

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**RWE AG and RWE Eemshaven Holding II BV**

Claimants

and

**Kingdom of the Netherlands**

Respondent

**ICSID Case No. ARB/21/4**

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**ORDER OF THE TRIBUNAL TAKING NOTE OF THE  
DISCONTINUANCE OF THE PROCEEDING AND DECISION ON COSTS**

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***Members of the Tribunal***

Ms. Lucy Reed, President of the Tribunal

Mr. James Boykin, Arbitrator

Mr. Toby Landau KC, Arbitrator

***Secretary of the Tribunal***

Dr. Jonathan Chevry

***Assistant to the Tribunal***

Ms. Lindsay Gastrell

*Date of dispatch to the Parties: 12 January 2024*

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## I. PROCEDURAL HISTORY

1. On 20 January 2021, RWE A.G., a public limited company incorporated under the laws of the Federal Republic of Germany, with its registered address in Essen, Germany, and RWE Eemshaven Holding II B.V., a Besloten Vennootschap (or limited liability) company incorporated under the laws of the Kingdom of the Netherlands with its registered address in Geertruidenberg, Netherlands (the “**Claimants**” or “**RWE**”), filed its Request for Arbitration (the “**Request**”) with the Secretariat of the International Centre for Settlement of Investment Disputes (“**ICSID**”) 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**”).
2. The Request was filed against the Kingdom of the Netherlands (the “**Respondent**” or the “**Netherlands**”).
3. The Secretary-General of ICSID registered the Request for Arbitration on 2 February 2021 pursuant to Article 36(3) of the ICSID Convention and Rules 6(1)(a) and 7(a) of the ICSID Institution Rules and notified the Parties of the registration.
4. The Parties agreed to constitute the Arbitral Tribunal in accordance with the following method: the Tribunal would consist of three arbitrators, one to be appointed by each Party, the third arbitrator, and President of the Tribunal to be appointed according to a list procedure.
5. The Tribunal is composed of Ms. Lucy Reed, a national of the United States of America, President, appointed by the Parties; Mr. James Boykin, a national of the United States of America, appointed by the Claimants; and Mr. Toby Landau KC, a national of the United Kingdom, appointed by the Respondent.
6. On 2 June 2021, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”) notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date, pursuant to the

Parties' agreement on the constitution of the Tribunal and the relevant provisions of the ICSID Convention and Arbitration Rules. Dr. Jonathan Chevry, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

7. On 30 August 2021, the Tribunal held a First Session with the Parties by videoconference.
8. On 15 October 2021, the Tribunal issued Procedural Order No. 1, setting out the procedural rules and procedural calendar for the proceedings.
9. On 18 December 2021, the Claimants filed their Memorial on the Merits, accompanied by two expert reports.
10. On 28 January 2022, the Claimants filed a request to address an objection to jurisdiction and an ancillary claim as preliminary questions (the "**Claimants' Application for Bifurcation and Expedition**").
11. On 11 February 2022, the Respondent filed observations on the Claimants' Application for Bifurcation and Expedition.
12. On 25 February 2022, the Tribunal issued Procedural Order No. 2 rejecting the Claimants' request to address an objection to jurisdiction and an ancillary claim as preliminary questions. As a result, the arbitration proceeded in accordance with the procedural timetable for non-bifurcated proceedings.
13. On 29 April 2022, the Claimants filed a request for provisional measures.
14. On 3 May 2022, the Respondent filed observations on the admissibility of the Claimants' request for provisional measures.
15. On 9 May 2022, the Claimants filed a response to the Respondent's observations of 3 May 2022.
16. On 17 May 2022, the Tribunal issued Procedural Order No. 3, deciding that the Claimants' request for provisional measures was admissible and establishing a briefing schedule on the Claimants' request.

17. On 31 May 2022, the Respondent filed a response to the Claimants' request for provisional measures.
18. On 7 June 2022, the Claimants filed observations on the Respondent's response of 31 May 2022.
19. On 14 June 2022, the Respondent filed a rejoinder to the Claimants' request for provisional measures.
20. On 16 August 2022, the Tribunal issued its Decision on provisional measures, rejecting the Claimants' request and issuing a series of recommendations for the Respondent.
21. On 5 September 2022, the Respondent filed its Counter-memorial on the Merits and Jurisdiction, accompanied by one expert report.
22. By email of 19 October 2022, the Claimants informed the Tribunal of the Parties' agreement of 18 October 2022 to suspend the arbitration with "immediate effect" and on the following terms:
  1. *The suspension has an initial period of nine months starting as of 18 October 2022 and may be extended by mutual agreement of the parties, provided that the suspension will end once the German Federal Court of Justice (BGH) publishes its decision on the appeal pending between the parties.*
  2. *For the purposes of this suspension, ICSID Arbitration Rule 45 does not apply.*
  3. *Once the arbitration continues, the Procedural Calendar will need to be reviewed (e.g. finding a new hearing date and checking the schedule in light of holiday periods and conflicts with other commitments); and*
  4. *To enable this and to account for the additional time needed to recommence ongoing workstreams, the first deadline following the restart of the arbitration will in any event be extended by two weeks.*
23. By email of the same day, the Respondent confirmed its agreement with the content of the Claimants' email.

24. On 20 October 2022, the Tribunal issued Procedural Order No. 4 taking note of the Parties' agreement to suspend the proceeding for a period of nine months.
25. On 20 June 2023, the Claimants informed the Tribunal that the Parties had agreed to extend the suspension of the proceeding until 15 September 2023. The Respondent confirmed the Parties' agreement by email of the same date.

## **II. DISCONTINUANCE**

26. By email of 18 September 2023, the Claimants observed that "as the Tribunal is likely aware, the German Federal Court of Justice declared the present arbitration inadmissible under German and European law" and that the RWE board was expected to decide in the next month whether to discontinue the present proceeding.
27. In addition, the Claimants informed the Tribunal of the Parties' agreement to extend the suspension of the proceeding until 16 October 2023. RWE noted that "[t]he Parties have further agreed that the suspension is without prejudice to the right of the Parties to jointly or individually request the discontinuance of the proceedings during the pendency of the suspension."
28. By letter of 16 October 2023, RWE formally requested the discontinuance of the proceeding pursuant to Rule 44 of the ICSID Arbitration Rules.
29. Rule 44 of the ICSID Arbitration Rules provides:

If a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue.

30. By letter of 17 October 2023, in accordance with Rule 44 of the ICSID Arbitration Rules, the Tribunal ordered the Respondent to state by 27 October 2023 whether it opposed the discontinuance of the proceeding.
31. By letter of 20 October 2023, the Netherlands noted that it “agrees with Claimants that the declaration of the present arbitration by the German Federal Court of Justice as inadmissible compels its discontinuance” and confirmed its consent to the discontinuance of the proceeding.
32. As a result, in accordance with the Parties’ request and pursuant to Rule 44 of the ICSID Arbitration Rules, the Tribunal hereby takes note of the discontinuance of the proceeding.

### III. COSTS

33. In its letter of 20 October 2023, the Netherlands also observed that RWE’s request of 16 October 2023 did not address the issue of allocation of costs between the Parties and requested this issue to be addressed in a schedule of simultaneous written submissions.
34. On 24 October 2023, the Tribunal invited the Respondent to address the issue of costs allocation by 8 November 2023 in a submission not exceeding 10 pages, and invited the Claimants to comment on the Respondent’s submission on costs by 22 November 2023.
35. On 8 November 2023, the Respondent filed its submission on costs (the “**Respondent’s Submission on Costs**”), along with the Affidavit of [REDACTED] [REDACTED] the Senior Legal Advisor at the Ministry of Economic Affairs and Climate of the Netherlands (“[REDACTED] Affidavit”) setting out the costs claimed. The Respondent requested the Tribunal to order the Claimants to bear the Netherlands’ costs in this proceeding as described in the [REDACTED] Affidavit, in full or in substantial part.



36. On 22 November 2023, the Claimants provided their comments on the Respondent’s Submission on Costs (the “**Claimants’ Comments on Costs**”).

37. By email dated 27 November 2023, the Netherlands stated that the representation in RWE’s Comments on Costs that it had not reached out to RWE to try to reach an agreement on costs is false, as evidenced by an attached email of 31 August 2023.

#### **A. The Parties’ Positions on Costs**

38. The presentations of the Parties’ positions in the sections below are not meant to serve as an exhaustive review of the Parties’ submissions on the Respondent’s request for costs, but rather as summaries of those arguments that are relevant to the Tribunal’s analysis and findings on the allocation of costs. The Tribunal has carefully considered the written statements made by the Parties and the authorities referred to by them.

##### **(1) The Respondent’s Position**

39. The Respondent seeks the legal and arbitration costs it has incurred through the discontinuance of this arbitration. The Respondent notes, in particular, that the Tribunal reserved costs issues in connection with its decisions denying the Claimants’ requests for bifurcation and provisional measures.<sup>1</sup>

40. Acknowledging the tribunal’s refusal to grant costs in *Uniper v. Netherlands*,<sup>2</sup> the Netherlands summarizes its position as follows:<sup>3</sup>

*The Netherlands has incurred significant expenses in this arbitration, to the detriment of Dutch taxpayers. The Netherlands accordingly asserts that, in view of the exceptional circumstances of this case, it is appropriate for it to receive compensation for the fees and expenses it was forced to bear. It was required to defend against requests for bifurcation and provisional measures. It was required to prepare a voluminous Counter-Memorial accompanied by, inter alia, an expert report and significant technical evidence. It was finally*

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<sup>1</sup> Procedural Order No. 2: Decision on Bifurcation (25 February 2022), para 59(C); Decision on Provisional Measures (16 August 2022), para. 93(E).

<sup>2</sup> *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. the Kingdom of the Netherlands*, ICSID Case No. ARB/21/22, Order of the Tribunal Taking Note of the Discontinuance of the Proceedings and Decision on Costs (17 March 2023), para. 71.

<sup>3</sup> Respondent’s Submission on Costs, 8 November 2023 (“**Respondent’s Costs Submission**”), para. 3 (footnote omitted).

*required to unnecessarily prepare for the resumption of the proceedings, and the ensuing document production phase. All these costs were incurred, and yet they leave the Parties exactly where they began more than three years ago: with Claimants' identical ECT claims, only now before the Dutch courts. Regrettably, at no time during these three years did Claimants act in a way that would mitigate the Netherlands' financial exposure. In these "exceptional circumstances," which stand in stark contrast to those pertaining to the Uniper proceedings arising from a similar factual context, it is only fair and just that Claimants should bear all or a substantial part of Respondent's financial burden in this arbitration.*

41. As a preliminary matter, the Respondent contends that the Tribunal has the power to order a party to bear the costs of the other party, whether pursuant to the ICSID Arbitration Rules, its inherent powers or, here, Article 28 of Procedural Order No. 1.
42. In support, the Netherlands contends that "ICSID tribunals and annulment committees have repeatedly affirmed their power to award costs in the particular context of a request for discontinuance."<sup>4</sup> For example, the annulment committee in *ATA v. Jordan* noted that, although a decision on costs "is normally taken in an award ... in case of discontinuance of the proceedings, it can be done in the Order noting the discontinuance."<sup>5</sup> The tribunal in *Quadrant v. Costa Rica* observed that because "nothing in the rules governing this proceeding preclude the Tribunal from deciding on the allocation of the advance payments and costs of this truncated proceeding," it could make an allocation of costs in a discontinuance order.<sup>6</sup>
43. The Respondent further explains that ICSID tribunals and annulment committees have based their allocation of costs in discontinuance orders on a number of factors. For example, in *RSM v. Grenada*, the annulment committee noted the exceptional circumstances of RSM having failed to pay its advance on costs while also (with other shareholders) commencing a separate proceeding against Grenada.<sup>7</sup> In

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<sup>4</sup> Respondent's Costs Submission, para 7.

<sup>5</sup> *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Order Taking Note of the Discontinuance of the Proceedings (11 July 2011), para. 24.

<sup>6</sup> *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica*, ICSID Case No. ARB (AF)/08/01, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs (27 October 2010) ("*Quadrant*"), para. 6.6.

<sup>7</sup> *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Order of the Committee Discontinuing the Proceedings and Decision on Costs (28 April 2011), para. 65.

*Quadrant*, the tribunal noted the factors of “a party’s bad faith, lack of cooperation, dilatory or otherwise improper conduct.”<sup>8</sup>

44. The Respondent asks the Tribunal, in applying such factors, to order the Claimants to pay all or a substantial portion of its costs. Among other reasons, RWE unnecessarily increased the costs of this arbitration by, first, unsuccessfully pursuing an application, which the Tribunal noted to be in an “unusual procedural posture,” to bifurcate the Netherlands’ intra-EU objection before the Netherlands filed such an objection<sup>9</sup> and, second, unsuccessfully applying for provisional measures to cause the Netherlands to withdraw or suspend the German court proceedings. The Respondent also charges the Claimants with “act[ing] with a plain lack of transparency” in “fail[ing] to notify the Netherlands and the Tribunal of their intention to assert the very same claims before Dutch courts, and otherwise act[ing] as though the arbitration proceedings would resume,”<sup>10</sup> even after the 27 July 2023 decision of the German Federal Supreme Court that these proceedings are inadmissible under German and European law. As a consequence of RWE’s overall conduct, says the Netherlands, it incurred unnecessary legal expenses to oppose the bifurcation and provisional measures applications and had no choice but to prepare a full Counter-Memorial with technical and expert evidence and commence the document production phase. In comparison, the proceedings in the *Uniper v. Netherlands* arbitration were at a very early stage before Uniper sought discontinuance.

45. The Respondent argues, in conclusion, that “[b]y any standard, Claimants’ requests for bifurcation and provisional measures, belated request for discontinuance on the basis of facts that had long been anticipated, and failure to act transparently constitute ‘exceptional circumstances’ that warrant the allocation of costs in favour of the Netherlands.”<sup>11</sup>

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<sup>8</sup> *Quadrant*, para. 67.

<sup>9</sup> Procedural Order No. 2: Decision on Bifurcation, para. 50.

<sup>10</sup> Respondent’s Costs Submission, para. 24.

<sup>11</sup> Respondent’s Costs Submission, para. 25.

46. The Netherlands requests total costs of EUR [REDACTED]. This amount appears in the [REDACTED] Affidavit, which is two pages long. [REDACTED] states as follows:<sup>12</sup>

*I have reviewed the invoices prepared by Foley Hoag LLP, De Brauw Blackstone Westbroek and other expenses in relation to this proceeding that were paid by Respondent. Respondent's costs in connection with this arbitration have been incurred in undertaking the following non-exhaustive list of activities necessary for the proper defense of Claimants' claims:*

- *Research, meetings, drafting and correspondence in connection with the cooling off period.*
- *Research, meetings, drafting and correspondence in connection with the constitution of the Tribunal.*
- *Research, meetings, drafting and correspondence in connection with the Request for Bifurcation, Provisional Measures.*
- *Research, meetings, drafting and correspondence in connection with the submission of the Counter-Memorial.*
- *Research, meetings, drafting and correspondence with Compass Lexecon;*
- *Research, meetings, drafting and correspondence in connection with the preparation of the Redfern Schedule.*
- *Research and drafting in connection with Claimants' ECT claims submitted before the Hague Court of Appeal.*
- *Conferrals relating to the suspension of the proceedings.*
- *Research, meetings, drafting and correspondence in connection with the preparation of resumption of the proceedings, i.e. costs incurred in relation to the Document Production stage.*
- *Conferrals relating to Claimants' proposal to discontinue the arbitration proceedings.*
- *Research and preparation of the Netherlands' cost submission.*

*I hereby confirm that the following reflects the costs incurred by Respondent in this ICSID proceeding:*

| <b>Category</b>  | <b>Cost</b>  |
|--|--|
| ICSID advance payments   | EUR [REDACTED]   |
| Legal representation and advice (incl. expert fee and other expenses, e.g., printing, translations, transport) | EUR [REDACTED] (De Brauw, includes expert fees, e.g. Compass Lexecon) <sup>1</sup> |
|  | EUR [REDACTED]   |
| Total  | EUR [REDACTED]   |

<sup>12</sup> Affidavit of [REDACTED], 8 November 2023.

*I believe that the statements made, and all calculations presented herein are true and accurate, and that all related calculations have been expressed correctly. I remain at the Arbitral Tribunal's disposal to provide a more detailed upon request.*

[Footnote 1] *This amount includes fees of legal representation incurred in proceedings in the first instance of the German proceedings. It is estimated that at least [REDACTED] of this amount was incurred directly in connection with the ICSID proceedings. A detailed accounting can be provided upon the Tribunal's request.*

## **(2) The Claimants' Position**

47. In the Claimants' Comments on Costs, the Claimants ask the Tribunal to reject the Respondent's request for costs. Should the Tribunal determine to allocate costs, the Claimants "reserve the right to file a detailed cost submission at a later point in time, if deemed necessary by the Tribunal."<sup>13</sup>
48. In the Claimants' words, they "limit [their] submission to whether the Tribunal has the power to allocate costs and, if so, to whom."<sup>14</sup>
49. RWE emphasizes that there is no express rule in the ICSID Convention or in the ICSID Arbitration Rules for allocation of costs following discontinuance. Article 61(2) of the ICSID Convention and ICSID Arbitration Rule 47(1)(j) provide only that a tribunal may allocate costs in an award. RWE describes this as "sensible since only awards are enforceable in national courts of ICSID Member States."<sup>15</sup>
50. As for the Respondent's reliance on examples of discontinued arbitrations in which tribunals have awarded costs, RWE says that the Netherlands "essentially repeats its own submissions in the parallel *Uniper* case" where the "tribunal quite correctly held that those decisions were based on an explicit or implied agreement of the parties."<sup>16</sup> The Claimants emphasize that, where tribunals have allocated costs in discontinuance orders, they have done so on a case-by-case basis and only if: (a) the parties have reached an agreement on costs; (b) there was an additional legal basis,

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<sup>13</sup> Claimants' Submission on Costs, 22 November 2023 ("**Claimants' Costs Submission**"), para. 1.

<sup>14</sup> Claimants' Costs Submission, para. 1.

<sup>15</sup> Claimants' Costs Submission, para. 9.

<sup>16</sup> Claimants' Costs Submission, para. 5.

such as the ICSID Administrative and Financial Regulations and Additional Facility Rules in *Quadrant*; or (c) there were special circumstances such as bad faith, lack of cooperation, or overall improper conduct by a party. According to RWE, none of these factors is applicable here.

51. Despite their professed limitation to the argument that the Tribunal lacks power to allocate costs, the Claimants also allege that the “Respondent’s submission is a remarkable piece of procedural bad faith.”<sup>17</sup> In RWE’s words:<sup>18</sup>

*This proceeding has been discontinued since Respondent has successfully torpedoed this arbitration. It instituted the German Proceedings, alleging that they would only concern European law, although they necessarily had to deal with the exclusivity of ICSID arbitration. And this is also what happened: The German courts found Article 41 of the ICSID Convention to be inapplicable and, therefore, declared the present ICSID arbitration inadmissible. In addition, Respondent resisted bifurcation of these proceedings, which would have avoided a full submission on the merits and thereby reduced costs enormously.*

52. The Claimants object to the Respondent’s “first resort[ing] to measures violating the ICSID Convention and then request[ing] to be rewarded for doing so by being awarded costs.”<sup>19</sup> Citing to *Bin Cheng*, RWE contends that the Netherlands’ “[n]ow asking for an allocation of costs violates the fundamental principle that no one may profit from his own wrongdoing (*nullus commodum capere de sua injuria propria*).”<sup>20</sup>

53. Even assuming that the Tribunal has the authority to allocate costs, the Claimants argue that there is no legal basis for such an allocation here. This is because, in its letter of 20 October 2023, the Respondent declared that it “unconditionally consents to the discontinuance of the current proceedings,” and the consequence under ICSID Arbitration Rule 44 is that “the Tribunal [...] shall in an order take note of the discontinuance of the proceeding.”<sup>21</sup>

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<sup>17</sup> Claimants’ Costs Submission, para. 2.

<sup>18</sup> Claimants’ Costs Submission, para. 2.

<sup>19</sup> Claimants’ Costs Submission, para. 3.

<sup>20</sup> Claimant’s Costs Submission, para. 6, citing *Bin Cheng*, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 149ff.

<sup>21</sup> Claimants’ Costs Submission, para. 4.

54. As for the level of costs claimed by the Respondent at some EUR [REDACTED], the Claimants note the impact of the Netherlands' change of legal counsel and experts after the first round of submissions. RWE puts the blame for the high legal costs claimed for preparation of the Counter-Memorial and other submissions on the Netherlands' own decisions to pursue the anti-arbitration injunction proceedings and resist early bifurcation.

## **B. The Tribunal's Analysis and Decision**

55. *The Tribunal's Jurisdiction to Order Costs*: The Tribunal begins with certain observations on the question of its authority to order the Claimants to pay costs to the Respondent as an element of the discontinuance order – albeit, as explained below, the Tribunal does not address this issue in detail and need not resolve it, in the circumstances of this case.

56. As noted in the Parties' submissions, ICSID tribunals and annulment committees have taken different approaches to this question.

57. In this connection, the Tribunal does not agree with the Respondent's reliance on Article 28.2 of Procedural Order No. 1. Article 28.2 provides (emphasis added):

*The parties are to conduct themselves in a manner consistent with the efficient use of time and resources and observe Tribunal directions, so as to enable the arbitration to proceed to the award in a proper, fair and efficient way. The Tribunal may take unreasonable behavior into account when **exercising its discretion** to allocate costs. Unreasonable behavior includes unjustified failure to meet deadlines in the Procedural Calendar or comply with other procedural orders, dilatory tactics, excessive document production requests, unnecessarily intemperate inter-lawyer correspondence, unnecessary legal argument, excessive cross-examination, patently exaggerated claims or unjustified interim applications.*

In the Tribunal's view, Article 28.2 is not a source of authority for the Tribunal to allocate costs in this discontinuance order. Rather, Article 28.2 sets out standards of party conduct to guide the Tribunal in exercising its discretionary authority – whatever discretionary authority it may possess – in allocating costs.

58. Article 28.2 does not give the Tribunal any power that it otherwise lacks to allocate costs in a discontinuance order, as compared to costs allocation in an award under

Article 61(2) of the ICSID Convention. The Tribunal undoubtedly would have discretion to assess costs against RWE in an award in connection with their applications for bifurcation and provisional measures; indeed, as pointed out by the Netherlands, the Tribunal expressly reserved this authority in the relevant decisions. Despite these express reservations of authority, however, it does not necessarily follow that the Tribunal may allocate costs, not in an award, but in an order discontinuing the proceedings.

59. The Tribunal has considered the possibility that the Parties have agreed, by implication, that it has the power to allocate costs in an order “taking note of the discontinuance” for purposes of Rule 44 of the ICSID Arbitration Rules. It could be said that the Claimants have implicitly agreed with the Respondent that costs are allocable in light of the Claimants’ statement that they “reserve the right to file a detailed cost submission at a later point in time, if deemed necessary by the Tribunal.”<sup>22</sup>
60. However, the Tribunal need not determine whether there was an agreement or not, because the Tribunal has determined to deny the Respondent’s request for costs on separate grounds.
61. *The Circumstances of this Case*: Most importantly, the Tribunal cannot ignore the circumstances leading to the Claimants’ decision to discontinue this arbitration. That decision cannot be said to be truly voluntary.
62. The Netherlands chose to pursue its *Achmea/Komstroy* objection primarily through the German courts, by invoking a German procedural rule to obtain a decision that there was no valid arbitration agreement between the Netherlands and the Dutch and German RWE Claimants under the ECT following the September 2021 decision of the European Court of Justice in *Komstroy*. Once the German Federal Supreme Court affirmed that *Komstroy* requires the German courts to find the ECT arbitration agreement (as between EU member state parties) *void ab initio*, the Claimants’ request for discontinuance followed.

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<sup>22</sup> Claimants’ Costs Submission, para. 1.



63. In these circumstances, the Tribunal considers that it would be inequitable for the Claimants to have to bear the Respondent's costs in this arbitration. The Claimants initiated the arbitration in January 2021, in reliance on rights they believed they possessed under the ICSID Convention and the ECT before the September 2021 *Komstroy* decision. The Netherlands went outside the ICSID Convention regime to pursue its *Achmea/Komstroy* objection before the German courts. Having succeeded in establishing under German procedural law that this Tribunal effectively lacks jurisdiction, the Netherlands cannot fairly be allowed now to invoke the very jurisdiction it disavowed to claim its arbitration – and German court litigation – costs under the ICSID Convention, the ICSID Arbitration Rules., and this Tribunal's Procedural Order No. 1. It is inherently contradictory for the Netherlands to challenge the jurisdiction of this ICSID Tribunal outside of the ICSID regime by proceeding before the EU domestic courts and then come back to this ICSID Tribunal to claim costs. In taking these contrary positions, the Netherlands' application for costs fails on the basis of the Netherlands' failure to adhere to the international law maxim *allegans contraria non-est audiendus* ("a person adducing to the contrary may not be heard", or as paraphrased by Lord McNair, a party "cannot blow hot and cold." [Lord McNair, *The Law of Treaties* 485, 485 (1961)]).
64. On this ground alone, even assuming that the Tribunal has jurisdiction to order costs, the Tribunal has determined to deny the Netherlands' request for costs.
65. To be clear, the Tribunal accepts that there are situations in which a tribunal may order costs of proceedings that have resulted in a finding that the tribunal has no jurisdiction. But in the Tribunal's view, the circumstances of this case are clearly distinguishable.
66. Further, in coming to this determination, the Tribunal need not accept RWE's argument that the Netherlands breached the ICSID Convention and therefore cannot benefit from its own wrong in obtaining costs. This is not a question of bad faith on the part of the Netherlands, but of holding parties in international arbitration to the consequences of their legal positions.

67. Although it is not strictly necessary, the Tribunal will address the substance of the Netherlands' request for costs. In specific, even if the Tribunal were inclined to allocate reasonable costs to the Netherlands, there simply is no objective or fair way to do so on the basis of the evidence provided.
68. The information in the [REDACTED] Affidavit is, at best, skeletal – a short bullet-point list of “research, meetings, drafting and correspondence” reportedly undertaken by counsel at different stages of the arbitration, with no details as to the lawyers involved, the experts retained, the time invested, the billing rates, the actual invoices submitted, or the payments made on invoices. Although [REDACTED] states that she reviewed the invoices of two law firms – Foley Hoag LLP and De Brauw Blackstone Westbroek – only the latter firm is referenced in the table setting out the total of more than EUR [REDACTED] in legal fees. The footnote to the table states that the total includes an estimated [REDACTED] attributable to the first instance German court proceedings.
69. Furthermore, although the Tribunal did expressly reserve costs issues in its decisions denying RWE's applications for bifurcation and provisional measures – and assuming the Tribunal were to have authority to estimate and allocate such costs in this discontinuance order – the Tribunal would not consider it fair to take a black-and-white view as to which Party prevailed in those applications. As for the bifurcation application, although the Claimants failed in their attempt to force the Respondent to file an *Achmea/Komstroy* preliminary objection at an early stage, it cannot fairly be said that the Claimants were unreasonable in seeking to save time and costs by seeking to bifurcate the very objection that ultimately led to termination of this arbitration – and RWE should not be punished with a costs assessment for having done so. As for the provisional measures application, it bears recalling that the Tribunal went to some effort in the order denying the application to memorialize the Netherlands' public statements that the German court proceedings were not intended to interfere with the Tribunal's jurisdiction – although that is ultimately what happened. The inequitable nature of the Netherlands' claim for some EUR [REDACTED] in costs is underscored by [REDACTED] disclosure that the Netherlands incurred almost one-third of those costs in the German court proceedings aimed at

defeating this Tribunal's jurisdiction, and another significant portion in resisting the Tribunal's consideration of the *Achmea/Komstroy* objection as a threshold issue.

70. In light of the decision not to order costs in the Netherlands' favor, the Tribunal need not examine in detail the Parties' mutual accusations of bad faith and wasted procedural steps, or the related issue of whether such conduct – as in *RSM v. Grenada* – constitutes exceptional circumstances warranting an allocation of costs with the discontinuance order. At a high level, the Tribunal observes that neither side behaved in a manner evincing bad faith and, indeed, both sides pursued their arbitration strategies with relatively equal determination. Accordingly, the Tribunal considers it equitable that the Claimants and the Respondent each bear their own costs of this arbitration.

71. As a final point, the Tribunal acknowledges that, in the footnote to the [REDACTED] Affidavit, [REDACTED] states that “[a] detailed accounting can be provided upon the Tribunal's request.” The Tribunal sees no basis for requesting a further detailed accounting, having invited the Respondent in its letter of 24 October 2023 to submit its costs submissions and the Netherlands having chosen to do so in skeletal fashion. Fairness does not require the Tribunal to give the Netherlands an additional opportunity to rectify evidentiary shortcomings in its costs submissions. In related vein, as the Tribunal has determined not to allocate costs, there is no basis for RWE to exercise its asserted right to submit its own request for costs.

#### IV. ORDER

72. Based on the foregoing, the Tribunal **orders** as follows:

- a. The arbitral proceeding initiated by RWE AG and RWE Eemshaven Holding II BV against the Netherlands in ICSID Case No. ARB/21/4 is **discontinued** on the day of adoption of the present Order in accordance with ICSID Arbitration Rule 44; and
- b. The Respondent's Request for Costs is **denied**.



James Boykin  
Arbitrator

Date: 12 January 2024



Toby Landau KC  
Arbitrator

Date: 12 January 2024



Lucy Reed  
President of the Tribunal

Date: 12 January 2024