**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Mainstream Renewable Power Ltd and others**

**v.**

**Federal Republic of Germany**

**(ICSID Case No. ARB/21/26)**

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# PROCEDURAL ORDER NO. 8

***Members of the Tribunal***
Ms. Wendy Miles KC, President of the Tribunal
Mr. Antolín Fernández Antuña, Arbitrator
Dr. Charles Poncet, M.C.L., Arbitrator

***Secretary of the Tribunal***
Ms. Martina Polasek

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17 July 2023

# I. RELEVANT PROCEDURAL BACKGROUND

1. On 30 May 2023, the Claimants submitted an application for Provisional Measures (the "**Application**"), together with: (i) the Witness Statement of [redacted] dated 30 May 2023; (ii) Exhibits C-0284 through C-0303; and (iii) Legal Authorities CL-0240 (amended) and CL-0281 through CL-0306.

2. In accordance with the Tribunal's invitation, on 9 June 2023, the Respondent submitted its comments on the Application (the "**Response**"), together with: (i) the Witness Statement of [redacted] dated 7 June 2023; (ii) the Second Witness Statement of [redacted] dated 8 June 2023; (iii) Exhibit R-0048; and (iv) Legal Authorities RL-0257 through RL-0274.

# II. THE PARTIES' SUBMISSIONS

## A. THE CLAIMANTS' APPLICATION

3. The Claimants seek Tribunal recommendations that the Respondent:

   a. withdraws its appeal against the decision issued on 28 April 2022 by the Higher Regional Court of Berlin (*Kammergericht* or "**Berlin Court**") rejecting its application that the present arbitration proceedings brought under ICSID Case No. ARB/21/26 ("**Arbitration**") be declared "*inadmissible*" pursuant to section 1032(2) of the German Code of Civil Procedure (*Zivilprozessordnung* or "**ZPO**") ("**Germany's Appeal**"), which is currently pending before the German Federal Court of Justice (*Bundesgerichtshof* or "**BGH**") in docket I ZB 43/22; and

   b. withdraws or discontinues with prejudice any other 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 Arbitration; and

   c. refrains from initiating any further applications or proceedings against any of the Claimants or related entities before any national court that have the purpose of

preventing the Claimants or related entities from continuing the Arbitration, including requests for any kind of injunctive relief, or recognition or exequatur proceedings; or

d. in the alternative to (c) (but without prejudice to (a) and (b)), notifies the Claimants and the Tribunal well in advance of any further filing before any national court with a connection to the Arbitration so that the Claimants are put in a position to apply for new provisional measures before the Tribunal.

4. By way of background to the Application, according to the Claimants, on 17 May 2023, the German Federal Court of Justice or *Bundesgerichtshof* ("**BGH**"), Germany's highest court of civil and criminal jurisdiction, located in Karlsruhe, heard the Respondent's Appeal and during the hearing or on the same day the BGH:

a. "*expressed the view that 'there cannot be any doubt that' the Tribunal could not have jurisdiction as a matter of EU law*";

b. "*indicated to the Parties its strong inclination to uphold Germany's Appeal and to issue a decision that the Arbitration be declared 'inadmissible' pursuant to section 1032(2) of the [German Civil Code of Procedure (or the Zivilprozessordnung) (**Exhibit C-0284**)] ZPO*"; and

c. notified the Claimants that it would issue a decision on Germany's Appeal on 27 July 2023.

5. The Claimants submit that the BGH's position is "*very unlikely to change*" and that without the provisional relief sought:

a. "*the integrity of the Arbitration and indeed the integrity of ICSID arbitration are at risk*";

b. the BGH decision would be "*the very first of its kind*" declaring arbitration proceedings conducted under the ICSID Convention inadmissible;

c. its legal basis would be a German law provision applicable to arbitration proceedings with a seat, or at least with a seat of the arbitration to be determined, as opposed to ICSID arbitration; and

d. it would seriously undermine the integrity of the ICSID Convention, including the principles of consent (Article 25 of the ICSID Convention) and competence-competence (Article 41 of the ICSID Convention). Section 1032(2) of the ZPO provides that "*[u]ntil 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*" (**C-0284**, Official English translation of the ZPO, Article 1032(2)).

6. The Claimants' Application (i) summarises the relevant circumstances that gave rise to the Application; (ii) sets out and applies the applicable standard for provisional measures pursuant to Article 47 of the ICSID Convention and Rule 39(1) of the ICSID Arbitration Rules; (iii) seeks to demonstrate that the Recommendations meet each of these standards; (iv) provides a timeline; and (v) describes the relief sought.

7. First, as to the circumstances giving rise to the Application, the Claimants submit as follows:

a. on 17 August 2021, shortly before the constitution of the Tribunal and while the Parties were in discussion with ICSID regarding a president, the Respondent filed a petition for declaratory relief before the Berlin Court seeking that the Arbitration be declared "*inadmissible*" pursuant to section 1032(2) of ZPO ("**Petition**");

b. the Respondent did not notify the Claimants or the Tribunal that it had filed the Petition;

c. on 12 October 2021, Germany filed an application for the early dismissal of Mainstream's claims pursuant to Rule 41(5) of the ICSID Arbitration Rules, omitting to mention the Petition;

d. on 18 October 2021, the Claimants' counsel received a letter from the Berlin Court by post enclosing the Petition and providing a period of one month for response;

e. on 26 October 2021, at the First Session in the arbitration, the Claimants notified the Tribunal about the Petition;

f. on 28 October 2021, the Respondent provided a copy of its Petition;

g. on 28 April 2022, the Berlin Court dismissed the Petition with costs, finding that "*petitions for declaratory relief on the basis of section 1032(2) of the ZPO are not available in the context of arbitration proceedings conducted on the basis of the ICSID Convention, which establishes a self-contained regime*" (the "**Decision**");

h. on 6 May 2022, the Claimants informed the Tribunal of the Berlin Court Decision together with their Memorial on Jurisdiction;

i. on 20 May 2022, the Respondent appealed the Decision before the BGH (the "**Appeal**"); and

j. on 17 May 2023, the BGH heard the appeal in Karlsruhe, Germany,[1] and issued a resolution ("*Protokoll*") indicating that "*the date for the pronouncement of a decision [on Germany's Appeal] is set for Thursday, 27 July 2023, 8.30 a.m., room E101*".

8. Based on accompanying evidence of an attendee at the Appeal hearing on 17 May 2023, the Claimants are strongly of the view that the BGH will grant the appeal.

9. Secondly, as to the jurisdiction of the Tribunal to grant the relief sought, the Claimants rely on Article 47 of the ICSID Convention and Rule 39(1) of the ICSID Arbitration Rules. The Claimants submit that "*[a]lthough Article 47 of the ICSID Convention and Rule 39(1)*

[1] Together with appeals by RWE AG ("**RWE**") and Uniper SE ("**Uniper**") against the Court of Appeal of Cologne (*Oberlandesgericht* or "**OLG**") decisions dated 1 September 2022 that the arbitration proceedings brought by RWE and Uniper against the Netherlands in ICSID Cases Nos. ARB/21/4 and ARB/21/22 were "*inadmissible*" pursuant to section 1032(2) of the ZPO.

*of the ICSID Arbitration Rules use the verb 'to recommend,' it is well-settled that provisional measures granted by ICSID tribunals are legally binding*",[2] and that ICSID tribunals have issued orders for provisional measures in order to enjoin a respondent State from pursuing parallel domestic proceedings,[3] referring in particular to *WOC v. Spain*.[4]

10. According to the Claimants, the criteria to consider in determining the Application are:[5]

a. the existence of *prima facie* jurisdiction over the arbitration;

b. the existence of rights that require protection by way of provisional measures;

c. the urgency and necessity of the measures requested; and

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[2] See, for instance, **CL-0281**, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999, para. 9; **CL-0282**, *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*"; **CL-0283**, *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; **CL-0284**, *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; **CL- 0285**, *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; **CL-0286**, *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.

[3] **CL-0287**, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Procedural Order No. 5, 1 March 2000 (recommending the suspension of parallel bankruptcy proceedings involving the claimant); **CL- 0288**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3 (Procedural Measures), 18 January 2005, para. 1. For a list of examples, see **CL-0240**, S. Schill , L. Malintoppi, A. Reinisch, Ch. Schreuer, A. Sinclair, *Schreuer's Commentary on the ICSID Convention*, Volume 1, 3rd edition, Cambridge 2022, pp. 606-607, paras 255-266.

[4] **CL-0289**, *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, 3 May 2023, para. 116.

[5] **CL-0289**, *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, 3 May 2023, para. 76; **CL-0290**, *Gerald International Limited v. Republic of Sierra Leone*, ICSID Case No. ARB/19/31, Procedural Order No. 2 (Decision on the Claimant's Request for Provisional Measures), 28 July 2020, paras 142-143; **CL-0291**, *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Procedural Order No. 7, 11 July 2022, para. 65. See also **CL-0292**, Koh/Yeo, "Rule 47", in Happ and Wilske (eds.), *ICSID Rules and Regulations 2022*, Article-by-Article Commentary, 2022, pp. 503-510, paras 46-67.

d. the proportionality of those measures.

11. As to *prima facie* jurisdiction, the Claimants argue that the Tribunal has *prima facie* jurisdiction over the dispute provided it is able to "*satisfy itself that upon an initial analysis, i.e. 'at first sight'/ prima facie, it has jurisdiction. For this, it is necessary and sufficient that the facts alleged by the Claimant establish this jurisdiction without it being necessary or possible at this stage to verify them and analyse them in depth*".[6] It contends that this is without prejudice to the Tribunal's full review of the jurisdictional arguments in due course.[7] The Claimants set out their arguments as to the Tribunal's *prima facie* jurisdiction in three respects:

a. **Jurisdiction *ratione voluntatis***: in the form of the Respondent's valid consent to ICSID arbitration under the ECT and the Claimants' acceptance in its Request for Arbitration;

b. **Jurisdiction *ratione materiae***: in the form of the Claimants' "*investments*" in Germany pursuant to Article 1(6) of the ECT and Article 25(1) of the ICSID Convention;

c. **Jurisdiction *ratione personae***: the First, Second and Third Claimants are companies organised under the laws of Ireland and "*investors*" and "*nationals of another Contracting State*" for the purposes of Article 1(7) of the ECT and Article 25(2)(b) of the ICSID Convention and the Fourth, Fifth and Sixth Claimants are German companies controlled by the First, Second and Third Claimants and wholly owned by the Second Claimant and therefore also "*investors*" and "*nationals of*

[6] **CL-0290**, *Gerald International Limited v. Republic of Sierra Leone*, ICSID Case No. ARB/19/31, Procedural Order No. 2 (Decision on the Claimant's Request for Provisional Measures), 28 July 2020, para. 168; **CL-0293**, *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application for Provisional Measures, 9 December 2009, para. 42.

[7] See for instance, **CL-0290**, *Gerald International Limited v. Republic of Sierra Leone*, ICSID Case No. ARB/19/31, Procedural Order No. 2 (Decision on the Claimant's Request for Provisional Measures), 28 July 2020, para. 173; **CL-0282**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1 (Procedural Measures), 1 July 2003, para. 6.

*another Contracting State*" for the purposes of Article 1(7) of the ECT and Article 25(2)(b) of the ICSID Convention.

12. As to the existence of rights, the Claimants argue that the German Court Proceedings endanger their ICSID arbitration rights including:

a. the right of access to international adjudication of their ECT claims under the ICSID Convention pursuant to Article 26(4)(a)(i) of the ECT and Article 25 of the ICSID Convention;

b. the right to have the dispute, including jurisdictional arguments, submitted to the exclusive authority of this Tribunal in accordance with Article 26 of the ICSID Convention;

c. the right to the preservation of the *status quo* between the Parties and the non-aggravation of the dispute until a final decision on the merits is issued in accordance with Article 47 of the ICSID Convention; and

d. the right to non-aggravation in that the Claimants are entitled to the issuance of a binding and enforceable award, recognised by enforcing courts as binding and subject to those courts taking the steps necessary to enforce it as a final judgment of that court, pursuant to Articles 53(1) and 54 of the ICSID Convention.

13. The Claimants submit that these rights "*are being endangered by the BGH's imminent decision in the German Court Proceedings that Germany initiated without any notice to the Claimants or the Tribunal with the exclusive goal of being issued a declaration that the Arbitration is 'inadmissible' as a matter of German civil procedural law*". They argue as follows:

a. regarding rights of access, the German Court Proceedings limit the Tribunal's own determination of its jurisdiction, to the extent that Germany is seeking to obtain a declaratory relief aimed at opposing the validity of the arbitration agreement underlying this Arbitration (relying on *WOC v. Spain* tribunal, "*the Claimants'*

*rights to access and to exclusivity, including their rights to access and to exclusivity in relation to the determination of this Tribunal's jurisdiction, are endangered by the German Proceedings*";

b. regarding the right of exclusivity, in the German Court Proceedings the Respondent is pursuing a parallel legal remedy in the German Court Proceedings (again relying on *WOC v. Spain* tribunal, "*[e]ven if not binding upon the Tribunal, there are clearly legal consequences capable of arising out of the German Proceedings*", such as "*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*", given that "*[r]ecourse 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*");

c. regarding the right to non-aggravation, based on [redacted] view that the Appeal "*very likely*" will result in the declaratory relief, the Claimants argue that such relief will aggravate the dispute insofar as the Claimants will need to defend such relief in parallel proceedings and the Respondent will likely seek to use the relief to seek an injunction to prevent the arbitration from proceeding, "*at variance with clear mandate of the [ICSID]Convention and will violate [Germany's] international obligations under the [ICSID] Convention*";[8] and

d. regarding the right to an enforceable award, the effect of the relief would be for any award issued by the Tribunal to be "*inadmissible*" pursuant to section 1032(2) of the ZPO and therefore unenforceable in Germany, as well as "*strong signalling effects towards enforcement courts based in other EU Member States, which may*

[8] **CL-0240,** S. Schill , L. Malintoppi, A. Reinisch, Ch. Schreuer, A. Sinclair, *Schreuer's Commentary on the ICSID Convention*, Volume 1, 3rd edition, Cambridge 2022, p. 607, para. 259 (citing Judge Schwebel on "anti-suit injunctions").

*refuse to enforce any award issued by the Tribunal on similar grounds*" and enforcement courts in non-EU Member States.

14. The Claimants further submit that the recommendations they seek by way of provisional measures are necessary to preserve the Claimants' ICSID arbitration rights "*and the integrity of the ICSID system as a whole*". They rely on:

a. previous provisional measures orders that considered measures "*necessary*" where "*aimed at preventing actions of a party which are capable of causing or of threatening irreparable prejudice to the rights invoked*",[9] including *Rizzani v. Kuwait*, where the tribunal found that "*the term 'irreparable' harm must be understood as requiring a material risk of 'serious or grave damage to the requesting party, and not harm that is literally "irreparable"'*";[10]

b. their post-hearing submissions in the Appeal that:[11]

> National law does not provide for the setting aside of a foreign arbitral award even in the case of (alleged) invalidity of the arbitration clause; it is only possible to refuse a declaration of enforceability for this reason.

c. EU Member States' proceedings based on the *Achmea* judgment.

15. As to the integrity of ICSID, the Claimants submit that the German Court Proceedings "*pose a threat to the integrity of the ICSID arbitration system as whole, which is based on*

[9] **CL-0288**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3 (Procedural Measures), 18 January 2005, para. 8. Adopting a similar test, see for instance: **CL-0298**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, para. 38 (provisional measures must be necessary to "*avoid the occurrence of irreparable harm or damage*"); **CL-0299**, *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures, 3 March 2010, para. 46; **CL-0300**, *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, paras 34-35.

[10] **CL-0301**, *Rizzani de Eccher S.p.A., Obrascón Huarte Lain S.A. and Trevi S.p.A. v. State of Kuwait*, ICSID Case No. ARB/17/8, Decision on Provisional Measures, 23 November 2017, para. 103; **CL-0302**, *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea,* ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures, 21 January 2015, para. 109.

[11] BGH docket I ZB 43/22 dated 26 May 2023, p. 12, para. (ee).

*the autonomous and self-contained nature of the ICSID arbitration procedure, and the corollary principles of competence-competence (Article 41 of the ICSID Convention), exclusivity of the ICSID arbitration and non-interference of domestic courts (Article 26 of the ICSID Convention)*".

16. They rely on *Schreuer's Commentary on the ICSID Convention*, where he states that:

> Art. 26 is the clearest expression of the self-contained and autonomous nature of the arbitration procedure provided for by the Convention. [...]
>
> The first sentence of Art. 26 has two main features. The first is that, once consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum, national or international, and are restricted to pursuing their claim through ICSID arbitration. This principle operates from the moment of valid consent. [...]
>
> The second feature of Art. 26, first sentence, is that of non-interference with the ICSID arbitration process, once it has been instituted. The principle of non-interference is a consequence of the self-contained nature of proceedings under the Convention. The Convention provides for an elaborate process designed to make arbitration independent of domestic courts. Even in the face of an uncooperative party, ICSID arbitration is designed to proceed independently without the support of domestic courts. This is evidenced by the provisions on the constitution of the tribunal (Arts. 37-40), on proceedings in the absence of a party (Art. 45(2)), on autonomous arbitration rules (Art. 44), on applicable law (Art. 42(1)), and on provisional measures (Art. 47). It is only in the context of enforcement that domestic courts may enter the picture (Arts. 54-55).

17. The specific risk that they seek to avert is that the Respondent will rely on the relief to further interfere with the Claimants' ICSID rights "*either by raising arguments on the basis of the Declaratory Relief in the course of this Arbitration or by applying for injunctive relief before domestic courts with the aim of preventing the Claimants from pursuing the Arbitration*". They suggest that this is a risk evidenced by the Respondent's "*procedural*

*attitude in relation to the EU Objection and relentless commitment to oppose the Tribunal's jurisdiction in this arbitration*", and refer to the Respondent:

a. commencing the German Court Proceedings;

b. requesting to bifurcate the arbitration;

c. making two additional applications in the Arbitration, "*exclusively aimed at putting an end or staying the Arbitration*", in which it failed to mention the German Court Proceedings; and

d. "*fiercely opposing the Tribunal's jurisdiction in no less than five written submissions*".

18. As to urgency, the Claimants rely on the prior ICSID provisional measures decision in *Tokios Tokelés v. Ukraine* to assert that a measure is urgent where "*action prejudicial to the rights of either party is likely to be taken before such final decision is taken*",[12] arguing that in similar decisions "*urgency was characterised where the measures requested where aimed at preventing the issuance of conflicting decisions*",[13] or "*the aggravation of the dispute*".[14] They make three arguments in support:

a. that urgency exists "*in light of the impending BGH decision*" to be issued on 27 July 2023 and is likely to result in "*a declaratory judgment that the Arbitration is 'inadmissible' pursuant to section 1032(2) of the ZPO, and therefore impair the integrity of the Arbitration and the ICSID system as a whole*", and that up until the

[12] **CL-0288**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005, para. 8. See also **CL-0304**, *Case Concerning Passage Through the Great Belt (Finland v. Denmark),* Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, p. 12, para. 23.
[13] Application, para 42. **CL-0289**, *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, 3 May 2023, para. 97.
[14] **CL-0295**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, para. 74; **CL-0284**, *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. 55.

Appeal hearing on 14 May 2023, it "*had valid reasons to believe that the Berlin Court Decision – which dismissed Germany's Petition for Declaratory Relief – would stand before the BGH" and that understanding "radically changed at the Hearing*", based on:

i. [redacted] impression at the hearing;

ii. German press commentary following the hearing; and

iii. that "*such outcome may also be inferred from the BGH's previous case law*", by reference to *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia (II)* (PCA Case No. 2020-15);

b. that urgency exists "*in light of the risk of conflicting decisions as to the validity of the arbitration agreement resulting from [the Respondent's] offer to arbitrate in Article 26 of the ECT and [the Claimant's] acceptance of this offer in its Request for Arbitration dated 30 April 2021*", again relying on *WOC v. Spain*, arguing that here:

> … the urgency is even more acute than in the *WOC Photovoltaik Portfolio v. Spain* case, in which the tribunal had agreed to issue measures identical to the Recommendations ***at a time at which the Berlin Court – the first instance Court – had not yet ruled on Spain's application for the arbitration proceedings to be declared 'inadmissible' under section 1032(2) of the ZPO***. Further, as can be seen from the above quote, at the time of the issuance of the recommendations in that case, it was not even known when the Berlin Court would issue its decision. Conversely, in the Arbitration, the Berlin Court has already issued a decision and the decision to be issued by the BGH is imminent and scheduled to be issued in less than two months from the date of this Application. [Emphasis added]

c. that urgency is necessary to prevent aggravation of the dispute, relying on *Burlington v. Ecuador* for support in the statement in the tribunal's decision that, "*when the measures are intended to protect against the aggravation of the dispute*

*during the proceedings, the urgency requirement is fulfilled by definition*",[15] characterising the Respondent's conduct as taking several bites of the cherry to maximise its chances of success in relation to the EU Objection, constituting an abuse of process.

19. The Claimants submit that the Respondent's strategy is unfair and highly prejudicial to the Claimants who have had to defend and incur significant costs in defending the EU Objection before this Tribunal and the German courts, including exposing the Claimants to "*almost* [redacted] *as a result of the statutory fees applicable in German court proceeding*" (or more if the Respondent initiated proceedings in other fora).

20. As to proportionality, the Claimants submit that the provisional measures they seek are proportionate. They refer to tribunals in prior ICSID proceedings seeking to "*balance the harm that would be caused to (i) the applicants as a result of the preservation of* the status quo*, and (ii) the other party as a result of the issuance of the provisional measures requested*",[16] and ordering provisional measures where "*the harm spared the petitioner 'exceed[ed] greatly the damage caused to the party affected' by it*."[17]

[15] **CL-0295**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, para. 74; **CL-0284**, *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. 55.

[16] **CL-0306**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, para. 158 ("*However, Claimants have accurately pointed out that the necessity requirement requires the Tribunal to consider the proportionality of the requested provisional measures. The Tribunal must thus balance the harm caused to Claimants by the criminal proceedings and the harm that would be caused to Respondent if the proceedings were stayed or terminated*."); **CL-0283**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, para. 93; **CL-0284**, *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. 72; **CL-0295**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, para. 82.

[17] **CL-0300**, *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, para. 41.

21. The Claimants make three arguments as to why, in their submission, the provisional measures sought would preserve their rights and "*the integrity of the ICSID system as a whole, while having no impact on the Respondent's rights in the Arbitration*", and are proportional:

    a. they have no impact on the Respondent's ability to pursue the EU Objection (or any other jurisdictional objection) in this Arbitration;

    b. the likely impact of the German Courts Proceedings relief "*would render any potential award issued by the Tribunal unenforceable in Germany and would have strong 'signalling effects' towards enforcement courts based in other EU Member States and even outside of the EU*", and the Respondent's failure to disclose the proceedings raises "*serious grounds for concern about the consequences or further steps that the Respondent might pursue in furtherance of the [relief]*";

    c. the damaging effect and serial consequences that the relief "*might have on the ICSID system as a whole*", encouraging other state parties to "*pursue similar remedies in their own jurisdictions and escape their international obligations under the ICSID Convention*".

22. The Claimants also refer to the assurances provided by the Netherlands in the *RWE* and *Uniper* cases, but describe these as "*inapposite in the present dispute*" because: (i) they would very likely be legally unenforceable before domestic courts; and (ii) unlike in *RWE* and *Uniper*, the Respondent did not give prior notification, engaged in protracted discussions to constitute the Tribunal, and concealed the German Court Proceedings from the Claimants and Tribunal and in filing the Appeal "*even provided demonstrably false information to the Claimants and the Tribunal*".

23. The Claimants seek relief no later than 13 July 2023, because to be effective it is required prior to the issuance of the BGH decision on 27 July 2023, so as to provide the Respondent with "*ample time (even more than necessary) to implement*". To facilitate this deadline, the Claimants waived their right to respond and to request a hearing on provisional

measures (although expressed willingness to attend one if the Tribunal requested). According to the Claimants, the provisional measures would require Germany to take steps "*based on an analogous application of section 516 of the ZPO, as ruled by the BGH in an order dated 25 April 2012*".[18]

## B. THE RESPONDENT'S RESPONSE

24. The Respondent's position is that the Application must be dismissed in its entirety for two primary reasons: (i) the German Court Proceedings "*do not interfere with this arbitration*"; and (ii) the requirements for issuing provisional measures under Article 47 of the ICSID Convention are not met, as there is no necessity, urgency, or proportionality.

25. First, as to the German Court Proceedings not interfering with the arbitration, the Respondent makes four arguments:

    a. the Appeal aims at assessing the validity of an arbitration agreement;

    b. the Appeal is limited to declaratory relief;

    c. the German Civil Code of Procedure provision underlying the Appeal applies to ICSID proceedings;

    d. the decision of the German Federal Court of Justice can and will assist the Tribunal; and

    e. the ICSID Convention is not at issue in the German Court Proceedings.

26. Regarding (a), the Respondent submits in relation to the Application that:

[18] **C-0284**, Official English translation of the German Civil Code of Procedure, section 516 and **C-0301**, Order issued by the BGH on 25 April 2012 in docket XII ZB 460/11. See also Witness Statement of [redacted] para. 14.

a. it "*aims at preventing Respondent from obtaining a decision in proceedings pursuant to Sec. 1032 para. 2 German Code of Civil Procedure, currently pending before the German Federal Court of Justice*";

b. it concerns an "*appeal on points of law against a decision issued by the Higher Regional Court Berlin*", which had "*dismissed the application of the Federal Republic of Germany pursuant to Sec. 1032 para. 2 German Code of Civil Procedure*";

c. the German Federal Court of Justice held a public hearing on 17 May 2023 (together with two other appeals on points of law in *RWE* and *Uniper*); and

d. the hearing date was publicly announced on the German Federal Court of Justice's website on 8 February 2023.

27. According to the Respondent, Section 1032, paragraph 2 of the German Code of Civil Procedure permits German courts assess the admissibility or inadmissibility of the underlying arbitration, based on the language "*[u]ntil 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*" and does "*not interfere with the underlying arbitration*", because "*[w]here 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*".

28. Regarding (b), the Respondent argues that the Claimants mischaracterise Section 1032, paragraph 2 of the German Code of Civil Procedure, in that it:

> … aims at assessing whether there is a valid arbitration agreement, here pursuant to Art. 26 ECT which is invoked by Claimants. Sec. 1032 para. 2 German Code of Civil Procedure does not serve the purpose of making a determination on the ICSID Convention. Sec. 1032 para. 2 German Code of Civil Procedure provides for declaratory relief with *inter partes* effect. It is not capable of granting injunctive relief.

29. It denies that proceedings under Section 1032, paragraph 2 of the German Code of Civil Procedure "*block*" the underlying arbitration, and its expert, [redacted] states that:

> This procedure does not result in any claim to cease and desist from continuing with the present arbitration procedure against the defendants, the Claimants, the World Bank, the International Centre for the Settlement of Investment Disputes (ICSID), the Tribunal in the arbitration procedure ICSID Case No. ARB/21/26 or its members. In particular, it is not an anti-arbitration injunction procedure which could halt an arbitration procedure, particularly one outside of the territory of the Federal Republic of Germany.

30. Regarding (c), in response to the Claimants' argument that Section 1032, paragraph 2 of the German Code of Civil Procedure would not apply to ICSID arbitration, the Respondent notes that Section 1025, paragraph 2 of the German Code of Civil Procedure provides that "*[t]he provisions of sections 1032, 1033 and 1050 are to be applied also in those cases in which the place of arbitration is located abroad or has not yet been determined*", but denies that this excludes ICSID arbitration, claiming instead that it "*expressly widens the scope of application with respect to Sec. 1032 German Code of Civil Procedure*". It notes that the Claimants' argument was discussed and rejected in the Higher Regional Court Cologne decisions in *RWE AG et al. v. Kingdom of the Netherlands* and *Uniper SE et al. v. Kingdom of the Netherlands*.

31. Regarding (d), the Respondent submits that the decision of the German Federal Court of Justice "*can and will assist this Tribunal when rendering its decision on jurisdiction*", because it "*will decide as an independent and impartial court*", taking into account "*all arguments advanced by the parties in the proceedings pursuant to Sec. 1032 para. 2 German Code of Civil Procedure*" and "*decide on its competence and jurisdiction and then on the admissibility of these arbitration proceedings*". It submits that:

> It is in the interest of all Parties and the Tribunal to get the German Federal Court of Justice's view on the question of the admissibility of these arbitration proceedings. Despite the CJEU's clear jurisprudence on the inadmissibility of intra-EU investor-State arbitrations – including ICSID arbitration – and the EU Member States'

> obligation to give full effect to the CJEU's jurisprudence, Claimants continue to argue in this arbitration that the CJEU's jurisprudence is irrelevant for their case. The German Federal Court of Justice will provide additional insight.

32. This Tribunal decided to rule on the topic of inadmissibility of intra-EU investor-State arbitrations only when rendering its decision on the merits, denying the request for bifurcation. If and to the extent this Tribunal now grants the Claimants' Provisional Measures Application, based on mere hypotheses and guesses made by the Claimants and misjudging the nature of the proceedings pursuant to Section 1032, paragraph 2 of the German Code of Civil Procedure, this Tribunal would not only contradict itself, but also act neither impartially nor independently, favouring one Party's legal opinion over the other.

33. Regarding (e), the Respondent disagrees that a decision of the German Federal Court of Justice would undermine the integrity of the ICSID Convention and argues that "*proceedings under Sec. 1032 para. 2 German Code of Civil Procedure determine the validity of the arbitration agreement invoked by Claimants without addressing or violating the ICSID Convention*", as the "*German Federal Court of Justice will decide upon the validity of an arbitration agreement pursuant to Art. 26 ECT*" on the basis of German and EU law, which it alleges means "*the ICSID Convention is not at issue*". It refers to [redacted] Witness Statement comment that "*the German Federal Court of Justice voiced doubts that, in view of the applicable EU law, the arbitration agreement at issue is valid*", and concludes that if there were not valid arbitration agreement, "*the ICSID Convention does not come into play at all*".

34. Secondly, as to standard pursuant to Article 47 of the ICSID Convention, the Respondent submits that the requirements for issuing provisional measures under Article 47 of the ICSID Convention are not met because:[19]

[19] **RL-0262**, *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/2/14, Decision on the Claimants' Request for Provisional Measures, 16 August 2022, para. 76; **RL-0263**, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Request for Provisional Measures,

a. "*[t]here is no endangerment of any of Claimants' alleged rights that could be protected by ways of provisional measures*";

b. the requirements of necessity, urgency and proportionality are not fulfilled; and

c. the Claimants "*act contradictorily and not in good faith in that they make use of legal proceedings in the Federal Republic of Germany when it suits them but want to cut off Respondent from proceedings before the German courts when they fear that they may lose*".

35. The Respondent further states that "*provisional measures are extraordinary measures which must not be recommended lightly*",[20] and that the burden of proof lies with the Claimants.[21]

36. Regarding (a) endangerment to rights, the Respondent argues that the Claimants' "*right of access to international adjudication of their ECT claims under the ICSID Convention*", "*right to have the dispute [...] submitted to the exclusive authority of this Tribunal*", "*right to the preservation of the status quo between the Parties and to non-aggravation of the dispute*" and right to the issuance of a binding and enforceable award are not endangered, as follows:

a. simply asserting the right of access is endangered is insufficient and "*[n]either the Claimants' statement nor their citation from the findings in [WOC] includes a reasoning why the proceedings under Sec. 1032 para. 2 German Code of Civil Procedure should endanger*" such right;

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28 October 1999, para. 10; **RL-0264**, C. Schreuer, The ICSID Convention, A Commentary, 3rd ed. 2022, p. 1075 *et seq.*, para. 85.

[20] *See*, *inter alia*, **RL-0265**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures, 6 September 2005, para. 38; **RL-0263**, *Emilio Agustín Maffezini v. Kingdom of Spain*, Decision on Request for Provisional Measures, 28 October 1999, para. 10.

[21] **RL-0262**, *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, Decision on the Claimants' Request for Provisional Measures, 16 August 2022, **Exhibit**, para. 75.

b. the Claimants "*obviously are not prevented from participating*" in the arbitration as the Appeal "*will be of declaratory nature*" and Section 1032, paragraph 3 of the German Code of Civil Procedure states that the Tribunal can continue these proceedings;

c. the Claimants' argument that the Appeal breaches the Tribunal's exclusive jurisdiction based on *WOC v Spain*, in which the tribunal found that the "*Respondent's intended use of any declaration in the present Arbitration in support of any submission it may make as to the validity of the arbitration agreement*" was a legal consequence and hence a remedy within the meaning of Article 26(1) of the ICSID Convention, "*is wrong and its concern unfounded*";

d. other tribunals found no rights are endangered where court proceedings "*will have no foreseeable effect on the Tribunal's ability to make a determination on the issues in the arbitration*",[22] citing to *Uniper SE et al. v. Kingdom of the Netherlands*:

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

e. the test for provisional measures to protect the integrity of the proceedings requires a link between the other proceedings and the party's ability to pursue its claims in the arbitration;[23]

[22] *See*, *inter alia*, **RL-0265**, *Plama Consortium Limited v. Republic of Bulgaria*, Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures, 6 September 2005, para. 42.
[23] **RL-0266**, *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22, Procedural Order No. 2 – Decision on the Claimants' Request for Provisional Measures, 9 May 2022, para. 73.

f. the Claimants' reasoning was contradictory in seeking provisional measures having accepted that this Tribunal will not be bound by the decision of the German Federal Court of Justice;

g. the Claimants' concerns ignore Section 1032, paragraph 3 of the German Code of Civil Procedure "*which explicitly states that this arbitration may continue, and the Tribunal may render an award*";

h. the right to non-aggravation of the dispute refers to actions that make resolution of the dispute by the Tribunal more difficult and to maintain the *status quo*, which does not include the Claimants having to defend themselves "*against the Declaratory Relief in the arbitration and continue defending itself against the same relief in the German Court Proceedings, thereby incurring significant costs*", as confirmed in *Churchill and Planet Mining v. Indonesia*:[24]

> An allegation that the *status quo* has been altered or that the dispute has been aggravated needs to be buttressed by concrete instances of intimidation or harassment. On this basis, of the record as it presently stands, the Tribunal is of the view that the Claimants have not met the burden of establishing conduct of this nature.

i. the Appeal "*will not render the resolution of the dispute by the Tribunal more difficult*", there are "*no instances of intimidation or harassment*" and "*[t]he decision of the German Federal Court of Justice can assist the Tribunal on EU law by, for instance, clarifying the application of the CJEU's* Achmea*,* Komstroy*,* PL Holdings European Food *and the* Romatsa *Decisions to this dispute*";

j. Claimants incur no additional costs in the German Court Proceedings because they are "*close to final*", and the "*only step left appears to be the rendering of the*

[24] **RL-0267**, *Churchill Mining Plc and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014, para. 72.

*decision of the German Federal Court of Justice on 27 July 2023*", which "*will be irreversible*" with "*no further appeals*";

k. "*it is not correct that, the 'attempt to block the Arbitration would be "at variance with clear mandate of the [ICSID] Convention and will violate [Germany's] international obligations under the [ICSID] Convention"'*", as Section 1032, paragraph 3 of the German Code of Civil Proceedings "*expressly states that the arbitration may continue, and a tribunal may render an award*"; and

l. the CJEU *Romatsa* judgment states "*clearly that ICSID arbitral awards in intra-EU investor-State arbitrations cannot be enforced in the EU*", which means "*[a]ll EU Member States, including their domestic courts, must follow the CJEU's jurisprudence*" and "*a provisional measure to prevent the German Federal Court of Justice from handing down a decision will not change this fact*".

37. Regarding (b), necessity, urgency and proportionality, the Respondent submits as to necessity that:

a. the Claimants are acting "*contradictorily and in bad faith by attempting to cut off Respondent's access to German legal proceedings while Claimants themselves use German administrative and legal proceedings before the BSH and the German Constitutional Court, respectively*" (being an applicant in the proceedings leading to the German Constitutional Court decision dated 30 June 2020);

b. the tribunals in *RWE AG et al. v. Kingdom of the Netherlands* and *Uniper SE et al. v. Kingdom of the Netherlands* rejected requests for provisional measures against proceedings under Section 1032, paragraph 2 of the German Code of Civil Procedure;

c. the German Federal Court of Justice has been fully transparent, the Respondent has been fully transparent, and this Tribunal has been fully informed;

d. the protection of the ICSID system as a whole is not a valid basis for necessity or to establish that there is a material risk of irreparable harm to the rights of a party if the measure is not granted;

e. the Claimants' argument that there is a material risk of an injunction "*shows Claimants' blunt disrespect not only regarding Respondent's attempt to fulfill its obligations under EU law, but also regarding Respondent's procedural rights in this arbitration*", as "*the German Federal Court of Justice's eventual decision will declare what the law is*" and that "*already is and will be part of this arbitration notwithstanding the exact wording and motivation of the German Federal Court of Justice's eventual decision*", and is, in any event, a "*mere speculation*" and "*[p]rovisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions*", but rather "*to protect the requesting party from imminent harm*";

f. Claimants "*were informed early when the application was served onto them*" and aware of the German Court Proceedings "*immediately after the First Session on 28 October 2021*", and "*[t]here is no obligation to inform the ICSID Secretariat about proceedings before domestic courts, let alone before a tribunal has been constituted*";

g. the Respondent's 23 May 2022 letter requested this Tribunal to stay the arbitral proceedings until the German Federal Court of Justice has decided upon Respondent's appeal in the proceedings pursuant to Section 1032, paragraph 2 of the German Code of Civil Procedure, meaning the Tribunal was aware of the Respondent's appeal;

h. Claimants rely on *WOC v. Kingdom of Spain*, where "*the tribunal's main argument seems to have been the Kingdom of Spain's record of prior actions in previous arbitrations*" and the "*Respondent has no such record*".

38. The Respondent submits as to urgency that "*a measure is urgent where action prejudicial to the rights of either party is likely to be taken before such final decision is given*".[25] In response to the Claimants' concern that the German Federal Court of Justice may declare the "*inadmissibility*" of the arbitration, the Respondent states that "*[t]he inadmissibility of intra-EU investor-State arbitration under EU law has been determined by the CJEU ever since the CJEU's Achmea Judgment*".

39. The Respondent further submits that those proceedings commenced on 18 October 2021, and the "*Claimants have addressed these proceedings in this arbitration on multiple occasions without ever touching upon the subject of a need for provisional measures*" and "*have had the chance to request provisional measures for almost two years*", delay of which demonstrates the lack of urgency.

40. The Respondent submits as to proportionality that provisional measures always must be proportionate, the harm, if not granted, "*must substantially outweigh the harm of the party against whom the measure is directed if the measure is granted*",[26] and the measures "*may not be awarded for the protection of the rights of one party where such provisional measures would cause irreparable harm to the rights of the other party*".[27]

41. In the current case, the Respondent submits that provisional measures "*would have no impact on Respondent's rights as Respondent is free to argue the intra-EU objection in the arbitration*", citing to the decisions in *Uniper SE et al. v. Kingdom of the Netherlands* and *RWE AG et al. v. Kingdom of the Netherlands*.

[25] **RL-0268**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, Decision on Provisional Measures, 17 August 2007, para. 59; **RL-0271**, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006, para. 76; **RL-0264**, C. Schreuer, The ICSID Convention, A Commentary, 3rd ed. 2022, p. 1078, para. 97.
[26] **RL-0272**, *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Respondent's Application for Provisional Measures, 12 May 2016, para. 107.
[27] **RL-0268**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, Decision on Provisional Measures, 17 August 2007, para. 93.

42. As to the enforceability of any award, the Respondent submits that this "*will be assessed independently from the German Federal Court of Justice's eventual decision, as follows from the CJEU's* Romatsa *Decision*".

43. It goes on to argue that rather than the Appeal causing harm to the Claimants, the measures "*will cause irreparable harm to Respondent, because it is nothing but an attempt to cut off Respondent's access to justice*", as the Application is "*an abuse of rights since it is contradictory and violates the fundamental principle of good faith*".[28] It reinforces in this regard that the Claimants "*themselves took matters to the German courts to pursue questions that are part of this arbitration*", being one of the applicants in the proceedings that led to the decision of the German Constitutional Court dated 30 June 2020, thus benefitting "*from the protection that Respondent's court system provides*" and "*making use of the remedies offered under German law before the BSH regarding the reimbursement of costs for their projects*". According to the Respondent, this shows the "*Claimants' attempt to cherry pick by pursuing those legal remedies they like and rejecting those they currently consider unhelpful*".

44. Finally, the Respondent argues that the Claimants seek to "*deprive Respondent of its right to access to justice in a way that violates the German Constitution*", and that "*German courts do not tolerate anti-suit injunctions directed against proceedings pending before German courts*", relying on a decision of the Higher Regional Court Hamm dated 2 May 2023.[29]

45. By way of relief, the Respondent requests that the Tribunal dismisses the Application in its entirety and orders the Claimants to bear the costs arising out of and in connection with it.

[28] **RL-0273**, *Orascom TMT Investments S.a.r.l. v People's Democratic Republic of Algeria,* ICSID Case No. ARB/12/35, Award, 31 May 2017.
[29] **RL-0274**, Higher Regional Court Hamm, Decision dated 2 May 2023 – 9 W 15/23.

## III. THE TRIBUNAL'S ANALYSIS

46. Both Parties agree that the Tribunal has authority to recommend provisional measures pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.

### A. APPLICABLE LEGAL STANDARD

47. The applicable legal standard is largely agreed between the Parties. The governing provisions are Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.

48. Article 47 of the ICSID Convention provides:

> 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.

49. Article 39 of the ICSID Arbitration Rules provides:

> **Provisional Measures**
>
> (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.
>
> (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.

50. Neither Article 47 nor Rule 39 provides a legal standard of review or requirements to be met. However, provisional measures are an extraordinary measure that will not be granted lightly. In order to examine whether appropriate circumstances are present, tribunals typically examine whether the provisional measures are necessary, urgent and required to avoid irreparable harm to the applicant.

51. In the current case, the Claimants characterises the standard as requiring (i) existence of *prima facie* jurisdiction over the arbitration; (ii) existence of rights that require protection by way of provisional measures; (iii) urgency and necessity of the measures requested; and (iv) proportionality of those measures. The Respondent appears to accept this standard and the Tribunal proceeds to apply it below.

## B. APPLICATION OF THE LEGAL STANDARD

### *(i) Prima Facie Jurisdiction*

52. The *prima facie* jurisdiction of the Tribunal over the arbitration appears to be accepted by both Parties. In light of the Tribunal's decision in respect of the Respondent's Rule 41(5) Application, insofar as *prima facie* jurisdiction is required for provisional measures, this requirement is satisfied.

***(ii) Existence of Rights that Require Protection by Way of Provisional Measures***

53. As to the existence of rights requiring protection, the Claimants seek to characterise four separate rights, including access to ICSID arbitration, exclusive jurisdiction, preservation of the *status quo* and non-aggravation including in relation to a binding and final award. The essence of the Claimants' request for protective provisional measures, once distilled, is that the German Court Proceedings will adversely impact and undermine their ability fully to pursue their investment protection rights pursuant to the ECT and the ICSID Convention.

54. Without in any way predetermining its final decision on jurisdiction or the merits of the claims pending a full hearing of the same, the Application requires the Tribunal to consider the scope of its *prima facie* jurisdiction in order to determine whether or not it is exclusive and/or prejudiced by the Appeal decision.

55. Article 26(5) of the ECT provides as follows:

> (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:
>
> (i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;
>
> (ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and
>
> (iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules.
>
> (b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a

> commercial relationship or transaction for the purposes of article I of that Convention.

56. Article 26 of the ICSID Convention provides as follows (emphasis added):

> **Article 26**
>
> 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.

57. The *prima facie* jurisdiction of the Tribunal in respect of this arbitration is plainly exclusive on the clear and unequivocal language of Article 26 of the ICSID Convention. That jurisdiction extends to this Tribunal's ability to determine its own jurisdiction pursuant to the Convention and/or ECT. Accordingly, proceedings brought in any other fora in respect of the claims in the arbitration and jurisdiction pursuant to the ICSID Convention and ECT, including the question of jurisdiction, would be in breach of the ICSID Convention, Article 26.

58. The Respondent has been at pains to point out that the German Court Proceedings deal only with the Tribunal's jurisdiction to hear these claims as a matter of German and EU law, as opposed to the ICSID Convention, the ECT and, presumably, principles of public international law. However, the Respondent has also put before this Tribunal, in its objection to jurisdiction in the arbitration, points of German and EU law.

59. Ultimately, the arguments made in the German Court Proceedings and in the arbitration arising out of the Respondent's jurisdiction case are all based on its intra-EU objection. These arguments are closely intertwined and contain overlapping arguments and issues for determination. In fact, the Respondent has repeatedly submitted that the Appeal decision will assist the Tribunal in its consideration of those issues.

60. The Tribunal is not persuaded that the Respondent's decision to refrain from asking the German Court from determining jurisdiction pursuant to the ECT or the ICSID Convention

necessarily eliminates potentially overlapping jurisdictional claims, defences and issues arising out of the Respondent's intra-EU objection.

61. Accordingly, the Tribunal concludes on the basis of its *prime facie* jurisdiction that the German Court Proceedings, insofar as they seek to determine the jurisdiction of the Tribunal, appear potentially to be in breach of the ICSID Convention exclusive jurisdiction clause. The Tribunal accepts the Respondent's argument that the Claimants participated in those proceedings, but the Respondent initiated the originating application to the Berlin Court to request pursuant to Section 1032(2) ZPO for a declaration that the arbitration was "*inadmissible*" based on its intra-EU jurisdictional objection. Therefore, any breach would lie with the Respondent.

62. The Respondent has raised the fact that the Claimants "*themselves took matters to the German courts to pursue questions that are part of this arbitration*", being one of the applicants in the proceedings that led to the decision of the German Constitutional Court dated 30 June 2020, but the Tribunal considers that this may validly fall within the scope of Article 26 of the ICSID Convention and/or sufficiently deal with matters outside the scope of the Tribunal's jurisdiction. In any event, those proceedings were commenced more than three years ago and the Respondent has never raised them as a basis for provisional measures from this Tribunal. Indeed, these are likely the type of proceedings referred to in *Uniper SE et al. v. Kingdom of the Netherlands*, when the tribunal referred to "*[t]he mere existence of proceedings before another judicial body does not necessarily threaten the exclusivity of ICSID proceedings*", "*where there may be concurrent jurisdiction between domestic courts and international investment tribunals*".

63. The German Court Proceedings, on the other hand, relate to issues within the Tribunal's competence and may "*purport to decide, or hinder the Tribunal's freedom to decide, those issues*". In particular, the Respondent's German Court Proceedings seek to pre-empt and undermine the jurisdiction of the Tribunal to determine its own jurisdiction, at least on certain issues, pursuant to the relevant international law instruments to which the Respondent is party.

64. The Tribunal reiterate that jurisdiction in the arbitration remains in dispute and the aforementioned reasoning is based solely on its *prime facie* jurisdiction. The Tribunal does not in any way predetermine the outcome of its decision on jurisdiction having heard the full submissions, evidence and arguments of the Parties.

***(iii) Urgency and Necessity***

65. Having determined that the Claimants do indeed have valid rights in relation to which provisional measures may arise and be appropriate, the Tribunal turns to the urgency and necessity of the requested measures.

66. First, as to urgency, both Parties also appear to accept that a provisional measure is urgent where action prejudicial to the rights of either party is likely to be taken before such final decision is given.[30] The Tribunal also endorses that approach.

67. The challenge for the Claimants in their provisional measures Application is that the German Court Proceedings were commenced on 18 October 2021, almost two years prior. The Claimants were plainly aware of the proceedings as they have defended them in the German Court – indeed prevailing at first instance – and addressed them in the arbitration. It is only at the point at which the Claimants understand that the Appeal may not be in their favour that they are seeking urgent provisional measures.

68. In order to satisfy the requirement of urgency, the Claimants would need to establish that the decision on Appeal, as opposed to the German Court Proceedings as a whole, constituted the breach of its rights. It does not. It is the German Court Proceedings themselves that would constitute the breach of the Tribunal's exclusive jurisdiction to the extent that they engage in any issues going to jurisdiction pursuant to the ICSID

[30] **CL-0288**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005, para. 8. See also **CL-0304**, *Case Concerning Passage Through the Great Belt (Finland v. Denmark),* Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, p. 12, para. 23. **RL-0268**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, Decision on Provisional Measures, 17 August 2007, para. 59; **RL-0271**, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006, para. 76; **RL-0264**, C. Schreuer, The ICSID Convention, A Commentary, 3rd ed. 2022, p. 1078, para. 97.

Convention and/or ECT, including their interrelationship with EU or German law. Insofar as the Claimants considered it appropriate to seek provisional measures from this Tribunal in respect of those proceedings, it needed to have done so at the outset, or at least as soon as it became aware of their existence.

69. Insofar as "*the measures requested were aimed at preventing the issuance of conflicting decisions*",[31] or "*the aggravation of the dispute*",[32] this risk arose almost two years ago. The Claimants cannot plead urgency only now, over 18 months into the German Court Proceedings, once the outcome looks to be turning against them.

70. Therefore, the Tribunal finds that the necessary requirement of urgency does not exist in the current situation, because the Claimants seek provisional measures in respect of proceedings likely commenced in breach of the ECT and ICSID Convention, only once the final appeal in those proceedings was imminent.

71. Secondly, as to necessity, the requested measures must be required or necessary in order to avoid imminent harm to the rights of the Claimants. In this regard, the Respondent has provided its assurances that:

a. this Tribunal will not be bound by the decision of the German Federal Court of Justice;

b. the Claimants' concerns are addressed by Section 1032, paragraph 3 of the German Code of Civil Procedure "*which explicitly states that this arbitration may continue, and the Tribunal may render an award*";

[31] Application, para 42; **CL-0289**, *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, 3 May 2023, para. 97.
[32] **CL-0295**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, para. 74; **CL-0284**, *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. 55.

c. the enforceability of any award "*will be assessed independently from the German Federal Court of Justice's eventual decision, as follows from the CJEU's* Romatsa *Decision*"; and

d. "*it is not correct that, the 'attempt to block the Arbitration would be "at variance with clear mandate of the [ICSID] Convention and will violate [Germany's] international obligations under the [ICSID] Convention"'*", as Section 1032, paragraph 3 of the German Code of Civil Proceedings "*expressly states that the arbitration may continue, and a tribunal may render an award*".

72. On the basis of reassurances from the Respondent as to its position that the German Court Proceedings are not an attempt to block either the arbitration or the enforcement of the award, and that both would proceed independently of the German Court Proceedings, the necessity for the provisional measures is also unclear. Insofar as the cost associated with the German Court Proceedings causes additional loss to the Claimants, they may be able to identify a legal basis to seek to recover those in these proceedings.

73. Moreover, as the Respondent has also pointed out, the issue before the German Court has already been considered by the CJEU and determined by that court in favour of the Respondent's position. The Tribunal notes in this regard the Respondent's restated position that "*[t]he inadmissibility of intra-EU investor-State arbitration under EU law has been determined by the CJEU ever since the CJEU's Achmea Judgment*", the CJEU *Romatsa* judgment states "*clearly that ICSID arbitral awards in intra-EU investor-State arbitrations cannot be enforced in the EU*", and therefore "*[a]ll EU Member States, including their domestic courts, must follow the CJEU's jurisprudence*" and "*a provisional measure to prevent the German Federal Court of Justice from handing down a decision will not change this fact*".

74. In this regard, the clear tenor of the Respondent's submissions objecting to the provisional measures Application is that the outcome of the Appeal will merely replicate the outcome in the CJEU and other EU member state court decisions and therefore not change the existing *status quo*. That position does rather beg the question why the German Court

Proceedings were commenced, and in particular why they were commenced at a time when this Tribunal was in the process of being constituted. However, that is a matter for costs in due course, as opposed to a basis for provisional measures in this case.

75. On the basis of the Respondent's reassurances therefore, the Tribunal finds that the provisional measures are also not necessary to prevent additional harm to the Claimants, because their right to have this Tribunal determine its jurisdiction over their claims pursuant to the ECT and ICSID Convention is unimpacted by the German Court Proceedings.

***(iv) Proportionality***

76. Finally, as to proportionality, the relevant harm "*must substantially outweigh the harm of the party against whom the measure is directed if the measure is granted*",[33] and the measures "*may not be awarded for the protection of the rights of one party where such provisional measures would cause irreparable harm to the rights of the other party*".[34]

77. In the current situation, in light of the Tribunal's decision as to urgency and necessity above, the Tribunal is not required to consider the factor of proportionality, including but not limited to whether or not the Respondent had a right to commence the German Court Proceedings during the constitution of the Tribunal in the arbitration, or the need to do so in light of its submission that the matter it seeks to have determined in the German Court Proceedings is already resolved by the CJEU.

78. In conclusion, the Tribunal does not find the urgency or necessity for the particular relief sought at this time, primarily because the German Court Proceedings have been underway for some time and the only new factor is that the Appeal decision may be adverse to the Claimant. Nevertheless, the Tribunal is concerned that there is a future risk that the Respondent may commence additional proceedings, or seek remedy based on or

[33] **RL-0272**, *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Respondent's Application for Provisional Measures, 12 May 2016, para. 107.
[34] **RL-0268**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, Decision on Provisional Measures, 17 August 2007, para. 93.

enforcement of the Appeal decision, that may be contrary to this Tribunal's exclusive jurisdiction. Therefore, whilst not granting the provisional measures as sought, the Tribunal considers it necessary and appropriate to make a firm recommendation to the Respondent to refrain from doing so or, at minimum, to notify the Claimants and Tribunal well in advance of any steps to do so.

## IV. DECISION

79. On the basis of the above considerations, the Tribunal:

a. declines to order the Respondent to withdraw Germany's Appeal, which is currently pending before the BGH in docket I ZB 43/22; and

b. declines to order the Respondent to withdraw or discontinue with prejudice any other 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 Arbitration.

80. The Tribunal does however require that the Respondent:

a. refrains from initiating any further applications or proceedings against any of the Claimants or related entities before any national court that have the purpose of preventing the Claimants or related entities from continuing the Arbitration, including requests for any kind of injunctive relief, or recognition or exequatur proceedings; or, at minimum,

b. notifies the Claimants and the Tribunal well in advance of any further filing before any national court with a connection to the Arbitration so that the Claimants are put in a position to apply for new provisional measures before the Tribunal.

81. The Tribunal defers any question of costs in connection with the request for provisional measures for consideration at a later stage in this Arbitration.

On behalf of the Tribunal,

[signed]

Ms. Wendy Miles KC
President of the Tribunal
Date: 17 July 2023