷⁹ which was in

⁷³ Application, paras. 89-97, referring to Decision on the Claimant’s Request for Provisional Measures in “RWE AG and RWE Eeshaven Holding II BV vs Kingdom of the Netherlands” (ICSID Case No. ARB/21/4) (16 August 2022) (**Exhibit C-14**), paras. 82, 91; Reply, paras. 118-142.

⁷⁴ Application, para. 96, referring to Decision by the Cologne Higher Regional Court of 1 September 2022 (1 September 2022) (**Exhibit C-15**).

⁷⁵ Application, para. 96 and fn. 41.

⁷⁶ Application, para. 100, referring to Decision on the Claimants’ Request for Provisional Measures in “Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. vs Kingdom of the Netherlands” (ICSID Case No. ARB/21/22) (17 February 2022) (**Exhibit C-16**), p. 2, para. e); Reply, paras. 118-142.

⁷⁷ Application, para. 101, referring to Press release issued by the Cologne Higher Regional Court on 8 September 2022 (8 September 2022) (**Exhibit C-17**).

⁷⁸ Application, para. 101.

⁷⁹ Application, para. 103, referring to Decision by the Berlin Higher Regional Court of 28 April 2022 (28 April 2022) (**Exhibit C-18**); Reply, paras. 59-63, 127. In this context, the Claimants recall the following statement made by the tribunal in the *SPP vs Egypt* case: “[t]he jurisprudence of the Permanent Court of International Justice and the International Court of Justice makes clear that a sovereign State’s interpretation of its own

fact recognised by the Federal Republic of Germany in the consent act dated 25 February 1969, also known as InvStreitObkG, approving the ICSID Convention (the “**Consent Act**”).⁸⁰ This decision is under appeal, but the ICSID Tribunal has refused to stay the ICSID proceedings or to bifurcate the proceedings.⁸¹

(m) the fact that the German domestic proceedings have taken precedence over the ICSID arbitration;⁸²

(n) the fact that the Respondent is capable of resorting to the most extreme strategies to abuse the ICSID process,⁸³ notably the following “*anti-ICSID*” injunctive actions, where the Respondent seeks to persuade the Dutch courts to act as an executive branch of the EU administration, rather than independent and impartial judges⁸⁴:

- i. *NextEra*: on 22 December 2022, and despite the ruling of the ICSID Annulment Committee according to which “[the Respondent] *ha[d] not established a manifest excess of powers under Art. 52(1)(b) based upon the interpretation and application of the applicable law under Art. 26(6)*

unilateral consent to the jurisdiction of an international tribunal is not binding on the tribunal or determinative of jurisdictional issues (...) Indeed, to conclude otherwise would contravene Article 41(1) of the Washington Convention, which provides that:

The Tribunal shall be the judge of its own competence.”. See Reply, para. 128 citing to *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Decision on Jurisdiction (14 April 1998) (**Legal Authority CL-2**), para. 60.

⁸⁰ Reply, para. 61. See Law on the Convention of 18 March 1965 for the Settlement of Investment Disputes between States and Nationals of Other States (25 February 1969) (**Exhibit R-4**); and Decision by the Berlin Higher Regional Court of 28 April 2022 (28 April 2022) (**Exhibit C-18**), p. 6, item a.

⁸¹ Application, paras. 103-105, fn. 45, referring to PO No. 2 in “*Mainstream Renewable Power Ltd and others vs Federal Republic of Germany*” (ICSID Case No. ARB/21/26) (1 June 2022) (**Exhibit C-19**); and Procedural Order No. 3 and Dissenting opinion of Mr. Antolín Fernández Antuña in “*Mainstream Renewable Power Ltd and others vs Federal Republic of Germany*” (ICSID Case No. ARB/21/26) (7 June 2022) (**Exhibit C-20**); Reply para. 127.

⁸² Application, para. 97.

⁸³ Reply, paras. 6, 88.

⁸⁴ Reply, para. 87.

of the ECT”,⁸⁵ the Respondent applied to the Dutch courts requesting a worldwide injunction to stop the enforcement of ICSID awards.⁸⁶ On 12 January 2023, the NextEra investor filed a Motion for Preliminary Injunction and Temporary Restraining Order before the District Court of the District of Columbia, warning the US courts about the Respondent’s “anti-ICSID” strategy.⁸⁷ On 15 February 2023, Ms. Tanya S. Chutkan, United States District Judge (“**Judge Chutkan**”), rendered an anti-anti-enforcement injunction enjoining the Respondent from pursuing its “anti-ICSID” injunction against NextEra.⁸⁸

ii. *9REN*: with facts similar to those referred to with regard to the *NextEra* case, on 15 February 2023, Judge Chutkan rendered an anti-anti-enforcement injunction enjoining the Respondent from pursuing its “anti-ICSID” injunction against 9REN.⁸⁹

(o) the fact that the requested measures are necessary,⁹⁰ urgent⁹¹ and proportional.⁹²

According to the Claimants: (i) the measures are necessary to avoid harm not only to the Claimants’ rights and interests but also to the ICSID system in general; (ii)

⁸⁵ Reply, para. 85, citing to *NextEra Energy Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*. ICSID Case No. ARB/14/11, Decision on Annulment (18 March 2022) (**Exhibit C-30**), para. 250.

⁸⁶ Spain’s Anti-Suit Injunction against NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. in The Netherlands (22 December 2022) (**Exhibit C-26**).

⁸⁷ Memorandum in Support of Petitioner's Motion for Preliminary Injunction and Temporary Restraining Order. *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*. Civil Action No. 19-cv-01618 (TSC) (12 January 2023) (**Exhibit C-27**).

⁸⁸ Memorandum Opinion of Judge Tanya S. Chutkan. *NextEra Energy Holdings B.V. and NextEra Energy Spain Holdings B.V.* Civil Action No. 19-cv-01618 (TSC) (15 February 2023) (**Exhibit C-28**).

⁸⁹ Memorandum Opinion of Judge Tanya S. Chutkan. *9REN Holding S.à.r.l. v. Kingdom of Spain*. Civil Action No. 19-cv-01871 (TSC) (15 February 2023) (**Exhibit C-29**).

⁹⁰ Application, paras. 140-147; Reply, paras. 143-150.

⁹¹ Application, paras. 148-154, referring to PO No. 1 in “*Burlington Resources Inc. vs Ecuador*” (ICSID Case No. ARB/08/5) (29 June 2009) (**Exhibit C-22**), para. 74 (when the measures are intended to protect against aggravation of the dispute during the proceedings, “*the urgency requirement is fulfilled by definition*”); Reply, paras. 151-153.

⁹² Application, paras. 155-159; Reply, paras. 154-157.

the measures are urgent as the longer the German Proceedings are allowed to continue, the further their grip on this ICSID Arbitration will increase, and the harder it will become for belated provisional measures to provide protection to the Claimants; and (iii) the measures are proportional as they essentially cause the Respondent to comply with its obligations as an ICSID Contracting State.

4. The Tribunal's powers under Rule 39(1)

43. The Claimants assert that the Tribunal has broad powers to order the requested provisional measures.⁹³ The Claimants note that ICSID Arbitration Rule 39(1) empowers the Tribunal to end the German Proceedings and restore the exclusivity of the ICSID system.⁹⁴
44. According to the Claimants, they are not requesting extraordinary measures. Rather, they are requesting the same relief that numerous ICSID tribunals have found warranted under the Convention to safeguard procedural rights to ICSID arbitration.⁹⁵
45. The Claimants submit that this conflict is an anomaly, which results from the Respondent's lack of compliance with its ICSID obligations to act in good faith and

⁹³ Application, para. 11.

⁹⁴ Application, paras. 118-138, referring "Schreuer's Commentary on the ICSID Convention. A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of other States" (3rd Edition) (22 September 2022) (**Exhibit C-9**), pp. 1080, 1089, 1092-1094, 1102-1103, 1111-1112; PO No. 5 in "CSOB vs Slovakia" (ICSID Case No. ARB/97/4) (1 March 2000) (**Exhibit C-21**); PO No. 3 in "Tokios Tokelés v. Ukraine" (ICSID Case No. ARB/02/18) (18 January 2005) (**Exhibit C-12**), para. 1; PO No. 1 in "Burlington Resources Inc. vs Ecuador" (ICSID Case No. ARB/08/5) (29 June 2009) (**Exhibit C-22**), paras. 57, 65; Order in "Plama Consortium Limited vs Bulgaria" (ICSID Case No. ARB/03/24) (29 June 2009) (**Exhibit C-23**).

⁹⁵ Application, para. 124, referring to cases cited in "Schreuer's Commentary on the ICSID Convention. A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of other States" (3rd Edition) (22 September 2022) (**Exhibit C-9**), pp. 1089, 1092: "CSOB vs Slovakia" (ICSID Case No. ARB/97/4) (1 March 2000) (**Exhibit C-21**); *SGS vs Pakistan*, Procedural Order No. 2, 16 October 2002 (2005) 8 ICSID Reports; *Zhinvali vs Georgia* (ICSID Case No. ARB/00/1), Award, 24 January 2003, para. 38; PO No. 3 in "Tokios Tokelés v. Ukraine" (ICSID Case No. ARB/02/18) (18 January 2005) (**Exhibit C-12**).

causes a waste of economic resources in duplicated proceedings that would otherwise not exist.⁹⁶

46. The Claimants consider that the Respondent's denial of this Tribunal's *prima facie* jurisdiction is purely tactical, as it is clear that the Parties concluded a binding arbitration agreement on 18 March 2022, after the Claimants submitted a Request for Arbitration accepting the Respondent's unilateral ICSID arbitration offer which was clearly and unambiguously set out in Article 26(4)(a)(i) of the ECT.⁹⁷ The Claimants highlight the fact that the Respondent did not object to the registration of the Request for Arbitration.⁹⁸

B. THE RESPONDENT'S POSITION

1. Introduction

47. The Respondent confirms it filed a request under Section 1032(2) of the ZPO with the Berlin Court on 14 October 2022.⁹⁹
48. The Respondent underscores that the request was filed before the constitution of the Arbitral Tribunal, dated 27 December 2022, as required by Section 1032(2) of the German ZPO.¹⁰⁰
49. The Respondent submits that (i) neither the ICSID Convention nor the ECT contain rules prohibiting Section 1032(2) ZPO proceedings and (ii) this Arbitral Tribunal does not have *prima facie* jurisdiction. Moreover, the Respondent submits that (iii) the provisional measures sought by Claimant are not covered by ICSID Arbitration Rule

⁹⁶ Reply, para. 106.

⁹⁷ Reply, paras. 37-49.

⁹⁸ Reply, para. 46, referring to Schreuer's Commentary on the ICSID Convention. A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of other States (3rd Edition) (4 October 2022) (**Legal Authority CL-1**), p. 688.

⁹⁹ Opposition, para. 1; Response, para. 1. The Tribunal notes the inconsistency identified in fn. 27 above.

¹⁰⁰ Opposition, para. 5; Response, para. 5.

39, and in the hypothesis that they were, (iv) the elements of urgency, necessity and proportionality would not be met.¹⁰¹

50. Notwithstanding the above, the Respondent has asserted that it is “*the intention of the Kingdom of Spain to grant the Arbitral Tribunal the guarantees it deems necessary in the present proceedings and always in relation to its competence*”.¹⁰² The Respondent considers that the assurances sought by the Claimants in paragraph 148 of the Reply are “*gravely abusive*” and affirms that the same “*will not be given i[n] the terms that are being demanded*”.¹⁰³

2. Neither the ICSID Convention nor the ECT contain rules prohibiting Section 1032 (2) ZPO proceedings

51. The Respondent asserts that Article 25 of the ICSID Convention does not prohibit Section 1032(2) ZPO proceedings, as the said provision of the Convention may only be applied if the parties to the proceedings have concluded an arbitration agreement. The assessment of the existence of a valid arbitration agreement is the subject matter of the proceedings being conducted under Section 1032 (2) ZPO.¹⁰⁴

52. The Respondent confirms that it “*validly gave its consent to ICSID Convention and has never questioned it. What is being questioned is whether there is consent to arbitrate a specific dispute, related to the ECT, to which Spain has not given its consent.*”¹⁰⁵

53. The Respondent asserts that Article 26 of the ICSID Convention does not apply to the German Proceedings because exclusivity cannot apply to the interpretation and application of rights and obligations of EU Member States under the EU Treaties and

¹⁰¹ Opposition, paras. 8-9; Response, para. 7.

¹⁰² Response, para. 21.

¹⁰³ Response, para. 119.

¹⁰⁴ Opposition, para. 12.

¹⁰⁵ Opposition, para. 16.

- the issue of interpretation and application of the EU Treaties is to be settled before European Courts, in this case the German courts, not before this Arbitral Tribunal.¹⁰⁶
54. This argument misses the point. Exclusivity applies to the determination of jurisdiction by the ICSID Tribunal including whether there was consent to arbitrate the dispute. The Tribunal will have to address whatever arguments are advanced by the Parties on this issue including (if a Party chooses) arguments based on EU law. Indeed, it seems clear from the terms of Section 1032 (2) that this point would not be an answer to the power of the Tribunal to determine its jurisdiction had the Tribunal been constituted by the time the request for declaratory relief had been filed with the Berlin Court. Even if it was appropriate, the Tribunal does not have the facility to transfer some arguments for decision by another court or tribunal.
55. The Respondent further asserts that there is no binding effect of proceedings under Section 1032 (2) ZPO, as the purpose of a decision under Section 1032 (2) ZPO is to enable, at an early stage of the proceedings, the parties thereto and, under certain circumstances, an ICSID arbitral tribunal, to take into account the state courts' assessment of the admissibility of the arbitral proceedings.¹⁰⁷
56. The Respondent contends that the purpose of the declaratory action under Section 1032 (2) ZPO is to assess the validity of an offer to arbitrate under EU Law, which undoubtedly does not fall within the scope of the competence of this arbitral tribunal.¹⁰⁸ The Respondent adds that its application is not an attack on the ICSID system but rather the Respondent is seeking in good faith to brief the Tribunal on whether EU law permits or precludes intra-EU investor-State arbitration in this case.¹⁰⁹

¹⁰⁶ Opposition, para. 24.

¹⁰⁷ Opposition, paras. 28-30, referring to Article 2(4) of the Consent Act — Law on the Convention of 18 March 1965 for the Settlement of Investment Disputes between States and Nationals of Other States (25 February 1969) (**Exhibit R-4**).

¹⁰⁸ Opposition, para. 35; Response, para. 44.

¹⁰⁹ Opposition, para. 39; Response, para. 48.

57. The Respondent stresses that bad faith must be proved by whom it is alleged and that the Claimants have failed to prove their case.¹¹⁰

3. This Arbitral Tribunal does not have *prima facie* jurisdiction

58. The Respondent submits that the Arbitral Tribunal does not have *prima facie* jurisdiction, as there are “*ra[t]ional doubts of the validity of the arbitral agreement under EU Law, which is an element that affects this arbitral tribunal jurisdiction ratio voluntatis, as it’s contended whether a valid arbitral agreement exists.*”¹¹¹

59. The Respondent further submits that its legal arguments are not solely tactical, but rather constitute the basis for the Application to be dismissed.¹¹²

4. The provisional measures sought by the Claimants are not covered by ICSID Arbitration Rule 39(1)

60. The Respondent asserts that Article 39 of the ICSID Arbitration Rules requires the petitioner to state which rights are in danger.¹¹³

61. According to the Respondent, the Claimants have failed to point out the specific rights that the German Proceedings initiated by the Respondent have put in danger.¹¹⁴

62. The Respondent further notes that the subject matters of the German Proceedings and of the instant arbitration are not the same. The Respondent submits that the parallel proceedings referred to in the cases invoked by the Claimants did not relate to the admissibility of the arbitration in question.¹¹⁵ The Respondent takes issue with the Claimants’ interpretation of the issue raised in the *Zhinvali* case; the dispute brought

¹¹⁰ Opposition, para. 49.

¹¹¹ Opposition, para. 62.

¹¹² Response, paras. 56-60.

¹¹³ Opposition, para. 66.

¹¹⁴ Opposition, para. 78, 113.

¹¹⁵ Opposition, paras. 52-55.

before the national judge was based on an agreement subsequent to the commencement of the arbitration and thus independent from the agreement to arbitrate.¹¹⁶

63. The Respondent further notes that the tribunals in *RWE vs The Netherlands* and in *Uniper vs The Netherlands* — cases in which, according to the Respondent, the provisional measures sought might have been analogous to those sought by the Claimants — have denied the provisional measures requested by the claimants in those cases.¹¹⁷ Moreover, the Respondent highlights that in both these cases, the proceedings have been stayed at the request of the respective claimants.¹¹⁸ The Respondent further notes that the *Uniper vs The Netherlands* case has been discontinued, at the claimant's request, following the approval by the latter's board and EU authorities of a government bail-out plan that provided for withdrawal of the case.¹¹⁹ The Respondent concludes that there is no precedent of an arbitral tribunal ordering a party to an arbitral proceeding to withdraw or discontinue a request for a declaratory relief on the admissibility of an arbitral proceeding.¹²⁰
64. The Respondent stresses that the Claimants wilfully omit any reference to the existing conflict regarding the enforcement of ICSID awards that constitute state aid. According to the Respondent, it must refrain from paying awards consisting of state aid as a result of the European Commission's Decision in State Aid Case SA.54155.¹²¹

¹¹⁶ Response, para. 112, referring to *Zhinvali Development Ltd. v. Republic of Georgia* (ICSID Case No. Arb/00/1) Award (24 January 2003) (**Exhibit RL-4**).

¹¹⁷ Opposition, para. 56, referring to *RWE AG and RWE Eeshaven Holding II BV vs Kingdom of the Netherlands* (ICSID Case No. ARB/21/4). Decision on the Claimant's Request for Provisional Measures (16 August 2022) (**Legal Authority RL-1**); and *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. vs Kingdom of the Netherlands* (ICSID Case No. ARB/21/22). Decision on the Claimant's Request for Provisional Measures (17 February 2022) (**Legal Authority RL-2**); Response, para. 113.

¹¹⁸ Opposition, paras. 59-60, referring to Letter from the Dutch Legal Service to the Parliament of the Netherlands dated 14 November 2022 (14 November 2022) (**Exhibit R-5**).

¹¹⁹ Response, para. 75, referring to *Uniper v. Netherlands* arbitration is discontinued | Investment Arbitration Reporter (iareporter.com) (17 March 2023) (**Exhibit R-6**).

¹²⁰ Opposition, paras. 57-58; Response, para. 114.

¹²¹ Response, paras. 94, 127, referring to European Commission C(2021). State Aid SA.54155 (2021/NN) – Arbitration award to Antin – Spain (July 2021) (**Legal Authority RL-3**).

65. The Respondent further notes that Judge Chutkan's order issuing anti-anti enforcement injunctions enjoining the Respondent from pursuing anti-ICSID injunctive actions has been appealed and contradict a Memorandum Opinion issued by United States District Judge S. Richard J. Leon, which granted the Respondent's motion to dismiss, issued in the enforcement procedure Case 1:21-cv-03249-RJL regarding the enforcement of an ICSID award, dismissing the petition to confirm the said award.¹²²

5. The elements of necessity, urgency and proportionality are not met

66. With regard to necessity, the Respondent submits that the Claimants are overly and incorrectly dramatic in their allegations that they are in "*serious risk of losing access to ICSID altogether*". The Respondent further underlines the difference in nature between enforcement procedures and that of arbitration proceedings.¹²³

67. The Respondent further submits that the Claimants have not proven that the Respondent will seek injunctive relief to enjoin the Claimants from pursuing the instant arbitration nor have they explained the legal ground that would enable the Respondent to seek such relief. The Respondent further notes that the Claimants have not argued that the damages that may be caused would be irreparable.¹²⁴

68. With regard to urgency, the Respondent stresses that the German Proceedings do not prevent the instant arbitration from continuing nor do they prevent the Arbitral Tribunal from rendering its award.¹²⁵ The Respondent adds that the "*risk really feared is to give this arbitral tribunal an additional exhibit to take into account when assessing its our [sic] jurisdiction*".¹²⁶

¹²² Response, para. 100, referring to United States District Judge S. Richard J. Leon Memorandum Opinion, dated 2023.03.29, in case Case 1:21-cv-03249-RJL (29 March 2023) (**Exhibit R-7**).

¹²³ Response, para. 126.

¹²⁴ Opposition, paras. 81-94, 114-116.

¹²⁵ Opposition, paras. 95-104, 117; Response, paras. 128-130.

¹²⁶ Response, para. 129.

69. With regard to proportionality, the Respondent argues that the Respondent's position had not been taken into consideration, as the measures requested by the Claimants would affect the Respondent's (i) sovereignty and its decision to initiate proceedings before a European court, (ii) benefit to have a competent court's guidance on EU law, and (iii) right as an EU member to access EU courts to resolve an issue of interpretation of EU law.¹²⁷

V. ANALYSIS

A. LEGAL FRAMEWORK

1. Provisional Measures

70. The Tribunal's power to rule on the Claimants' Application for Provisional Measures is enshrined in the ICSID Convention and in the ICSID Arbitration Rules.

71. Article 47 of the ICSID Convention establishes that:

"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."

72. Furthermore, Rule 39 of the ICSID Arbitration Rules provides that:

"(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.

¹²⁷ Opposition, paras. 105-113, 118; Response, paras. 131-134.

(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.”

73. Although Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules use the verb “*to recommend*”, it is well-settled that provisional measures granted by ICSID Tribunals are legally binding.¹²⁸ The Parties to the present arbitration have not contested the binding nature of provisional measures.

2. Other provisions invoked by the Parties

74. The Parties also refer to the following provisions:

(a) Section 1032 of the ZPO:

“Section 1032

Arbitration agreement and action brought before a court

(1) Where an action is brought before a court in a matter that is the subject of an arbitration agreement, the court is to dismiss the action as inadmissible, provided that the respondent has raised a corresponding objection prior to commencement of the hearing on the merits of the case, unless the court finds that the arbitration agreement is null and void, ineffective or incapable of being performed.

¹²⁸ See, for instance, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 (28 October 1999), para. 9; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1 (Procedural Measures) (1 July 2003), para. 4: “*It is to be recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures “recommended” by an ICSID tribunal are legally compulsory; they are in effect “ordered” by the tribunal, and the parties are under a legal obligation to comply with them.*”; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (17 August 2007), para. 58; *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (I)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures (19 November 2007), para. 92; *Perenco Ecuador Ltd. V. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009), paras. 66-77; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Claimant’s Request for Provisional Measures (13 December 2012), para. 120.

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(2) *Until the arbitral tribunal has been formed, a request may be filed with the court to have it determine the admissibility or inadmissibility of arbitral proceedings.*

(3) *Where proceedings as referred to in subsection (1) or (2) are pending, arbitral proceedings nevertheless may be initiated or continued and an award may be made.*"¹²⁹

(b) Section 1040 of the ZPO¹³⁰:

"Section 1040

Competence of the arbitral tribunal to rule on its jurisdiction

(1) *The arbitral tribunal may rule on its own jurisdiction and in this context on the existence or the validity of the arbitration agreement. For that purpose, an arbitration clause is to be treated as an agreement independent of the other terms of the contract.*

(2) *The objection as to the arbitral tribunal lacking jurisdiction is to be raised no later than by the submission of the statement of defence. A party is not precluded from raising such an objection by the fact that the party has appointed an arbitrator or has participated in the arbitrator's appointment. The objection that the arbitral tribunal is exceeding the scope of its authority is to be raised as soon as the matter regarding which this allegation is being made is addressed in the course of the arbitral proceedings. In either case, the arbitral tribunal may admit a later objection if the party raising it submits sufficient cause excusing the delay.*

(3) *Where the arbitral tribunal considers that it has jurisdiction, its decision on an objection raised pursuant to subsection (2) generally takes the form of an interlocutory decision. In this case, either party may request a court decision within one month of having received the written notice of the interlocutory decision. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and may make an award."*

(c) Article 25(1) of the ICSID Convention:

"(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

¹²⁹ Relevant excerpt of the German Civil Code of Procedure (Section 1032) (1950) (**Exhibit C-2**); Relevant excerpt of the German Civil Code of Procedure (Section 1032) (1950) (**Exhibit R-2**).

¹³⁰ Reply, para. 57.

(d) Article 26 of the ICSID Convention:

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

(e) Article 41 of the ICSID Convention:

“(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.”

and

(f) Article 26 of the ECT,¹³¹ Articles 52-54 of the ICSID Convention,¹³² and Rule 41(1) of the ICSID Arbitration Rules.¹³³

B. APPLICABLE STANDARDS FOR THE RECOMMENDATION OF PROVISIONAL MEASURES

75. It is not disputed that the ECT is silent with regard to provisional measures and therefore the applicable provisions pursuant to which the Application is made are Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1). Pursuant to these provisions, the Tribunal has the necessary powers to grant provisional measures. Indeed, whilst such relief as is sought by the Claimants has not previously been ordered, other ICSID tribunals have issued orders for provisional measures to enjoin a respondent party from pursuing parallel domestic proceedings.¹³⁴

¹³¹ See, for instance, Reply, para. 40.

¹³² See, for instance, Opposition, paras. 25-26.

¹³³ See, for instance, Opposition, para. 31.

¹³⁴ See, for instance, PO No. 5 in “CSOB vs Slovakia” (ICSID Case No. ARB/97/4) (1 March 2000) (**Exhibit C-21**); *SGS vs Pakistan*, Procedural Order No. 2, 16 October 2002 (2005) 8 ICSID Reports; *Zhinvali Development Ltd. v. Republic of Georgia* (ICSID Case No. Arb/00/1) Award (24 January 2003) (**Exhibit RL-4**); PO No. 3 in “Tokios Tokelés v. Ukraine” (ICSID Case No. ARB/02/18) (18 January 2005) (**Exhibit C-12**); and PO No. 1 in “Burlington Resources Inc. vs Ecuador” (ICSID Case No. ARB/08/5) (29 June 2009) (**Exhibit C-22**).

76. The Parties further agree that the criteria which the Tribunal must consider in determining the Application are (a) whether the Tribunal has *prima facie* jurisdiction over the Parties' dispute;¹³⁵ (b) whether the Claimants have established they have rights which are endangered;¹³⁶ (c) the urgency and necessity of the measures requested; and (d) the proportionality of those measures.¹³⁷ The Tribunal notes that the Respondent has not sought to assert that there is no *prima facie* case on the merits.¹³⁸
77. The Tribunal therefore turns to consider each of the four criteria in turn.

C. DISCUSSION

1. Introduction

78. Before proceeding to its analysis of the Parties' positions, the Tribunal emphasises that the purpose of this Decision is to determine whether the provisional measures requested by the Claimants are warranted in this case. The Tribunal makes no decision at this stage on the underlying jurisdictional issues or any question of the merits. Further, the Tribunal's analysis is necessarily based on the Tribunal's understanding of the record as it presently stands and should not be understood to pre-empt any later or different finding of fact or conclusion of law.

2. Does the Tribunal have *prima facie* jurisdiction over the Parties' dispute?

79. The Respondent makes three submissions in support of its assertion that the Tribunal does not have *prima facie* jurisdiction over the dispute the subject of this Arbitration: (i) that "*the contested request for declaratory relief itself demonstrates the existence of racional [sic] doubts of the validity of the arbitral agreement under EU Law, which is an element that affects this arbitratl [sic] tribunal jurisdiction ratio voluntatis, as it's*

¹³⁵ Reply, paras. 37-49; Opposition, para. 62; Response, paras. 56-60.

¹³⁶ Application, paras. 125-138; Opposition, paras. 66-78; Reply, para. 143; Response, para. 103.

¹³⁷ Application, paras. 139-159; Opposition, paras. 79-118; Reply, paras. 143-157; Response, paras. 125-135.

¹³⁸ The Claimants submit that their "right to access the ICSID system is exclusively premised on the application of the ICSID Convention, assuming the validity of its claims under a *prima facie* standard": see Application, para. 128.

contended whether a valid arbitral agreement exists.”; (ii) that it stated its intention to challenge jurisdiction at the first session; and (iii) the Respondent’s substantive arguments opposing the Application from which it can be seen that the German Proceedings are not incompatible with the Arbitration, such that there is no right of exclusivity for this Tribunal to determine jurisdiction.¹³⁹ The foundation of each of the Respondent’s objections is the Respondent’s assertion that it did not consent to ICSID arbitration in respect of a dispute arising out of the ECT.

80. The Tribunal does not accept the Respondent’s submissions, finding that the Claimants have a *prima facie* right to pursue arbitration under the ICSID Convention.

81. The Respondent accepts, as it must, that it validly gave its consent to the ICSID Convention and accordingly to ICSID Arbitration. The Respondent further does not deny that it ratified the ECT. Indeed, the Respondent confirms that it has not yet raised a jurisdictional objection. However, the Respondent says it has not given consent to arbitrate this specific dispute arising out of the ECT and therefore there is no *prima facie* jurisdiction.¹⁴⁰ The Tribunal does not accept this. It cannot be correct that merely by raising a jurisdictional objection, a party can assert that there is no *prima facie* jurisdiction. Were that to be the case, any time a respondent party raised a jurisdictional objection, there would be no ability for the constituted tribunal to determine the merits of such jurisdictional objection. Accordingly, without prejudging the outcome of the Respondent’s jurisdictional objection, the Tribunal does not see any facially obvious defect that would deprive it of *prima facie* jurisdiction to proceed with determining the Application.

3. Have the Claimants established they have rights which are endangered?

82. The Respondent does not accept that the Claimants have identified any rights that are endangered by the German Proceedings.

¹³⁹ Opposition, paras. 62-65.

¹⁴⁰ Opposition, paras. 16-17.

83. The Claimants identify three rights: (i) the right of access to international adjudication of its ECT claims under the ICSID Convention (the “**right of access**”); (ii) the right to have the dispute, including jurisdictional arguments, submitted to the exclusive authority of this Tribunal, under the ICSID Convention (the “**right of exclusivity**”); and (iii) the right to the preservation of the *status quo* and non-aggravation of the dispute (the “**right to non-aggravation**”).
84. The Tribunal turns first to consider the nature of the Claimants' asserted rights of access and exclusivity and whether such rights are, in fact, endangered by the German Proceedings.
85. The Respondent submits that the Claimants' right of access to the ICSID Convention is dependent upon the existence of a valid arbitration agreement and as there is no valid arbitration agreement, there is no right of access. The Tribunal cannot however determine the application for provisional measures on the basis of the alleged absence of a valid arbitration agreement since it seems that this is a matter that will have to be determined if there is a challenge to the Tribunal's jurisdiction. This submission must accordingly be rejected.
86. The Respondent next says that nothing in the ICSID Convention prevents examination of the validity of a purported arbitration agreement nor prohibits the German Proceedings such that determination of the validity of the arbitration agreement is not within the exclusive jurisdiction of this Tribunal. In particular, the Respondent contends that Article 26 of the ICSID Convention does not prohibit the German Proceedings as the declaratory relief sought does not constitute “*a legal remedy*” for the solution of the dispute between the Parties for the purposes of Article 26(1). However, that is not what Article 26(1) says. Article 26(1) of the ICSID Convention provides as follows:

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

87. The first sentence of Article 26(1) of the ICSID Convention provides that a State's consent to arbitration is given to the "*exclusion of any other remedy*". It is broad in its terms. It does not refer to any particular type of remedy and nor does it refer to the remedy being limited to a remedy for the resolution of the dispute.
88. In supporting its submission that the German Proceedings are not a legal remedy, the Respondent notes that any declaration issued does not have a binding effect on the Tribunal.¹⁴¹ The Respondent further submits that the purpose of the declaration being sought is only to assess the validity of an offer to arbitrate under EU law and to enable the Tribunal to take into account the German court's assessment of the validity of the arbitration agreement and of an offer to arbitrate under EU law.
89. The Tribunal does not accept these submissions. The Tribunal does not accept that a Declaration in the German Proceedings is not a legal remedy. It formally declares the legal position of the parties in a way that binds them as a matter of German and possibly EU law. Even if not binding upon the Tribunal, there are clearly legal consequences capable of arising out of the German Proceedings. One example is the Respondent's intended use of any declaration in the present Arbitration in support of any submissions it may make as to the validity of the arbitration agreement. Recourse to the German courts pursuant to Section 1032(2) of the ZPO must therefore be accepted to have legal consequences and, as such, comprise a remedy within the meaning of Article 26(1) of the ICSID Convention.
90. Even if it were to be argued that, given the reference to "*judicial remedies*" in the second sentence of Article 26(1) of the ICSID Convention, the proper construction of the phrase "*any other remedy*" in the previous sentence is limited to a judicial or legal remedy, the Tribunal does not accept that the German Proceedings, being proceedings commenced before the Berlin Court are other than judicial proceedings or that if declaratory relief is ordered, it is not a judicial remedy. The Tribunal considers that a

¹⁴¹ Opposition, para. 29.

Declaration granted by a judge is clearly a judicial remedy and indeed this is the remedy sought by the Kingdom of Spain in the German Proceedings.

91. The Respondent further asserts that the German Proceedings are not a legal remedy on the basis that the subject matter of the German Proceedings and the Arbitration are different; the subject matter of the German Proceedings being the applicability of the arbitration agreement under EU law which is a question of admissibility whereas the subject matter of the Arbitration is to determine the substantive issues with respect to the Claimants' investment. Again, the Tribunal does not accept this submission. The underlying subject matter of the German Proceedings and of this Arbitration is significantly overlapping in so far as both have to decide whether valid consent to arbitration was given by the Parties. In order to assess the claims brought by the Claimants against the Respondent with regard to their investment, the Tribunal has to decide upon its jurisdiction and the admissibility of the claims, which includes the question whether valid consent has been given by the Parties. The Berlin court has been requested to determine whether the arbitration proceedings before the Tribunal are "inadmissible" as a result of a lack of valid consent by the Parties. The fact the German Proceedings only relate to the "admissibility" of the Claimants' claims before this Tribunal does not mean the underlying subject matter is different.
92. Further, the Tribunal notes that whilst the text of Article 41 of the ICSID Convention does not explicitly provide that jurisdictional objections can only be heard by the tribunal once constituted, it is clear from the provisions of Article 41(1) that, as the "*judge of its own competence*" it is only the Tribunal, once constituted, which may determine its jurisdiction.¹⁴²
93. The Tribunal therefore finds that the Claimants' rights to access and to exclusivity, including their rights to access and to exclusivity in relation to the determination of this

¹⁴² The Tribunal notes with approval the approach of the New Zealand High Court in *Attorney-General v Mobil Oil NZ Ltd*: Judgement of the High Court of New Zealand in *Mobil Oil Corporation and others vs. New Zealand* (1 July 1987) (**Exhibit C-10**).

Tribunal's jurisdiction, are endangered by the German Proceedings. In reaching this determination, the Tribunal is not making any finding as to the validity of the arbitration agreement. However, to have any effect, the preservation of a right in these circumstances must include the preservation of a right to have this Tribunal determine any challenge to its jurisdiction and the provisional right (in the event of this Tribunal determining itself that it has jurisdiction to hear the substantive claim) to have that claim determined by ICSID.

94. Whilst the Tribunal notes the Claimants' submissions under this heading to the effect that it is not only their rights that are endangered by the German Proceedings but also the Tribunal's authority to rule on jurisdiction and the autonomy of the ICSID system, it is unnecessary to consider further these submissions at the present time given the Tribunal's determination that the Claimants have rights that are endangered by the German Proceedings.
95. Having determined that the Claimants have rights of access and of exclusivity which are endangered, the Tribunal need not consider the Claimant's asserted right to non-aggravation.
96. The Tribunal therefore turns to the next criteria, being urgency and necessity.

4. Urgency and Necessity

97. Whilst it is not presently known when the decision of the Berlin Court will be issued, the Claimants submit that "*the longer the German Proceedings are allowed to continue, the further their grip on this ICSID Arbitration will increase...*"¹⁴³ Having found that the German Proceedings put in danger certain rights of the Claimants, it cannot be denied that there is an urgency in issuing a Recommendation to prevent the Respondent from progressing the German Proceedings and indeed from initiating or progressing other proceedings relating to this arbitration whether seeking an injunction or otherwise, and so to protect the Claimant's rights. Whilst the Tribunal makes no

¹⁴³ Application, para. 150.

determination at this stage as to the validity of the arbitration agreement, the Tribunal accepts the Claimants' submissions as to inherent risk that there would be conflicting decisions as to the validity of the arbitration agreement reached by the Tribunal and the Berlin Court in the German Proceedings.¹⁴⁴

98. In circumstances where the Tribunal finds the Claimants' rights are endangered by the German Proceedings, it is clear that appropriate Provisional Measures are necessary. Whilst the Respondent correctly notes that it has expressed no intention of seeking injunctive relief to prevent the Claimants proceeding with this Arbitration, it is also clear that where previously arbitrations have been commenced against the Respondent relating to intra EU disputes under the ECT, the Respondent has sought injunctive relief restraining such claimants from pursuing ICSID arbitration or from enforcing ICSID awards. In circumstances where the Respondent has expressly declined the Claimants' invitation to respect any jurisdictional decision reached by the Tribunal and to undertake not to seek any injunctive relief against the Claimants (a matter which is further addressed below), the risk of irreparable harm to the Claimants if Provisional Measures were not granted is sufficiently serious and grave to make relief necessary.
99. The final criterion the Tribunal must address is whether the relief sought by the Claimants is proportionate.

5. Proportionality

100. The Tribunal's decision is ultimately determined by its analysis of this final criterion. As has been stated by the tribunals in the *RWE* and *Uniper* cases, this exercise is difficult; a number of meritorious arguments have been made by each Party and the consequences of the Tribunal's decision are likely to be significant, whichever Party prevails. The Tribunal accepts that the Respondent has genuine concerns with respect to the nature and effect of its obligations as an EU Member State under EU law and particularly, the Treaty on the Functioning of the European Union ("TFEU"). The

¹⁴⁴ Indeed the Respondent in its Opposition, para. 20, recognises that Article 26(1) ICSID is intended to avoid the risk of conflicting decisions.

Tribunal further accepts the need to accord due deference to the Respondent's sovereign right (subject to any Provisional Measures that might be granted in this arbitration) to commence proceedings, when it did, to ascertain the validity of the arbitration agreement under EU law. The Tribunal does not accept the allegation made by the Claimants that, whether by the nature of the application, its timing or the manner of its communication to ICSID or the Claimants, this amounted to bad faith. However, and relevant to the issue of proportionality, the Tribunal is also conscious of the fact that the Respondent is free to raise any jurisdictional objection it wishes in this arbitration. As far as this Tribunal is concerned it can advance any argument it chooses in support of any such jurisdictional objection. Indeed, the Respondent has not sought to argue that it needs the Declaration sought in the German Proceedings in order to advance a jurisdictional objection, but merely that it would be of assistance in briefing the Tribunal on EU Law¹⁴⁵.

101. On the other hand, the Tribunal accepts that the Claimants have reasonable grounds for concern about what consequences or other steps might follow a successful application for a declaration in the German Proceedings and the extrinsic evidence as to the manner in which the Respondent has acted in other ECT cases provides some support for the Claimants' submissions.
102. By way of example, the Respondent currently is seeking extensive relief from the Dutch courts with respect to the ICSID award obtained by NextEra against the Respondent, namely *inter alia* (i) a worldwide injunction to stop the enforcement of the NextEra ICSID award; (ii) an order compelling NextEra to withdraw its enforcement proceedings pending before the United States District Court for the District of Columbia; (iii) a penalty payment of EUR 30,000 per day; (iv) a one off penalty payment of up to EUR 300 million; and (v) declarations (a) as to the invalidity of the arbitration agreement; (b) that the damages awarded by the NextEra tribunal

¹⁴⁵ Opposition para. 39. See also paras. 44 and 55.

constitute state aid within the meaning of Article 107(1) of the TFEU; and (c) that the ICSID award incorrectly found that NextEra had legitimate expectation.¹⁴⁶

103. The Tribunal further notes the comments in the *Diario Expansión* article¹⁴⁷ and the Gaillard/Penushliski study,¹⁴⁸ to the effect that the Respondent is refusing to honour intra-EU ICSID awards because of internal EU obligations. Given the history of the Respondent's approach to intra EU cases to date, the Tribunal finds that the Claimants' concerns are not unreasonably held.
104. The Tribunal also attaches weight to the fact that the Respondent has declined to provide the form of assurances given by The Netherlands in the *Uniper* and *RWE* cases to the respective tribunals to the effect that any inadmissibility decision obtained as a result of the Section 1032 proceedings The Netherlands had commenced would be limited to a declaratory judgment. Indeed, upon a careful review of the tribunals' orders in each of these cases, it is clear that the assurances provided by The Netherlands were a significant, if not the determining, factor in their decisions not to recommend the provisional measures sought. In the *Uniper* decision, the tribunal expressly cited the respondent State's representations to the tribunal that it "[would] *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 [...] 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*

¹⁴⁶ Spain's Anti-Suit Injunction against NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. in The Netherlands (22 December 2022) (**Exhibit C-26**).

¹⁴⁷ Press release from *Diario Expansión*: "Government Push to Stop Renewable Energy Awards Worth 700 million euros" (20 January 2023) (**Exhibit C-8**).

¹⁴⁸ Emmanuel Gaillard and Ilija Mitrev Penushliski, "State Compliance with Investment Awards", *ICSID Review*, Vol. 35, No.3 (2020) (15 February 2021) (**Exhibit C-6**).

- court under German law, nor is the Respondent seeking any injunctive or similar relief.”*¹⁴⁹
105. Again, in the *RWE* decision, the tribunal noted that it “*must accept for now that the Netherlands’ confirmation to RWE on 22 March 2022 that it “has no intention to preclude the RWE Claimants from continuing to participate in the arbitration.[...] The Tribunal repeats and emphasises its understanding as set out in PO2 in February 2022 that such positive statements of the Netherlands are “assurances that it will not take any steps to interfere with the Tribunal’s kompetenz-kompetenz.”*”¹⁵⁰
106. The Netherlands’ approach can be contrasted with the Respondent’s approach in the present Arbitration; it is notable that the Respondent has declined to give any assurances that it will not take further steps other than in the present Arbitration or seek injunctive relief. Whilst the Respondent states that it has “*always maintained that the present arbitration should go forward, according to the procedure established in the ICSID Convention*”,¹⁵¹ the Respondent has equally asserted that it “*is not going to make any statement that might be construed as a waiver of injunctive action ...*”.¹⁵²
107. Although the Respondent provides reasons for declining the Claimants’ invitation to provide an unconditional written waiver of injunctive or any other kind of relief outside

¹⁴⁹ Decision on the Claimants’ Request for Provisional Measures in “Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. vs Kingdom of the Netherlands” (ICSID Case No. ARB/21/22) (17 February 2022) (**Exhibit C-16**), paras. d., iii. and iv. As mentioned in this document, “[d]uring the Hearing on the Claimants’ Request, the Claimants recommended that the Tribunal issue its decision in two stages, first the operative part of the decision, and second the full decision with the Tribunal’s reasoning.” The full decision made by the Uniper tribunal is available here:

https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C9713/DS17559_En.pdf.

See, in particular, paras. 93 and 94, where the Uniper tribunal asserts as follows: “*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.*”

¹⁵⁰ Decision on the Claimant’s Request for Provisional Measures in “RWE AG and RWE Eeshaven Holding II BV vs Kingdom of the Netherlands” (ICSID Case No. ARB/21/4) (16 August 2022) (**Exhibit C-14**), paras. 85-86.

¹⁵¹ Response, para. 16.

¹⁵² Response, para. 13.

the ICSID system, it is notable that the Respondent has not provided any alternative proposals to seek to ameliorate the Claimants' concerns. Whilst the Tribunal does not accept the Claimants' assertion that the Respondent's refusal *per se* evinces its intention to “*undermine this Arbitration and deprive the Claimants of its ICSID rights*”,¹⁵³ it is nevertheless something to which some weight must be attached that the Respondent does not offer any assurances as to future proceedings or applications to national courts relating to this arbitration and specifically does not follow the example in relation to such assurances set by The Netherlands in the *Uniper* and *RWE* cases.

108. In considering the question of proportionality, the Tribunal notes the Respondent's submissions that any order requiring the Respondent to waive its right to injunctive relief would be “*a disproportionate and unnecessary measure*” in circumstances where it has not initiated any injunctive action nor tried to undermine the Arbitration.¹⁵⁴ The difficulty the Tribunal faces is that, were the Respondent subsequently to commence proceedings for injunctive relief without prior notice to the Claimants, any relief the Claimants might seek from the Tribunal may then be moot. In this regard, the Tribunal notes that whereas The Netherlands, in the *RWE* and *Uniper* cases, gave prior notification of its intention to seek declaratory relief under Section 1032, the Respondent did not notify the Claimants or ICSID of its intention until after the proceedings had been filed, notwithstanding that, at that precise time, the Parties were engaged in “*best efforts*” discussions to appoint, by agreement, the presiding arbitrator. Whilst the Tribunal does not make any findings of bad faith on the part of the Respondent, the picture that is painted is still one of a lack of full transparency. As a consequence, the Tribunal cannot exclude the possibility that injunctive proceedings could be commenced by the Respondent without notice to the Claimants, such that the Claimants may be prejudiced in their ability to apply for further provisional measures from the Tribunal.

¹⁵³ Reply, para. 19.

¹⁵⁴ Opposition, para 20.

109. The Respondent submits it would suffer prejudice if the requested provisional measures were granted, in particular that the Tribunal would lose the benefit of a competent court's guidance on EU law. However, the Tribunal is reassured that there would be minimal prejudice to the Respondent given that the Respondent will not be prohibited from adducing evidence as to the relevant EU law, including as to any other Section 1032 applications which may, by then, have been determined. Further, if the European Commission's Application is granted, the Tribunal will have before it such submissions the European Commission may wish to make as to EU law.

6. Conclusion

110. The Tribunal shares the concern expressed by both the *RWE* and *Uniper* tribunals as to the potentially grave implications for claimants of the type of application which we see again in this case in the German Proceedings. Having weighed up the Parties' competing arguments, the Tribunal decides that the Claimants' rights are endangered by the German Proceedings and potentially other proceedings that might, in the absence of any assurances, be commenced by the Respondent without notice or without sufficient notice to enable an application for provisional measures to be heard and determined in a meaningful and effective way. In the absence of any assurances from the Respondent analogous to those given by The Netherlands, the Tribunal finds it is necessary and proportionate to recommend relief by way of Provisional Measures. Without adopting precisely the wording proposed by the Claimants, the Tribunal considers that the following provisional measures proportionately meet what is necessary in the circumstances.
111. In reaching this conclusion, on the basis of the material that is available to it at this time, the Tribunal wishes to make clear that it has formed no view on whether or not it has jurisdiction to hear some or all of the claims that have been put before it, or on any aspect of the merits. It has simply concluded that, at this stage of the proceedings and on the basis of the limited material that is available to it, the following provisional measures should be granted, namely:

- (a) RECOMMEND the Respondent to withdraw or discontinue with prejudice any application or proceedings against any of the Claimants or related entities, or any of them, initiated before any national court, which application or proceedings has any connection to the present ICSID Arbitration, including the Petition for Declaratory Relief under Section 1032(2) of the ZPO filed by the Respondent before the Berlin Higher Regional Court (*Kammergericht*) in docket 12 SchH 9/22; and
- (b) RECOMMEND the Respondent not to initiate any further applications or legal proceedings against any of the Claimants or related entities or any of them before any national court that have as their purpose preventing the Claimants or related entities, or any of them, from continuing the present ICSID arbitration, including requests for any kind of injunctive relief, or recognition or exequatur proceedings.
112. Finally, the Tribunal wishes to record that it finds some of the language used in the Claimants submissions such as “*guerrilla tactics*”, “*parochial features*”, “*anti-ICSID motion*”, “*anti-arbitration cookbook*” to be unnecessary. The Tribunal is not and will not be influenced by emotionally laden language used by either Party and would direct the Parties to avoid such language in future submissions.

VI. COSTS

113. This decision is without prejudice to the allocation of costs in these proceedings, which will be decided at a later stage.

VII. UPDATED PROCEDURAL CALENDAR

114. As foreshadowed in paragraph 15.1 of Procedural Order No. 1, “[t]he *Procedural Calendar for the subsequent milestones will be determined upon issuance of the Tribunal’s decision on the Claimant’s Application and after consideration of the Parties’ respective positions and shall be reflected in an Updated Annex A. Such Updated Annex A shall contain the full procedural timetable, detailing the number and*

sequence of pleadings, together with the dates on which they are to be filed, as well as the date of the hearing.”

115. The Parties are therefore invited to provide their views on the Procedural Calendar for the subsequent milestones in these proceedings by no later than 25 May 2023.

VIII. DECISION

116. For the foregoing reasons, the Arbitral Tribunal:

- (a) RECOMMENDS the Respondent to withdraw or discontinue with prejudice any application or proceedings against any of the Claimants or related entities initiated before any national court, which application or proceedings has any connection to the present ICSID Arbitration, including the Petition for Declaratory Relief under Section 1032(2) of the ZPO filed by the Respondent before the Berlin Higher Regional Court (*Kammergericht*) in docket 12 SchH 9/22;
- (b) RECOMMENDS the Respondent not to initiate any further applications or legal proceedings against any of the Claimants or related entities or any of them before any national court that have as their purpose preventing the Claimants or related entities, or any of them, from continuing the present ICSID arbitration, including requests for any kind of injunctive relief, or recognition or exequatur proceedings;
- (c) RESERVES its decision on the costs of this application for a later stage; and
- (d) INVITES the Parties to provide their views on the Procedural Calendar for the subsequent milestones in these proceedings by no later than 25 May 2023.

On behalf of the Tribunal,



Mrs. Juliet Blanch
President of the Tribunal
Date: 3 May 2023