INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ExxonMobil Petroleum & Chemical BV

v.

Kingdom of the Netherlands

(ICSID Case No. ARB/24/44)

PROCEDURAL ORDER NO. 3

DECISION ON THE CLAIMANT'S FIRST APPLICATION FOR PROVISIONAL MEASURES

Members of the Tribunal
Prof. Dr. Mohamed S. Abdel Wahab, President of the Tribunal
Prof. Stanimir A. Alexandrov, Arbitrator
Prof. Jorge E. Viñuales, Arbitrator

Secretary of the Tribunal
Izabela Chabinska

31 October 2025

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I. PROCEDURAL HISTORY

1. On 30 September 2024, ExxonMobil Petroleum & Chemical BV ("**EMPC"** or the "**Claimant**") filed its Request for Arbitration against the Kingdom of the Netherlands (the "Netherlands" or the "**Respondent**")[1] arguing that the Respondent has breached its obligations under international law and Article 10(1) of the Energy Charter Treaty (**ECT**). Accordingly, EMPC requested the institution of arbitration proceedings against the Netherlands in accordance with Article 26 of 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. On 21 October 2024, the ICSID registered the Request for Arbitration under ICSID Case No. ARB/24/44 (the "**Case**" or "**Arbitration**").[2]

3. This proceeding is administered under the ICSID Arbitration Rules in force as of July 1, 2022 ("**ICSID Rules**" or "**ICSID Arbitration Rules**").

4. On 10 January 2025, the Netherlands filed a domestic lawsuit before the court in Antwerp, Belgium against EMPC (the "**Antwerp Action**" or the "**Antwerp Proceedings**").[3]

5. On 12 June 2025, EMPC submitted an Application for Provisional Measures under Article 47 of the ICSID Convention and ICSID Arbitration Rule 47 together with Appendices A and B, Factual Exhibits C-67 and C-68, and Legal Authorities CL-1 through CL-26 (the "**Claimant's Application**" or "**Application**") requesting, *inter alia*, that the Netherlands be ordered to withdraw the Antwerp Action.[4]

6. On 13 June 2025, the ICSID Secretary-General fixed the time limits for written submissions on the request pursuant to ICSID Arbitration Rule 47(2)(c).

7. On 4 July 2025, the Netherlands submitted the Observations of the Respondent on the Claimant's Application for Provisional Measures together with Factual Exhibits R-1 through R-8 and Legal Authorities RL-1 through RL-22 (the "**Respondent's Observations**" or "**Observations**").[5]

[1] Request for Arbitration dated 30 September 2024 ("**Request for Arbitration**").
[2] ICSID's Notice of Registration dated 21 October 2024.
[3] Antwerp Court, Netherlands Summons, 10 January 2025 (**C-67**).
[4] Claimant's Application for Provisional Measures dated 12 June 2025 (hereinafter, the "**Claimant's Application**"), ¶ 7.
[5] Respondent's Observations to Claimant's Application for Provisional Measures dated 4 July 2025 (the "**Respondent's Observations**").

8. On 15 July 2025, the Secretary-General notified the Parties of the constitution of the Tribunal pursuant to ICSID Arbitration Rule 21(1), following the acceptance by the Tribunal Members of their appointments as arbitrators in this case.[6]

9. On 17 July 2025, the Parties agreed to modify the remainder of the briefing schedule for the Application and on 21 July 2025, and the Tribunal approved the Parties' agreement.

10. Further to the Parties' agreed modified briefing schedule, on 25 July 2025, EMPC submitted the Claimant's Provisional Measures Application Reply together with Appendix A, Factual Exhibits C-69 through C-78 and Legal Authorities CL-22 bis, CL-27 through CL-45 (the "**Claimant's Reply**" or "**Reply**").[7]

11. On 15 August 2024, the Netherlands submitted the Respondent's Rejoinder on Provisional Measures together with Legal Authorities RL-6 ENG and RL- 23 through RL-34 (the "**Respondent's Rejoinder**" or "**Rejoinder**").[8]

12. On 18 August 2025, the Tribunal invited the Respondent "to confirm that it will implement the steps described in paragraph 11 of the Respondent's Rejoinder" by 22 August 2025 and to confirm that "it has completed the implementation of the steps described" by 26 August 2025, i.e.:

> "*... the Netherlands will by 26 August 2025 at the latest, complete the necessary formalities to: (1) withdraw irrevocably its application for interim relief before the Antwerp Business Court (requesting that EMPC suspend this arbitration); and (2) amend the relief sought on the merits in the Antwerp Proceedings to remove its request that EMPC be ordered to withdraw this arbitration. At the hearing on provisional measures before the Antwerp Business court, scheduled for 23 September 2025, the Netherlands will request the court formally to confirm the withdrawal and amendment.*"

13. By the same communication, the Tribunal also invited the Claimant to submit "a short response indicating whether and to what extent it considers this development to impact its request for provisional measures."

14. By letter of 22 August 2025, further to the Tribunal's invitation of 18 August 2025, the Respondent submitted its response together with Exhibit R-9. On the same date, the Claimant also submitted its response together with Exhibits C-124 through C-127.

[6] ICSID's Letter dated 15 July 2025.
[7] Claimant's Provisional Measures Application Reply dated 25 July 2025 (hereinafter, the "**Claimant's Reply**").
[8] Respondent's Rejoinder on Provisional Measures dated 15 August 2025 (hereinafter, the "**Respondent's Rejoinder**").

15. On 26 August 2025, the Tribunal held a video-conference session to hear the Parties' oral pleadings on EMPC's Application for Provisional Measures (the "**Hearing**").

16. Further to the discussions at the Hearing, on 2 September 2025, the Respondent submitted two separate communications to the Tribunal as well as a courtesy translation of the dispositive in *Poland v. LC Corp* together with Legal Authority RL-23ENG (updated). The first letter conveyed the Respondent's final position regarding the assurances previously transmitted directly to EMPC via email on 29 August 2025.[9] The second letter was submitted in response to the Tribunal's request – articulated by the President during the Hearing on provisional measures held on 26 August 2025 – that the Netherlands clarify whether the alleged tort raised in the Antwerp Proceedings constitutes a continuing wrongful act or a one-off event.[10]

17. On the same date, 2 September 2025, EMPC submitted a letter to the Tribunal addressing the Netherlands' stated position on the assurances.[11]

18. On 1 October 2025, EMPC furnished the Tribunal with an update regarding the Antwerp Proceedings. EMPC submitted that the Antwerp Court issued a procedural order officially adopting the Netherlands' proposed procedural calendar, and refusing to suspend the Antwerp Proceedings until the Tribunal first rules on its jurisdiction. EMPC offered to share the Antwerp Court's procedural order.

19. On 2 October 2025, the Tribunal informed the Parties that it wishes to receive the procedural order issued by the Antwerp Court, without comments or accompanying submissions from the Parties.

20. On the same date, 2 October 2025, EMPC circulated the procedural order issued by the Antwerp Court in the original Dutch language, together with an English translation thereof, submitted into the record as Exhibit C-129.

21. On 3 October 2025, the Tribunal invited the Netherlands to confirm whether it is content with the accuracy of the English translation of C-129-ENG as provided by EMPC on 2 October 2025.

22. On 6 October 2025, the Netherlands confirmed that it is content with the accuracy of the English translation of C-129-ENG as provided by EMPC.

[9] See the Respondent's Letter to the Tribunal dated 2 September 2025.
[10] See the Respondent's Letter to the Tribunal dated 2 September 2025.
[11] See the Claimant's Letter to the Tribunal dated 2 September 2025.

23. On 9 October 2025, the Parties circulated the agreed revised and updated transcripts for the First Session and Hearing on Provisional Measures.

24. This Decision sets out the Tribunal's analysis and order on EMPC's First Application for Provisional Measures. The Tribunal sets out the Parties' respective requests for relief in Section II and summarizes the Parties' positions in Section III of this Procedural Order. The fact that this Decision may not expressly reference all arguments does not mean that such arguments have not been considered. The Tribunal includes only those points which it considers most relevant for its decision. The Tribunal's analysis and decision are set out in Sections IV and V.

II. THE PARTIES' REQUEST FOR RELIEF

25. EMPC latest request for relief is as follows:[12]

> "*139. EMPC respectfully requests that the Tribunal preserve its rights by granting provisional measures. Specifically, the Claimant requests that the Tribunal:*
>
> *(a) DECLARE that pursuant to Articles 26 and 41 of the ICSID Convention, it has exclusive competence and authority to hear and resolve any objections to its jurisdiction and ORDER the Netherlands to comply with its obligations under the ICSID Convention;*
>
> *(b) ORDER the Netherlands to withdraw the Antwerp Action by signing, within three business days of this order, the submission to the Antwerp Court in the form of Appendix A to the Claimant's Application and ORDER the Netherlands not to resubmit the Antwerp Action during the pendency of the arbitration (or, the alternative relief described in paragraph 22 of the Application);*
>
> *(c) ORDER the Netherlands to refrain from initiating any further proceeding before national or EU courts, relating in any way to this Arbitration or seeking to restrain the Claimant from continuing this Arbitration or otherwise participating fully in this Arbitration, whether by injunctive relief or any other action;*

[12] Claimant's Reply, ¶¶ 139-140.

> *(d) ORDER the Netherlands to bear all fees and expenses incurred by both parties, ICSID and the Tribunal in connection with the Application;*
>
> *(e) GRANT any further or alternative provisional relief that the Tribunal considers just and appropriate.*
>
> *140. In light of the limited time before the 23 September 2025 hearing on the Antwerp Suspension Request, the Claimant respectfully requests that the Tribunal promptly issue the first, operative part of its decision on the Application once written and oral briefing, if any, has been completed, with reasons to follow at the Tribunal's convenience. The Claimant considers that this approach will allow the Parties sufficient time to comply with any applicable order issued by the Tribunal in advance of the hearing in Antwerp currently scheduled for 23 September 2025.*"

26. The Respondent's latest request for relief is as follows:[13]

> "*73. In light of the foregoing, the Tribunal is invited to:*
>
> *(a) Reject in its entirety EMPC's Application; and*
>
> *(b) Reserve its order as to costs.*"

III. THE PARTIES' POSITIONS

A. THE CLAIMANT'S POSITION

27. EMPC explains that the ICSID Convention and the ICSID Rules expressly authorize the Tribunal to order provisional measures to preserve the rights of the Parties and to protect its jurisdiction.[14]

28. The Claimant refers to Article 47 of the ICSID Convention which reads:

> "*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.*"

[13] Respondent's Rejoinder, ¶ 73.
[14] Claimant's Application, ¶¶ 24-26.

29. In turn, ICSID Rule 47(1) reads:

> "*A party may at any time request that the Tribunal recommend provisional measures to preserve that party's rights, including measures to:*
>
> *(a) prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process;*
>
> *(b) maintain or restore the status quo pending determination of the dispute;* […]."

30. EMPC states that although Article 47 of the ICSID Convention and Rule 47(1) of the ICSID Rules state that tribunals may "*recommend*" provisional measures, those "*recommendations*" by an ICSID tribunal are legally binding.[15] Therefore, parties to an ICSID arbitration "*are under an international obligation to comply with whatever the tribunal issues as provisional measures for the purpose of protecting its jurisdiction and its ability, should it so decide, to grant the relief requested*", as stated by the tribunal in *Perenco v. Ecuador*.[16]

31. Moreover, EMPC contends that ICSID tribunals consider the following five criteria when deciding on an application for provisional measures:[17]

> "(*a) whether the tribunal prima facie has jurisdiction;*
>
> *(b) whether the application engages rights requiring protection;*
>
> *(c) whether there is 'urgency';*
>
> *(d) whether the requested measures are 'necessary'; and*
>
> *(e) whether the requested measures are 'proportionate'*."

[15] Claimant's Application, ¶ 27.
[16] *Perenco Ecuador Ltd v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No ARB/08/6, Decision on Provisional Measures, 8 May 2009, ¶ 67 (**CL-11**).
[17] Claimant's Application, ¶ 28.

(1) Requirements for Provisional Measure

32. EMPC argues that it satisfies all requirements for granting the provisional measures, as summarized below.[18]

a. Prima Facie Jurisdiction

33. EMPC argues that it has made a *prima facie* case on jurisdiction and, as some tribunals also evaluate, a *prima facie* case on the merits.[19]

34. The Claimant states that for the Tribunal to find that it has *prima facie* jurisdiction over this dispute, it is sufficient that "*the provisions invoked appear prima facie to afford a basis for jurisdiction to decide the merits*."[20] In conducting such *prima facie* analysis, the Tribunal examines "*the facts alleged by the applicant* [for provisional measures] […] *without it being necessary* […] *to verify them and analyse them in depth*." [21]

35. In this regard, EMPC explains that a *prima facie* showing of jurisdiction is supplanted only "*when there are key facts or legal principles that can be easily and definitively disproven*." It further states that even when the Respondent has raised a jurisdictional objection, including its intra-EU Objection, tribunals typically look solely to the respondent's ratification of the ICSID Convention and the text of the applicable investment treaty, rather than engaging in an in-depth analysis of the objection itself.[22]

36. EMPC explains that the Tribunal has *prima facie* jurisdiction because it has alleged facts in its Request for Arbitration that, if proven, establish the Tribunal's jurisdiction over this dispute. In summary, EMPC argues that:[23]

> "*(a) Both the Netherlands and Belgium are parties to the ECT and the ICSID Convention, and both instruments are in force for each of them.*
>
> *(b) EMPC is, prima facie, a protected investor under Article 1(7) of the ECT and a 'National of another Contracting State' under Article 25(1) and (2) of the ICSID Convention because it was*

[18] Claimant's Application, ¶ 29.
[19] Claimant's Application, ¶ 30.
[20] *Hydro Srl and others v. Republic of Albania*, ICSID Case No ARB/15/28, Order on Provisional Measures, 3 March 2016, ¶ 3.8 (**CL-19**).
[21] *Millicom International Operations BV and Sentel GSM SA v. Republic of Senegal*, ICSID Case No ARB/08/20, Decision on the Application for Provisional Measures Submitted by the Claimants on 24 August 2009, 9 December 2009, ¶ 42 (**CL-13**). See also Claimant's Application, ¶ 31.
[22] Claimant's Reply, ¶ 39.
[23] Claimant's Application, ¶ 32.

> *incorporated and organized under Belgian law, with its registered office in Antwerp, Belgium.*
>
> *(c) EMPC has,* prima facie*, protected investments under Article 1(6) of the ECT and Article 25(1) of the ICSID Convention because it holds, among other investments, a 50% indirect ownership interest in* [NAM].
>
> *(d) The present dispute is a legal dispute that relates to and arises directly out of EMPC's 50% indirect ownership interest in NAM and concerns the Netherlands' breach of its obligations under Part III of the ECT.*
>
> *(e) Both the Netherlands and EMPC, prima facie, consented to resolve this dispute under ICSID arbitration. The Netherlands consented under Article 26 of the ECT, which contains its standing offer for ICSID arbitration of disputes with Belgian investors. EMPC accepted this standing offer and requested amicable settlement in a letter to the Netherlands on 27 June 2024. Three months later, after the failure of amicable settlement discussions, EMPC confirmed its consent to ICSID arbitration in its Request for Arbitration.*"

37. EMPC therefore concludes that the Tribunal has *prima facie* jurisdiction *ratione personae*, *ratione materiae, ratione temporis*, and *ratione voluntatis*. As many tribunals have found, the fact that the Netherlands may have objections to the Tribunal's jurisdiction is irrelevant to the *prima facie* jurisdictional inquiry.[24]

38. EMPC also states that there is a *prima facie* case on the merits. It explains that it has set out a *prima facie* claim in its Request for Arbitration, a 51-page submission that provides a substantial overview of the factual background to and legal basis for EMPC's Arbitration claims.[25]

39. It argues that to establish a prima facie claim on the merits, a party seeking provisional measures need only show that "*a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of* [that party]."[26] The tribunal in Klesch Group v. Germany considered there to

[24] Claimant's Application, ¶ 33.
[25] Claimant's Application, ¶¶ 34-35.
[26] *Sergei Paushok, CJSC Golden East Company, and CJSC Vostokneftegaz Company v. Government of Mongolia* (UNCITRAL), Order on Interim Measures, 2 September 2008, ¶ 55 (**CL-10**).

exist a prima facie case on the merits if the claims "*are not, on their face, frivolous or obviously outside the competence of the Tribunal*." [27]

40. EMPC invokes Article 10(1) of the ECT which requires the Netherlands to accord EMPC "*fair and equitable treatment*", amongst other grounds based on which the Tribunal might possibly reach the conclusion that the Netherlands has violated the ECT[28]:

> "*(a) The Netherlands decided to phase-out gas production from the Groningen Field, which was operated by NAM, because of gas-production induced tremors.*
>
> *(b) The Netherlands directed a state agency to administer and decide on claims brought by property holders who allegedly suffered tremor-related damage (Damage Handling Program). The Netherlands passes on to NAM the associated costs with administering and resolving such claims. In designing and administering the Damage Handling Program, the Netherlands has made a number of arbitrary and disproportionate policy choices that have resulted in unanticipated and massive claim payouts.*
>
> […]
>
> *(c) The Netherlands has also directed a state agency to identify certain buildings whose safety might be in question in the event of stronger tremors and thus required strengthening (the Strengthening Operation). The Netherlands passes on to NAM the costs associated with administering and conducting the Strengthening Operation. The Netherlands has made arbitrary and disproportionate policy decisions that have resulted in an unwarranted expansion of the Strengthening Operation. For instance, it has accepted demands from regional authorities to include in the strengthening assessment homes that were considered safe under applicable standards.*

[27] *Klesch Group Holdings Limited & Raffinerie Heide GmbH v. Federal Republic of Germany,* ICSID Case No ARB/23/49, Decision on Provisional Measures, 23 July 2024, ¶ 18 (**CL-26**), citing *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan,* ICSID Case No. ARB/13/38, Order on Application for the Grant of Provisional Measures, 24 November 2014, ¶ 41 (**CL-17**).

[28] Claimant's Application, ¶ 36.

> […]
>
> *(d) Under both programs, the Netherlands has imposed these costs on NAM in a manner lacking transparency, due process, and procedural fairness because it has not afforded NAM or its shareholders the opportunity to adequately investigate the individual claims underlying the charges. Indeed, in other proceedings, the Netherlands has admitted that it does not retain the individual information that forms the basis for the levies.*"

41. In this context, EMPC concludes that it is evident from these facts and their further elaboration in the Request for Arbitration that EMPC has established a *prima facie* claim on the merits.[29]

42. The Claimant replies to the Netherlands' allegation that the Tribunal "*does not have* prima facie *jurisdiction*" based on "*recent developments*" regarding the intra-EU Objection by stating that the Netherlands fails to show that, as a result of any "*recent developments*", the Tribunal's jurisdiction can "*be easily and definitely disproven*." [30]

43. EMPC explains that the "*recent developments*" invoked by the Respondent – the *June 2024 inter se declaration and agreement* and the February 2025 Note Verbale sent by Belgium to the Netherlands providing its opinion on the extent to which the present Arbitration is compatible with EU law – are only the most recent in this practice. EMPC argues that the Respondent fails to acknowledge, however, that the intra-EU Objection has been decided by at least 59 ICSID tribunals. As shown in Appendix A,[31] ICSID tribunals have rejected the objection in 57 of those 59 cases (and the statistics are similarly dispositive in non-ICSID intra-EU investment arbitrations).[32]

44. The Claimant also refers to the ICSID tribunal decision in *VM Solar Jerez* v. *Spain*, on 14 May 2025, which dismissed Spain's jurisdictional objections based on the "*inter se declaration*" and "*inter se agreement*."[33] EMPC explains that unlike the Netherlands in its Response, the tribunal engaged in the proper classification of those documents under international law before dismissing the intra-EU Objection. The tribunal's reasoning aligns

[29] Claimant's Application, ¶ 37.
[30] Claimant's Reply, ¶ 41.
[31] Appendix A to Claimant's Provisional Measures Application Reply dated 25 July 2025.
[32] Claimant's Reply, ¶¶ 42-43.
[33] *VM Solar Jerez GmbH and others v. Kingdom of Spain,* ICSID Case No ARB/19/30, Decision on Jurisdiction, Liability and Principles of Quantum, 14 May 2025, ¶¶ 326-328 (**CL-45**).

with the decisions of many other tribunals. The Netherlands' refusal to engage with these decisions undermines its argument that the Tribunal lacks *prima facie* jurisdiction.[34]

45. Based on the foregoing, EMPC concludes that the Tribunal should find that it has *prima facie* jurisdiction for purposes of the Application.[35]

b. Rights Require Preservation

46. EMPC states the next step in the inquiry is to determine whether the Application seeks to protect rights that are in need of protection.[36] In the words of the *Ipek v. Turkey* tribunal, "[p]*rovided the Tribunal is satisfied that the* [party requesting provisional measures] *has established a* prima facie *case,* [that party] *must make out* [...] [t]*he possession* [...] *of rights requiring protection*[.]"[37]Also, the tribunal *in Biwater Gauff v. Tanzania* explained that granting provisional measures is appropriate, *inter alia*, to "*direct the parties not to take any step that might* [...] *harm or prejudice the integrity of the proceedings*", to "*preserve the Tribunal's mission and mandate to determine finally the issues between the parties*", and to "*preserve the proper functioning of the dispute settlement procedure*." [38]

47. Accordingly, EMPC argues that it is appropriate to grant provisional measures whenever a party is taking action that threatens the adjudicative framework established by the ICSID Convention and the ICSID Rules. [39] EMPC also notes that the Netherlands does not dispute that protection and preservation of the integrity of the proceedings is a right capable of protection.[40]

48. EMPC describes the preservation of rights and the integrity of these proceedings under two provisions of the ICSID Convention, focusing on two key aspects: (i) Preservation of the exclusivity of ICSID arbitration under Article 26 of the ICSID Convention and (ii) Preservation of the Tribunal's exclusive jurisdiction to rule on its own jurisdiction under Article 41 of the ICSID Convention.[41]

[34] Claimant's Reply, ¶ 47-48.
[35] Claimant's Reply, ¶ 49.
[36] Claimant's Application, ¶ 38.
[37] *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No ARB/18/18, Procedural Order No 5 on Claimant's Request for Provisional Measures, 19 September 2019, ¶ 8 (**CL-20**).
[38] *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 3, 29 September 2006, ¶ 135 (**CL-9**).
[39] Claimant's Application, ¶ 39.
[40] Claimant's Reply, ¶ 51.
[41] Claimant's Application, ¶ 40.

(i) Preservation of the exclusivity of ICSID arbitration under Article 26 of the ICSID Convention

49. EMPC states that the exclusivity of ICSID arbitration under Article 26 is of "*central importance*" to dispute resolution under the ICSID Convention.[42] Article 26 provides:

> "*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.*"

50. The Claimant refers to the Executive Directors of the World Bank Report on the ICSID Convention which explains the purpose of Article 26 under the heading 'Arbitration as Exclusive Remedy':[43]

> "*It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26* […]"[44]

51. In addition, the Claimant states that Schreuer explains that Article 26 is the "clearest expression of the self-contained and autonomous nature of the arbitration procedure" and has two principal features. First, "once consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum, national or international […]" Article 26 applies "from the moment of valid consent." Second, is that of "non-interference with the ICSID arbitration process, once it has been instituted."[45]

52. Accordingly, EMPC contends that preserving the Tribunal's exclusive jurisdiction under Article 26 is central to "*preserv[ing] the Tribunal's mission and mandate to determine finally the issues between the parties*." If the Tribunal's exclusive jurisdiction under Article 26 is disrupted, then its mandate to finally determine the issues in dispute between the

[42] Claimant's Application, ¶ 41.
[43] ICSID Convention, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, ¶ 32 (**CL-1**).
[44] ICSID Convention, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, ¶ 32 (**CL-1**).
[45] Schreuer's Commentary on the ICSID Convention, Article 26 Commentary, ¶ 1 (**CL-22**).

parties will also be disrupted[46] as ICSID tribunals have previously drawn that very conclusion.[47]

53. Accordingly, EMPC states that its right to have its dispute with the Netherlands resolved by this Tribunal, to the exclusion of any other forum, is a right that is capable of and that warrants protection through a provisional measures order.[48]

54. The Claimant contends that the Netherlands makes no attempt to engage with these authorities. Nor does the Netherlands cite any authority of its own in support of its three "*baseless*" arguments that seek to limit the scope of Article 26 of the ICSID Convention.[49] The Claimant addresses each argument in turn:

55. *As to the first argument,* EMPC argues that the Netherlands allegation that the exclusivity of ICSID proceedings exists only where there is "*consent*" to arbitrate under the ICSID Convention is an erroneous and unfathomable assault both on the exclusivity of ICSID proceedings and the Tribunal's *Kompetenz-Kompetenz*. Then, on the Netherlands' logic, if a party contests that it has consented to arbitrate under the ICSID Convention, then, when faced with a live arbitration, it could bring its arguments regarding consent to any other fora it wishes.[50]

56. *With respect to the second argument,* EMPC states that the Netherlands makes "*the bizarre contention*" that the relief sought in the Antwerp Action is not inconsistent with Article 26 of the ICSID Convention because – in its representation to the Tribunal – it is not seeking "*injunctive relief*." EMPC replies that there is nothing in Article 26 of the ICSID Convention that says that the exclusivity of the ICSID proceedings is only threatened where injunctive relief is sought in a different forum. ICSID tribunals have enforced the exclusivity of ICSID proceedings in the face of other kinds of relief. EMPC further states that "[b]*ut more perplexing is that the Netherlands' contention regarding the relief it seeks in the Antwerp Action is wrong (and at a minimum, concerningly misleading)*." [51]

57. *As to the third argument,* the Netherlands states that Article 26 provides exclusivity only in connection "*with the merits of the investment dispute raised by EMPC*." As the Antwerp Action pertains to questions of jurisdiction and the State's consent to arbitrate, the Netherlands contends that it does not violate ICSID's exclusivity. EMPC replies "*the*

[46] Claimant's Application, ¶¶ 46-47.
[47] See for example: *Perenco Ecuador Ltd v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No ARB/08/6, Decision on Provisional Measures, 8 May 2009, ¶ 61 (**CL-11**); See also, *Ceskoslovenska Obchodni Banka, AS v. Slovak Republic*, ICSID Case No ARB/97/4, Procedural Order No 5, 1 March 2000, PDF pp. 1-3 (**CL-2**).
[48] Claimant's Application, ¶ 48.
[49] Claimant's Reply, ¶ 58.
[50] Claimant's Reply, ¶¶ 59-60.
[51] Claimant's Reply, ¶¶ 62-63.

Netherlands provides little explanation for this claim. The implication is that parties can freely seek rulings on issues relating to consent and jurisdiction from any other judicial body they wish. The position appears to hinge on the fact that Article 26 excludes 'any other remedy' and the Netherlands considers the word 'remedy' to refer only to the merits of a dispute. The ordinary meaning of the word 'remedy' captures any relief that can be requested and granted from a judicial body, including jurisdictional rulings and declaratory relief. Plainly, an anti-suit injunction of the variety sought in the Antwerp Action is a type of 'remedy.' Other tribunals have confirmed that the use of the word 'remedy' in Article 26 cannot be read narrowly and have rejected the Netherlands' attempted distinction." [52]

58. EMPC concludes that none of the Netherlands' arguments regarding the scope of exclusivity under Article 26 of the ICSID Convention are supported by any authority or common sense. Exclusivity is a cornerstone of the ICSID adjudicative system, and – by going to the Antwerp Court to seek findings on an objection to this Tribunal's jurisdiction and requesting an anti-suit injunction – the Netherlands has wholly disregarded Article 26 of the ICSID Convention. [53]

(ii) Preservation of the Tribunal's exclusive jurisdiction to rule on its own jurisdiction under Article 41 of the ICSID Convention

59. EMPC refers to Article 41 of the ICSID Convention which codifies the principle of *Kompetenz-Kompetenz*:[54]

> "*(1) The Tribunal shall be the judge of its own competence.*
>
> *(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal* […]"

60. It also refers to the Report of the Executive Directors to the Convention which observes that "*Article 41 reiterates the well-established principle that international tribunals are to be the judges of their own competence* […]" [55] Also, several ICSID tribunals have

[52] Claimant's Reply, ¶¶ 64-65.
[53] Claimant's Reply, ¶ 66.
[54] Claimant's Application, ¶ 49.
[55] ICSID Convention, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, ¶ 38 (**CL-1**).

recognized that, under Article 41(1), "*it is for the Tribunal, as the judge of its competence and not for* […] *national courts, to determine the basis of that competence* […]"[56]

61. Therefore, under Article 41, EMPC has a right to have any objection to the Tribunal's jurisdiction, including any question concerning the validity of the underlying arbitration agreement, decided exclusively by the Tribunal. As the *WOC* v. *Spain* tribunal put it, "*it is clear from the provisions of Article 41(1) that, as the 'judge of its own competence' it is only the Tribunal, once constituted, which may determine its jurisdiction*." The same tribunal concluded that the *Kompetenz-Kompetenz* principle ought to be protected by provisional measures. [57]

62. Accordingly, EMPC's right to have the Tribunal rule on its own jurisdiction, and not any other body, is a right that is capable of and that warrants protection through a provisional measures order.[58]

63. EMPC argues that the "Netherlands appears to agree with the foundational – and, frankly, irrefutable – principle that only the Tribunal can be the judge of its own jurisdiction." However, the Netherlands contends that the Antwerp Action does not violate or imperil Article 41 of the ICSID Convention. It explains that the objective of the Antwerp Action is to terminate the Arbitration before the Tribunal can rule on its own jurisdiction. Accordingly, the Netherlands' claim that the Antwerp Action does not seek to interfere with the Kompetenz-Kompetenz of the Tribunal cannot be accepted.[59]

64. EMPC discusses the Netherlands' allegation that the Antwerp Action does not violate the Tribunal's *Kompetenz-Kompetenz* under Article 41 because there is a distinction between the issues in the Arbitration and the Antwerp Action, such that "*EMPC does not have to litigate*" the same issues in both fora. EMPC explains that although the Netherlands has framed the Antwerp Action as founded in tort, its thesis is that EMPC committed the tort by filing an arbitration before a tribunal that, in the Netherlands' view, has no jurisdiction. To recall, the crux of the Netherlands' tort action is that EMPC "*violated the general standard of due care* […] *by instituting an intra-EU investment dispute with an arbitral tribunal that has no jurisdiction in this matter*."[60] To rule on the tort allegation, the Antwerp

[56] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 5.30 (**CL-15**).
[57] *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, ¶¶ 92-93 (**CL-25**).
[58] Claimant's Application, ¶ 55.
[59] Claimant's Reply, ¶¶ 72, 74.
[60] Antwerp Court, Netherlands Summons, 10 January 2025, ¶ 26 (**C-67**).

Court has to rule on the validity of the arbitration clause and, hence, the question of which body (the Tribunal or the Antwerp Court) has jurisdiction to decide on this question.[61]

65. Therefore, EMPC states that jurisdictional inquiry is within the exclusive remit of this Tribunal. The Netherlands may not circumvent Articles 26 and 41 of the ICSID Convention by labelling objections to the Tribunal's jurisdiction as novel tort claims.[62]

66. In this context, EMPC refers to the case of *WOC* v. *Spain*, where Spain sought a declaration from a German court challenging the compatibility of intra-EU arbitration with EU law, claiming it merely aimed to inform the ICSID Tribunal's assessment of the arbitration agreement's validity.[63] Like the Netherlands in the current dispute, Spain attempted to portray the domestic proceedings as distinct from and coexisting with the ICSID arbitration.[64] In this case, the tribunal's rejection of the argument was unequivocal: "*the [t]ribunal does not accept these submissions.*"[65] EMPC cites an extract from the tribunal's decision in that case:[66]

> "*The underlying subject matter of the German Proceedings and of this Arbitration is significantly overlapping in so far as both have to decide whether valid consent to arbitration was given by the Parties. In order to assess the claims brought by the Claimants against the Respondent with regard to their investment, the Tribunal has to decide upon its jurisdiction and the admissibility of the claims, which includes the question whether valid consent has been given by the Parties. The Berlin court has been requested to determine whether the arbitration proceedings before the Tribunal are 'inadmissible' as a result of a lack of valid consent by the Parties* […]"

67. Therefore, EMPC argues that the distinction that the Netherlands tries to draw between the present Arbitration and the Antwerp Action is baseless.[67]

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[61] Claimant's Reply, ¶¶ 77-78.
[62] Claimant's Reply, ¶ 79.
[63] *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, ¶ 88 (**CL-25**).
[64] Claimant's Reply, ¶ 82.
[65] *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, ¶ 89 (**CL-25**).
[66] *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, ¶¶ 91-93 (emphasis added) (**CL-25**).
[67] Claimant's Reply, ¶ 84.

68. EMPC states that the Netherlands' argument that it is required to pursue the Antwerp Action under EU law and the ICSID Convention does not preclude such an action, by invoking the conclusion reached by the *Uniper v. Netherlands*, is ill founded [68] for the following reasons: (i) the Netherlands has not established that EU law required it to pursue the Antwerp Action. The only support that it can point to is a letter that it received from the European Commission at its own request a few months after it filed the Antwerp Action,[69] (ii) the ICSID Convention does preclude filing actions in domestic courts that interfere with ICSID arbitrations under Article 26 and the numerous examples, cited by the Claimant in its Application,[70] and (iii) the Netherlands' reliance on the tribunal's decision in Uniper v. Netherlands to permit the Netherlands to continue the German proceedings is unavailing because of the very different circumstances in that case. In particular, the Netherlands' represented in Uniper that it was not "*seeking any injunctive or similar relief*."[71]

69. Thus, EMPC concludes that there are therefore material differences between the circumstances that were before the tribunals in *RWE*[72] *and Uniper*[73] and the circumstances here. The Netherlands is actively attempting to restrain EMPC from pursuing this Arbitration through the Antwerp Action and, in so doing, it is imperiling the Tribunal's *Kompetenz-Kompetenz* under Article 41 of the ICSID Convention.[74]

c. Necessity

70. EMPC contends that its requested provisional measures are "*necessary*" because the Antwerp Action poses an existential risk to EMPC's right to pursue this Arbitration.[75]

71. The Claimant argues that ICSID tribunals consider provisional measures "*necessary*" when they enable the avoidance of material risk of a serious or grave damage to the requesting party.[76] Some tribunals have adopted an alternative standard, whereby provisional

[68] Claimant's Reply, ¶ 85.
[69] Claimant's Reply, ¶ 86.
[70] Claimant's Reply, ¶ 87.
[71] Claimant's Reply, ¶ 88.
[72] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No ARB/21/4, Decision on the Claimants' Request for Provisional Measures, RWE v. Netherlands, Decision on PM Request, 16 August 2022 (**CL-24**).
[73] *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV* v. *Kingdom of the Netherlands*, ICSID Case No ARB/21/22, Procedural Order No 2, Decision on the Claimants' Request for Provisional Measures (Uniper v. Netherlands, PO2), 9 May 2022 (**CL-23**).
[74] Claimant's Reply, ¶ 92.
[75] Claimant's Application, ¶ 56.
[76] See for example: *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, ¶¶ 109, 111 (**CL-18**); *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No ARB/18/18, Procedural Order No. 5 on Claimant's Request for Provisional Measures, 19 September 2019, ¶ 10 (**CL-20**).

measures are considered "*necessary*" if they would avoid a harm that would not adequately be reparable by an award of damages[77] as explained by the tribunal in *Quiborax* v. *Bolivia* that provisional measures "*must be required to avoid harm or prejudice being inflicted upon the applicant*."[78]

72. EMPC contends, that the existence of "harm" here is clear, as follows:

> "*(a) The Netherlands is requesting that the Antwerp Court order EMPC to suspend and then withdraw the Arbitration. That is, the Netherlands is seeking domestic judicial assistance to bring an end to the Arbitration through an anti-suit injunction* […]
>
> *(b) If the Antwerp Court grants the Netherlands the relief it seeks, EMPC will be put in an impossible position. If EMPC does not comply with any such order, then the Netherlands reserves its rights to seek a penalty payment against EMPC from the Antwerp Court. A finding by a Belgian court that EMPC has violated the court's orders is also not a conclusion that is 'reparable by an award of damages.' Such a finding would harm EMPC's reputation publicly.*" [79]

73. EMPC also notes that other ICSID tribunals have likewise found the necessity criterion to be satisfied where domestic proceedings imperil the integrity of an ICSID arbitration, including in cases in which ICSID tribunals have granted provisional measures in connection with domestic proceedings. For these reasons, EMPC contends that it has satisfied the third element of the provisional measures test.[80]

74. EMPC further explains that the Netherlands' contention that EMPC will suffer no "harm" is belied by the relief it seeks, and the assurances that have been offered cannot cure the harm. The Claimant argues, in its letter to the Tribunal, that the Netherlands attempts to provide the Tribunal and EMPC comfort with assurances which, in the present circumstances, provide no comfort for the following reasons:[81]

75. *First***,** as to the Netherlands' confirmation that it intends to comply with all its obligations under international law – including the ICSID Convention and the Energy Charter Treaty, specifically Articles 53 and 54 of the ICSID Convention – EMPC contends that the

[77] Claimant's Application, ¶ 57.
[78] See for example: *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 156 (**CL-14**).
[79] Claimant's Application, ¶ 58.
[80] Claimant's Application, ¶ 59.
[81] See the Claimant's Letter to the Tribunal dated 2 September 2025.

assurance is vague and framed to prioritize the Netherlands' interpretation of EU law over its obligations under the ICSID Convention, rendering it a conditional promise based on its own legal view. EMPC argues that the Netherlands provided this assurance while seeking an anti-Arbitration injunction in Antwerp, and still maintains that such action does not breach the ICSID Convention, demonstrating its reliance on a unilateral interpretation. Even after withdrawing the injunction, the Netherlands continues the Antwerp Action, which challenges the Tribunal's jurisdiction and undermines ICSID's exclusive competence. EMPC asserts that the ongoing Antwerp Action appears intended to create *res judicata* to block enforcement of an adverse award, thereby violating Articles 53 and 54 of the ICSID Convention. [82]

76. *Second***,** as to the Netherlands' confirmation that it commenced the Antwerp Proceedings in a good faith effort to meet what it views as its obligations under the EU Treaties and not to challenge the *Kompetenz-Kompetenz* of the Tribunal, the Claimant maintains that this assurance is inadequate to protect its rights under the ICSID Convention for several reasons: (i) the Second Assurance is no assurance at all, as it merely explains past conduct without offering any commitment regarding future actions, (ii) the Respondent's justification – based on its own interpretation of EU Treaty obligations and the risk of infringement proceedings – is unsupported, given that no provision of EU law mandates such action and no such proceedings have ever been initiated, (iii) the Respondent's claim that it did not intend to challenge the Tribunal's jurisdiction is contradicted by its pursuit of injunctive relief aimed at halting the Arbitration entirely, and (iv) the assertion that the continued Antwerp Action is a good faith effort under EU law is unconvincing, as the injunctive relief has been withdrawn and the Respondent has failed to explain the Action's ongoing purpose, even when directly invited by the Tribunal to do so.[83]

77. *Third***,** as to the Netherlands' affirmation regarding its intended withdrawal of interim relief and amendment of the relief sought in the Antwerp Action, the Claimant argues this assurance is insufficient under the ICSID Convention for three reasons: (i) the withdrawal does not resolve the ongoing harm, as the Respondent continues to seek declaratory and monetary relief that undermines the Tribunal's jurisdiction, (ii) the Respondent is advancing the Antwerp Action on a timeline designed to secure a jurisdictional ruling before the Tribunal can decide the matter itself, and (iii) The Respondent intends to use any Antwerp ruling for *res judicata* effect in future proceedings, thereby interfering with the Arbitration and enforcement of any award. [84]

78. *Fourth***,** as to the Netherlands' confirmation that it will not argue that any Antwerp Business Court decision constitutes anything other than a finding of a tort under Belgian law and EU

[82] See the Claimant's Letter to the Tribunal dated 2 September 2025.
[83] See the Claimant's Letter to the Tribunal dated 2 September 2025.
[84] See the Claimant's Letter to the Tribunal dated 2 September 2025.

law, the Claimant contends that the Fourth Assurance, issued on 29 August 2025, is both irrelevant and misleading. Unlike in the *RWE* and *Uniper* cases, the Antwerp Action seeks a finding that the Claimant committed a tort by initiating this Arbitration, making the assurance inapplicable. The revised Fourth Assurance does not limit future use of any Antwerp judgment but affirms the Netherlands' intent to use it precisely as a finding of wrongdoing: (i) the only alleged wrongdoing is the Claimant's filing of this Arbitration, (ii) a tort finding necessarily requires the Antwerp Court to assess the Tribunal's jurisdiction and the validity of the Claimant's consent instrument, directly implicating the Tribunal's *Kompetenz-Kompetenz,* (iii) the Respondent's claim that only Belgian and EU law are at issue is contradicted by the fact that international law forms part of Belgian law and is already central to the Parties' submissions, and (iv) the Respondent has not disclaimed its intent to invoke *res judicata* from any Antwerp ruling, and the Fourth Assurance confirms it will use such judgment on its terms, preserving the threat to this Arbitration and enforcement proceedings.[85]

79. *Fifth***,** as to the Netherlands' confirmation that it will refrain from initiating further judicial proceedings before the final award, EMPC argues that the Fifth Assurance is both meaningless and inadequate: (i) it only applies to future injunctive actions and does not cure the ongoing violation caused by the Antwerp Action under Articles 26 and 41 of the ICSID Convention, (ii) the assurance is ineffective, as the Respondent admits no other national court has jurisdiction over its claims, (iii) the assurance contradicts the Respondent's earlier claim that EU law requires it to pursue all available remedies, and (iv) it does not address the risk that the Respondent will use any Antwerp judgment to interfere with enforcement after the Tribunal is *functus officio*.[86]

80. EMPC concludes that none of the Respondent's assurances protect its rights under Articles 26, 41, 53, and 54 of the ICSID Convention, and the risk of *res judicata* remains unaddressed. [87]

d. Urgency

81. EMPC also states that its requested measures are sufficiently "*urgent*" because the Antwerp Court may issue an order interfering with this Arbitration before this Tribunal can issue a final award.[88] It argues that the criterion of urgency is satisfied when "*a question cannot await the outcome of the award on the merits*."[89] Indeed, as the *Biwater v. Tanzania* tribunal

[85] See the Claimant's Letter to the Tribunal dated 2 September 2025.
[86] See the Claimant's Letter to the Tribunal dated 2 September 2025.
[87] See the Claimant's Letter to the Tribunal dated 2 September 2025.
[88] Claimant's Application, ¶ 60.
[89] *Burlington Resources Inc and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No ARB/08/5, Procedural Order No 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, ¶ 73 (**CL-12**).

reasoned, "*where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award* […] *this will equate to 'urgency' in the traditional sense (i.e. a need for a measure in a short space of time).*" [90]

82. EMPC states that there is certainly urgency here:

> "*(a) A procedural calendar has been fixed in the Antwerp Action to hear the Netherlands' request for an order suspending the Arbitration.*
>
> *(b) As explained above, the Netherlands' request for an order from the Antwerp Court that EMPC be required to suspend the Arbitration is to be heard on 23 September 2025.*
>
> *(c) From that date forward, there is a risk that the Antwerp Court will issue a ruling that will interfere with the Arbitration.*"[91]

83. Accordingly, EMPC contends that the issues posed by this Application cannot await the outcome of the final award in this case, which will certainly not be issued before the Antwerp Court rules on the Antwerp Suspension Request, and is unlikely to be issued before the Antwerp Court rules on the Antwerp Withdrawal Request. [92]

84. EMPC also argues that other ICSID tribunals have found the urgency criterion to be satisfied where it is possible for rulings to be issued in domestic proceedings that otherwise imperil the integrity of an ICSID arbitration. For instance, in *WOC v. Spain*, the tribunal confirmed that "*it cannot be denied that there is an urgency*" in granting provisional measures "*to prevent the [r]espondent from progressing the German Proceedings and indeed from initiating or progressing other proceedings relating to this arbitration whether seeking an injunction or otherwise* [...]"[93]

85. Moreover, in its Reply, EMPC rejects the Netherlands' contention that there is no urgency and argues that this contention is belied by the September 2025 hearing fixed by the Antwerp Court since, as stated by the Netherlands, "[i]*t is reasonable to expect that it will take at least 1.5 years before a hearing is held by the Antwerp Court with regard to the claims on the merits, and then it will take many more months before a judgment is issued.*"

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[90] *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No. 1, 31 March 2006, ¶ 76 (**CL-8**).
[91] Claimant's Application, ¶ 62.
[92] Claimant's Application, ¶ 63.
[93] *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, ¶ 97 (**CL-25**).

It goes on to observe that "*the Tribunal could potentially render its decision on jurisdiction well before the Antwerp Court is in a position to rule on the claims on the merits*." [94]

86. EMPC states that this argument is unavailing because it wholly ignores the 23 September 2025 hearing on the Antwerp Suspension Request.[95] EMPC highlights a contradiction in the Netherlands' position: while seeking provisional relief from the Antwerp Court to suspend this Arbitration, the Netherlands fails to explain how the ICSID Tribunal could exercise its jurisdiction if EMPC is legally bound to halt proceedings. This suggests the Netherlands expects EMPC to disregard the Antwerp Court's decision, which conflicts with its own counsel's assertion that such interlocutory orders are binding on the parties.[96] The Claimant argues that, therefore, the urgency here is manifest and cannot await the issuance of an award in this case. [97]

87. Furthermore, EMPC contends that the Netherlands cautiously suggests it might not enforce a favorable ruling on its Provisional Claim to suspend EMPC's Arbitration but offers no such assurance regarding its main request for EMPC to withdraw the Arbitration. It also notes that Belgian law lacks a contempt of court mechanism that could compel EMPC to comply with any court orders.[98]

88. EMPC explains that the Netherlands' suggested intentions regarding enforcement of any decisions of the Antwerp Court should not give the Tribunal any comfort as:[99] (i) if the Netherlands is operating under an understanding that it has a "*legal obligation*" under EU law to ensure that intra-EU investment arbitrations "*are suspended or withdrawn*" (as it claims), then that obligation would not be fulfilled if the Netherlands stopped short of enforcing an order by the Antwerp Court granting it the relief it seeks,[100] (ii) if it is true that the Netherlands need not attempt to enforce this relief, then the Tribunal has all the more reason to grant the provisional measures that EMPC is seeking, as the Netherlands will not suffer any meaningful prejudice,[101] (iii) the Netherlands appears to be inviting EMPC not to comply with injunctive orders that the Antwerp Court might grant in connection with the Arbitration. According to the Claimant, that is the only inference to be drawn by the Netherlands' contention that EMPC will suffer no harm here because there is no concept of contempt of court under Belgian law. Again, the Netherlands ignores what its own counsel in the Antwerp Action explains in its appended opinion: "*the parties are*

[94] Claimant's Reply, ¶ 98.
[95] Claimant's Reply, ¶ 99.
[96] Claimant's Reply, ¶ 100.
[97] Claimant's Reply, ¶ 101.
[98] Claimant's Reply, ¶ 106.
[99] Claimant's Reply, ¶ 107.
[100] Claimant's Reply, ¶ 108.
[101] Claimant's Reply, ¶ 109.

bound by […] *interlocutory decision*[*s*],"[102] and (iv) the Netherlands has stated that it wishes to rely on a judgment from the Antwerp Court on the validity of the arbitration agreement for its *"res judicata effect*." Regardless, the Netherlands has thus made clear that it intends to use that judgment in other, unnamed proceedings to attack this Arbitration.[103]

89. EMPC argues that it will thus be put in an impossible position if the Antwerp Court grants the Netherlands its requested relief: give up its rights and access to ICSID Arbitration or continue to pursue this Arbitration and violate injunctive domestic court orders. The risk associated with non-compliance with court orders is not reparable by the Tribunal in the final Award and the Netherlands fails to show otherwise. [104] In sum, according to EMPC, it has shown that the provisional measures are both necessary and urgent to avoid the imminent risk of interference with this Arbitration.[105]

e. Proportionality

90. EMPC also contends that its requested measures are proportionate because the harm sought to be prevented outweighs any prejudice that such measures may cause to the Netherlands.[106] EMPC explains that the requested measures will not prejudice the Netherlands' rights at all. Both the rights the Netherlands wants to vindicate and the remedies it seeks before the Antwerp Court are ones that can and should be before this Tribunal.[107]

91. EMPC argues that the Netherlands can raise any jurisdictional objection, including about the alleged invalidity of its consent under Article 26 of the ECT, in this Arbitration. [108] The possibility to bring any jurisdictional objection in its proper forum – i.e., the ICSID Arbitration – was precisely what led the tribunal in *WOC v. Spain* to consider that the adoption of provisional measures was in fact proportionate.[109]

92. EMPC states that the Netherlands seeks to recover through the Antwerp Action its costs in defending against the ICSID Arbitration. However, this Tribunal is empowered to allocate the costs of this ICSID proceeding between the Parties. The Netherlands is therefore free

[102] Claimant's Reply, ¶ 110.
[103] Claimant's Reply, ¶ 111.
[104] Claimant's Reply, ¶ 112.
[105] Claimant's Reply, ¶ 113.
[106] Claimant's Application, ¶ 66.
[107] Claimant's Application, ¶ 67.
[108] Claimant's Application, ¶ 68.
[109] *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, **CL-25**, ¶¶ 100, 110.

to seek before this Tribunal the relief it is now improperly seeking before the Antwerp Court.[110]

93. The Claimant argues that, in contrast, the harm that would be prevented by granting the provisional measures sought by EMPC is significant. Without the requested measures, (i) EMPC's rights to an exclusive remedy and access to international arbitration at ICSID will remain imperiled by the Antwerp Action; and (ii) EMPC may be exposed to severe penalties if it does not comply with the Antwerp Court's orders, as the Netherlands specifically reserved its right to seek sanctions in this scenario.[111]

94. As noted by the tribunal in *WOC v. Spain*, bringing a jurisdictional issue to a domestic court that should properly be before an ICSID tribunal creates an inherent risk of conflicting decisions.[112] By granting the provisional measures sought here, EMPC would not have to litigate the same issue—the validity of the arbitration agreement—at the same time before the Antwerp Court and this Tribunal. There would be no risk of conflicting decisions between this Tribunal's decision on jurisdiction and the Antwerp Action.[113]

95. In it Reply, the Claimant asserts that the Netherlands can obtain from the Tribunal relief that is analogous to the relief that it seeks in the Antwerp Proceedings. Thus, the relief that the Netherlands seeks in the Antwerp Action is available before this Tribunal:[114] (i) the Netherlands asks "*to hear it ruled that EMPC committed an unlawful act vis-à-vis the Netherlands by instituting an intra-EU investment arbitration dispute before an arbitral tribunal*." This is the Netherlands' objection to the Tribunal's jurisdiction re-packaged and labelled as an action in tort. A finding on the Tribunal's jurisdiction should be exclusively dispensed by this Tribunal,[115] (ii) the Netherlands asks that EMPC be "*ordered* […] *to pay the costs incurred by the Netherlands in the arbitration proceedings* […]." The Netherlands can obtain this relief from this Tribunal if it prevails on its jurisdictional objection, [116] (iii) the Netherlands asks EMPC to be "*ordered to pay the costs of the [Antwerp] proceedings* […]." The costs of the Antwerp Action are unnecessary because all of the relief that the Netherlands seeks can (and should properly) be sought from this Tribunal,[117] (iv) the Netherlands asks the Antwerp Court "*to declare the judgment be rendered enforceable notwithstanding appeal or opposition* […]." That too is something that the Respondent would achieve from this Tribunal because, pursuant to Article 54 of the ICSID Convention,

[110] Claimant's Application, ¶ 69.
[111] Claimant's Application, ¶ 70.
[112] *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, ¶ 97 (**CL-25**).
[113] Claimant's Application, ¶ 71.
[114] Claimant's Reply, ¶ 117.
[115] Claimant's Reply, ¶ 118.
[116] Claimant's Reply, ¶ 121.
[117] Claimant's Reply, ¶ 122.

"[e]*ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State*."[118]

96. Accordingly, if the Antwerp Action is enjoined by the Tribunal, the Netherlands will be able to achieve all of the material, substantive relief that it is seeking from the Antwerp Court. In such circumstances, the Netherlands will not suffer any meaningful harm or prejudice if the requested provisional measures are granted. [119]

97. EMPC also declares that the Netherlands has not identified any material or credible prejudice or harm that it will suffer if the provisional measures are granted as all of the alleged harm that the Netherlands says it will suffer is non-existent or overstated. [120]

98. *First***,** the Netherlands argues that granting provisional measures could force it to breach EU Treaty obligations, risking infringement proceedings by the European Commission, and notes that tribunals in *RWE* and *Uniper* respected similar concerns by not intervening in parallel domestic proceedings.[121]

99. EMPC argues that this argument is flawed for several reasons as: (i) the Netherlands cannot use its apprehension of other legal obligations in other legal systems to avoid its international law obligations under the ICSID Convention, (ii) the Netherlands' contention that it is required by EU law to pursue an anti-suit injunction against the Arbitration is not supported by any legal authority. And if it were genuinely obliged to pursue such an action, the Netherlands could not undertake not to seek enforcement of any favorable decision it might receive from the Antwerp Court. Its suggestion that it could ignore any such decision demonstrates that its position on EU law is not genuinely held, (iii) Further, there are exceedingly few examples of respondents to intra-EU investment arbitrations bringing domestic court actions like the Antwerp Action or like those the Netherlands filed in Germany in connection with the *Uniper* and *RWE* cases. Yet, to the Claimant's knowledge, the European Commission has not thus far ever brought an infringement proceeding against a respondent State for failing to pursue domestic remedies before a court of an EU Member State, and (iv) the Netherlands' continued reliance on *RWE* and *Uniper* here is flawed. The tribunals in both of those cases permitted the domestic proceedings to continue because, amongst other things, the Netherlands was not seeking injunctive relief that would interfere with the arbitral process, as it is here. Both tribunals indicated the outcome could well have been different had that not been so.[122]

[118] Article 54, ICSID Convention.
[119] Claimant's Reply, ¶ 124.
[120] Claimant's Reply, ¶ 125.
[121] Claimant's Reply, ¶ 126.
[122] Claimant's Reply, ¶ 127.

100. *Second***,** the Netherlands explains that the provisional measures would deprive it of fulfilling the related purposes of obtaining a decision "*confirm[ing] that a court of a Member State of the EU law [sic] finds that arbitration in this case is precluded under EU law*", and "*brief[ing] the Tribunal with the help of that decision on the interpretation and application of EU law.*" [123] EMPC argues that the Netherlands' claim of prejudice is unfounded; it has ample resources to present its EU law arguments and admits the Antwerp Court's decision would merely be helpful – not essential. Relying on such a non-critical authority doesn't justify breaching core ICSID Convention principles.[124]

101. *Third***,** EMPC argues that the Netherlands' claim of prejudice is speculative, as it has not identified any concrete follow-up proceedings. Its aim appears to be building a record for possible future litigation, which does not justify interference. The need for a decision from the Antwerp Court is unclear, especially since the Netherlands could likely raise its arguments without it.[125]

102. Fourth**,** the Claimant states that the Netherlands' argument that it would be "disproportionate to recommend provisional measures in light of the jurisdictional objections which the Netherlands will raise" is not particularized enough to understand what would be disproportionate about the provisional measures given the Respondent's intention of lodging the intra-EU Objection. For present purposes, Claimant will simply reiterate that it is the Tribunal that is the competent body to rule on its own jurisdiction. Accordingly, the fact that the Netherlands intends to lodge a jurisdictional objection does not mean that it should be permitted to ignore Articles 26 and 41 of the ICSID Convention and bring the crux of its jurisdictional complaint to another forum.[126]

103. EMPC further addresses the Netherlands' comments on the relief sought by EMPC as part of the discussion on the proportionality of the requested provisional measures as follows:[127]

104. *First***,** the Netherlands questions the need for EMPC to seek a declaration from the Tribunal, requested at paragraph 90(a) of the Application, that "*pursuant to Articles 26 and 41 of the ICSID Convention, it has exclusive competence and authority to hear and resolve any objections to its jurisdiction*." The declaration is required to remind the Netherlands of its obligations under the ICSID Convention, which, as EMPC argues, have otherwise been violated through its filing of the Antwerp Action. EMPC supplemented the requested relief to order the Netherlands to comply with those provisions of the ICSID Convention.[128]

[123] Claimant's Reply, ¶ 128.
[124] Claimant's Reply, ¶ 129.
[125] Claimant's Reply, ¶ 131.
[126] Claimant's Reply, ¶ 132.
[127] Claimant's Reply, ¶ 133.
[128] Claimant's Reply, ¶ 134.

105. *Second,* the Netherlands is troubled by the "*with prejudice*" and permanent nature of the Claimant's request, made in paragraph 90(b) of the Application, that the Netherlands be ordered to withdraw the Antwerp Action. In the Request for Relief below, the Claimant has removed "**with prejudice**" and modified the request to seek an order that the Netherlands not reinitiate the action during the pendency of the Arbitration. Accordingly, if granted, the Tribunal will not be granting any relief that extends beyond the issuance of the final award in this Arbitration.[129]

106. *Third,* the Netherlands challenges EMPC's request for alternative relief, which is a request for the Netherlands to suspend the Antwerp Action during the pendency of the Arbitration. However, the Netherlands can identify no genuine prejudice that it would suffer if it were requested to stay the Antwerp Action during the pendency of the Arbitration. In fact, it seems particularly logical for the Antwerp Court to await the outcome of the Arbitration before determining if it was "*tortious*" for EMPC to initiate the Arbitration.[130]

107. *Fourth,* the Netherlands contends that EMPC's requested relief set out in paragraph 90(c) of the Application – which requests that the Netherlands be ordered "*to refrain from initiating any further proceeding [...] relating in any way to this Arbitration or seeking to restrain the Claimant from continuing this Arbitration or otherwise participating fully in this Arbitration, whether by injunctive relief or any other action" – amounts to a "blanket ban on access to justice.*" That the Netherlands considers an order effectively requiring it to act in compliance with its obligations under the ICSID Convention to amount to an impermissible ban on access to justice only exemplifies why the order is needed. The Netherlands must be dissuaded from dreaming up more tortured tort claims, or similar claims, at other domestic courts that are mislabeled objections to this Tribunal's jurisdiction.[131]

108. In summary, EMPC satisfies all five prongs of the provisional measures test and so the relief that it seeks should be granted. The circumstances of the Antwerp Action are so troubling that – on the assumption that the Application will be successful – the Netherlands should be ordered to promptly pay the Claimant's costs associated with the Application.[132]

109. It should be also mentioned that EMPC contends that the Tribunal can take comfort that EMPC's request that the Tribunal prevent a domestic action from proceeding finds support in decisions from many other tribunals. It refers to ICSID tribunals which have granted

[129] Claimant's Reply, ¶ 135.
[130] Claimant's Reply, ¶ 136.
[131] Claimant's Reply, ¶ 137.
[132] Claimant's Reply, ¶ 138.

such relief where domestic proceedings risk interfering with ICSID's exclusive jurisdiction or otherwise interfere with the procedural integrity of the arbitration.[133]

110. In WOC v. Spain, the tribunal ordered Spain to (i) "withdraw or discontinue with prejudice" the German action, and (ii) directed Spain "not to initiate any further applications or legal proceedings" seeking to "prevent[] the [c]laimants [...] from continuing the present ICSID arbitration, including requests for any kind of injunctive relief [...]"[134]

111. In *Agility v. Pakistan*, the tribunal ordered the respondent to:[135]

> "*immediately withdraw and cause to be discontinued any proceedings in the courts of Pakistan seeking to restrain the [c]laimant from proceeding with these arbitration proceedings or otherwise seeking a stay of this arbitration [and to] [. . .] refrain from commencing or participating in any such proceedings in the future.*"

112. In *Ipek v. Turkey*, The tribunal ruled that domestic proceedings should be paused to uphold ICSID arbitration's exclusivity and prevent both parties from litigating the same issue simultaneously.[136] In *Tokios Tokéles v. Ukraine*, the tribunal went on to order the withdrawal of the pending domestic actions, among other relief.[137] In *Fouad Alghanim v. Jordan*, the tribunal concluded that issues in the domestic proceeding overlapped with issues in the arbitration and that "*Art 26 precludes the parties from pursuing other proceedings*" that overlap with the arbitration before domestic courts. The tribunal therefore ordered Jordan to "*refrain from prosecuting*" the domestic actions.[138]

113. EMPC concludes that these are only a few of many examples of tribunals granting provisional measures ordering the suspension or withdrawal of domestic proceedings that were viewed as imperiling the integrity of an ICSID arbitration.[139]

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[133] Claimant's Application, ¶ 74.
[134] *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, ¶ 111 (**CL-25**).
[135] Claimant's Application, ¶ 76.
[136] *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No ARB/18/18, Procedural Order No. 5 on Claimant's Request for Provisional Measures, 19 September 2019, ¶ 92 (**CL-20**)
[137] *Tokios Tokelés v. Ukraine*, ICSID Case No ARB/02/18, Order No. 1, 1 July 2003, ¶¶ 2-7 (**CL-4**).
[138] *Fouad Alghanim & Sons Co for General Trading & Contracting, WLL and Mr Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No ARB/13/38, Order on Application for the Grant of Provisional Measures, 24 November 2014, ¶¶ 66, 68, 76,77 (**CL-17**).
[139] Claimant's Application, ¶ 81.

(2) Costs

114. EMPC states that pursuant to Rule 52(3) of the ICSID Rules[140], the "Tribunal may make an interim decision on costs at any time, on its own initiative or upon a party's request."[141]

115. Even where a party is successful in an application for provisional measures, tribunals typically defer decisions on costs until the issuance of the final award. The circumstances here are, however, unique and, respectfully, should cause the Tribunal to order the Netherlands to bear all costs associated with this Application, including all of the fees and disbursements incurred by EMPC.[142]

116. EPMC emphasized the following, in particular:[143]

> "*(a) In pursuing the Antwerp Action, the Netherlands is knowingly violating its obligations under the ICSID Convention. In the RWE and Uniper cases, the Netherlands had to provide undertakings to the ICSID tribunals that—in pursuing German court actions—it would not seek to interfere with the ICSID tribunals' exercise of their jurisdiction. In other words, the Netherlands undertook not to seek the very relief it is now seeking in the Antwerp Action because such relief would interfere with the exclusivity of the ICSID proceedings. The Netherlands cannot feign ignorance that its pursuit of the Antwerp Action violates the ICSID Convention.*
>
> *(b) Nevertheless, the Netherlands pursued the Antwerp Action and did so before the ICSID Tribunal here was even constituted in the hope that it could achieve a ruling from the Antwerp Court before the ICSID Tribunal could issue any provisional orders.*
>
> *(c) EMPC has incurred the costs associated with this Application solely because of the State's decision to unlawfully bring a domestic court action seeking a jurisdictional ruling relating to this Arbitration.*
>
> *(d) The Tribunal is empowered to issue interim costs orders. Doing so here is essential to dissuade the Netherlands from*

[140] Claimant's Application, ¶ 82.
[141] Rule 52(3), ICSID Rules.
[142] Claimant's Application, ¶ 83.
[143] Claimant's Application, ¶ 84.

> *pursuing any other disruptive domestic litigation during these proceedings.*"

117. Accordingly, EMPC requests that the Tribunal request costs statements once all written and oral briefing for this Application has been completed.[144]

B. THE RESPONDENT'S POSITION

(1) Requirements for Provisional Measures

118. Regarding the requirements for granting provisional measures, the Netherlands refers to ICSID Arbitration Rule 47(3) which provides that the Tribunal, in deciding on the provisional measures:[145]

> "*shall consider all relevant circumstances, including: (a) whether the measures are urgent and necessary; and (b) the effect that the measures may have on each party.*"

119. According to the Netherlands, consistent case law of investment tribunals establishes that the threshold for tribunals to order provisional measures is high.[146] Tribunals may order provisional measures only as an exceptional remedy, reserved for exceptional cases. As also noted by the *Uniper* tribunal, an order of provisional measures forms an exception to the general principle of State sovereignty.[147] A similar conclusion was reached by the *Maffezini* tribunal[148] and the *Amec Foster Wheeler* tribunal.[149]

120. The Netherlands also argues that provisional measures can be requested – and as the case may be, ordered – at a time when a tribunal does not yet have a complete record of submissions. Thus, it is difficult for tribunals to ascertain, at that stage, their jurisdiction over the disputed claim and whether the disputed claim has a basis in law and in fact. Restraint in ordering provisional measures is also for that reason in order.[150] Moreover, it is common ground that the Tribunal has discretion to recommend provisional measures, under Article 47 of the ICSID Convention and Rule 47(1) of the ICSID Rules.

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[144] Claimant's Application, ¶ 85.
[145] Respondent's Observations, ¶ 77.
[146] Respondent's Observations, ¶¶ 78-79.
[147] *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22, Decision on the Claimants' Request for Provisional Measures, 9 May 2022, ¶ 60 (**CL-23**).
[148] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, Decision on Request for Provisional Measures, 28 October 1999, ¶ 10 (**RL-11**).
[149] *Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. v. Republic of Colombia*, ICSID Case No. ARB/19/34, Decision on Claimants' Application for Provisional Measures, 31 May 2022, ¶ 102 (**RL-12**).
[150] Respondent's Observations, ¶ 80.

121. In sum, the Netherlands notes the following[151]:

> "*(a) Provisional measures are an extraordinary remedy which should 'not be granted lightly by arbitral tribunals' and 'only be granted in very limited circumstances*'.
>
> *(b) The required approach to provisional measures is thus one of judicial restraint, which is all the more warranted when the tribunal is yet to rule on its jurisdiction.*
>
> *(c) Even when exceptional circumstances are demonstrated, the measures ordered must reflect only 'the minimum steps necessary to meet the objectives' set out in the ICSID Convention. The measures should be proportionate and not interfere more than is absolutely necessary with the other party's rights*."

122. The Netherlands asserts that EMPC has failed to engage with the exceptional nature of the relief it seeks and the consequences thereof on the exercise of the Tribunal's discretion.[152] It argues that although it is common ground that ICSID tribunals may order a party to withdraw domestic court proceedings, such measures are seldom granted, and in recent years, tribunals have become increasingly reluctant to do so, as the Netherlands noted in its Observations. In its Reply, EMPC does not comment on the increasing rarity of the measures it seeks.[153]

123. The Netherlands also holds the view that provisional measures can only be awarded if a claim on the merits can be established on a *prima facie* basis, the Parties agree that the following requirements for granting provisional measures must in any case be met and must be met cumulatively:[154]

> "*a. jurisdiction should be established on a prima facie basis;*
>
> *b. there should be a right of the applicant in need of protection;*
>
> *c. there should be a requirement (i.e. a necessity) for measures to avoid a harm;*
>
> *d. there should be sufficient urgency; and*

[151] Respondent's Rejoinder, ¶¶ 34-35.
[152] Respondent's Rejoinder, ¶ 36.
[153] Respondent's Rejoinder, ¶ 37.
[154] Respondent's Observations, ¶¶ 81-82.

e. the requested measures are to be proportionate."

124. The Netherlands argues that it is standing case law that the burden of proof of establishing the exceptional circumstances required for provisional measures lies with the party seeking these (EMPC).[155] It states that EMPC says nothing about its burden of proof in the Reply. The Netherlands argues that its submissions in this respect therefore appear to be common ground.[156]

125. As EMPC acknowledges, the Netherlands has faced two such requests for provisional measures, namely in the *Uniper* and in the *RWE* arbitrations. The respective tribunals both denied the claimant's requests and did not intervene in the parallel proceedings before the German courts.[157] It argues that EMPC's Application should also be denied, because none of the requirements for granting provisional measures have been fulfilled.[158]

126. The Netherlands discusses the requirements for granting provisional measures as follows.

a. No Prima Facie Jurisdiction

127. The Netherlands argues that the Tribunal does not have *prima facie* jurisdiction as it does not have jurisdiction to decide on EMPC's claims, because Article 26(2)(c) of the ECT cannot *prima facie* form a basis for consent to submit the current dispute to an ICSID tribunal.[159]

128. Although the Millicon tribunal held that a prima facie analysis of jurisdiction requires it to examine "the facts alleged by the applicant […] without it being necessary […] to verify them and analyse them in depth" [160], a claimant's allegations are not "immune from attack when there are key facts or legal principles that can be easily and definitively disproven."[161] A respondent can submit conclusive evidence that a tribunal does not have jurisdiction, which is then to be taken into account in the prima facie analysis. The Paushok case also

[155] Respondent's Observations, ¶ 82.
[156] Respondent's Rejoinder, ¶ 39.
[157] Respondent's Observations, ¶ 83.
[158] Respondent's Observations, ¶ 84.
[159] Respondent's Observations, ¶ 85.
[160] *Millicom International Operations BV and Sentel GSM SA v. Republic of Senegal*, ICSID Case No ARB/08/20, Decision on the Application for Provisional Measures Submitted by the Claimants on 24 August 2009, 9 December 2009, ¶ 42 (**CL-13**).
[161] Measures Applications in International Arbitration' in Neil Kaplan and Michael J Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration*: Liber Amicorum Michael Pryles, Alphen aan den Rijn: Kluwer Law International, p. 117 (**RL-15**).

illustrates that certain facts raised by the claimant are rebuttable by the respondent at the provisional measures phase.[162]

129. In this respect, the Netherlands submits that when EMPC purported to consent to arbitration by accepting Article 26(2)(c) of the ECT, this provision could not be invoked for the adjudication of intra-EU disputes. This is supported by recent developments which, to the best of the Netherlands' knowledge, have not yet been taken into account by other tribunals ruling on intra-EU disputes in their jurisdictional decisions.[163]

130. The Netherlands declares that the present dispute is one between an investor of an EU Member State, on the one hand, and an EU Member State on the other hand. [164] On 26 June 2024, the EU and its Member States – including Belgium and the Netherlands – agreed on an *inter se* declaration (the "***Inter Se* Declaration**") and an *inter se* agreement (the "***Inter Se* Agreement**"). [165]

131. The *Inter Se* Declaration and the *Inter Se* Agreement clarify that Article 26(2)(c) of the ECT must be interpreted to mean that it does not apply to disputes between a Member State of the EU and an investor from another EU Member State over an investment made by that investor in the former Member State of the EU.[166]

132. In the *Inter Se* Declaration, the EU and its Member States reaffirm in paragraph 1 that they share a common understanding on the interpretation and application of the ECT. According to this interpretation, Article 26(2)(c) of the ECT cannot and never could serve as a legal basis for intra-EU arbitration proceedings.[167]

133. The EU and its Member States further declared that they share the common understanding that, as a result of the absence of a legal basis for intra-EU arbitration proceedings pursuant to Article 26 of the ECT, Article 47(3) of the ECT cannot extend, and could not have extended, to such proceedings.[168]

134. As such, both the Netherlands and Belgium expressly agreed and confirmed, in the *Inter Se* Declaration, that Article 26(2)(c) of the ECT cannot apply as a basis for intra-EU investor-State arbitration proceedings. The declarations of the Contracting States

[162] *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. the Government of Mongolia*, (UNCITRAL) Order on Interim Measures, 2 September 2008, ¶ 48 (**RL-17**).
[163] Respondent's Observations, ¶ 87.
[164] Respondent's Observations, ¶ 88.
[165] Respondent's Observations, ¶ 89.
[166] Respondent's Observations, ¶ 90.
[167] Respondent's Observations, ¶ 91.
[168] Respondent's Observations, ¶ 92.

concerned should be dispositive to establish that the tribunal, at face value, does not have jurisdiction over an intra-EU dispute.[169]

135. In this respect, it is important to note that EMPC first invoked the investor-State arbitration clause of Article 26(2)(c) of the ECT by its letter of 27 June 2024, thus only after the *Inter Se* Declaration was agreed and signed by Belgium, which has also publicly provided ample information about the steps it had taken.[170] The *Inter Se* Declaration was agreed on 25 June 2024 and signed by the EU and its Member States on 26 June 2024.[171]

136. Also on 26 June 2024, the Belgian Ministry of Foreign Affairs publicly announced the agreement on and the signing of the *Inter Se* Declaration, explaining the agreed and confirmed non-applicability of the ECT arbitration provisions on intra-EU investment disputes.[172]

137. When EMPC invoked the investor-State arbitration clause of Article 26(2)(c) of the ECT first in its letter of 27 June 2024, and later in its Request for Arbitration that was filed on 30 September 2024, it was evident – and EMPC should and could have known – that the Netherlands and Belgium were in agreement that Article 26(2)(c) of the ECT could not and cannot serve as a legal basis for the present Arbitration.[173]

138. The *Inter Se* Agreement confirms the common understanding of the Netherlands and Belgium, which was agreed on 25 June 2024 by the EU and its Member States and initialed on 26 June 2024.[174] Furthermore, the above referenced position of the Netherlands was confirmed in a *Note Verbale* that the Kingdom of the Belgium conveyed to the Netherlands on 6 February 2025.

139. The Respondent argues that Belgium specifically confirmed in this *Note Verbale*, that in relation to the present Arbitration which has been initiated by EMPC, the investor-State arbitration clause of Article 26(2)(c) of the ECT:[175]

> "*is not applicable and therefore cannot serve as a legal basis for arbitration proceedings brought under the ECT.*"

140. The Netherlands concludes that EMPC commenced this Arbitration in breach of the above agreement of the Netherlands and Belgium on Article 26(2)(c) of the ECT that the latter

[169] Respondent's Observations, ¶ 93.
[170] Respondent's Observations, ¶ 94.
[171] Respondent's Observations, ¶ 95.
[172] Respondent's Observations, ¶ 96.
[173] Respondent's Observations, ¶ 97.
[174] Respondent's Observations, ¶ 98.
[175] Respondent's Observations, ¶ 100.

provision is not applicable in this case and cannot serve as a legal basis for this Arbitration.[176]

141. The Netherlands also argues that, as recognised by the tribunal in Pugachev v. Russia, "the Claimant must prove, not only that this Tribunal has prima facie jurisdiction over the general dispute, but also that it has prima facie jurisdiction for the requested interim measures."[177] Therefore, the Tribunal first has to be satisfied that it has prima facie jurisdiction to decide on EMPC's provisional measures claims.[178]

142. To determine whether it has *prima facie* jurisdiction, the Tribunal must consider whether the claims in question fall within the Parties' consent. As a necessary step of this exercise, the Tribunal has to ensure that there is a valid offer to arbitrate in the applicable treaty.[179]

143. The Netherlands submits that the *Note Verbale* evidences that there is a facially obvious defect to the Tribunal's jurisdiction. The *Note Verbale* conveys the official position of EMPC's home State (Belgium), confirming that the Netherlands did not extend a valid offer to arbitrate to Belgian investors in the ECT. This is a key fact which, without needing an in-depth analysis, disproves EMPC's assertion that the Tribunal has *prima facie* jurisdiction over the dispute. According to the Netherlands, notably, EMPC does not provide any substantive response to the *Note Verbale* in its Reply.[180]

b. There is No Right in need of Protection

144. The Netherlands states that there is no right in need of protection. As EMPC argues that the Antwerp Proceedings (i) would threaten its access to and the exclusivity of the present Arbitration under Article 26 of the ICSID Convention; and (ii) would infringe upon the Tribunal's right to rule on its own jurisdiction, the Netherlands sets out that the Antwerp Proceedings do not violate either Article 26 or 41 of the ICSID Convention.[181]

145. The Netherlands states the Antwerp Proceedings are not in breach of Article 26 of the ICSID Convention. It explains that Article 26 of the ICSID Convention provides that ICSID exclusivity applies only if there is consent to arbitration. Accordingly, the question of whether there is consent to arbitration cannot itself be subject to the exclusive remedies clause. Consent is required before there can be any ICSID exclusivity. According to the Netherlands, similarly, the distinction in Article 26 of the ICSID Convention between

[176] Respondent's Observations, ¶ 101.
[177] *Sergei Viktorovich Pugachev v. The Russian Federation*, (UNCITRAL) Interim Award, 7 July 2017, ¶ 216 (**RL-31**).
[178] Respondent's Rejoinder, ¶ 42.
[179] Respondent's Rejoinder, ¶ 43.
[180] Respondent's Rejoinder, ¶ 46.
[181] Respondent's Observations, ¶ 103.

'consent to arbitration' and 'any other remedy' confirms that any ICSID exclusivity pertains to the merits of the dispute, not to the preliminary issue of consent.[182]

146. Moreover, Article 26 of the ICSID Convention does not bar the Antwerp Proceedings in a situation where consent to arbitrate the dispute is lacking. Neither the Declaratory Claim nor the Ancillary Claims in the Antwerp Proceedings concern injunctive relief. A determination by the Antwerp Court that EMPC commits a tortious act under Belgian law in conjunction with EU law is not an order, much less an order aimed at the Tribunal or an injunction against EMPC. Thus, the declaratory relief requested by the Netherlands in the Antwerp Proceedings, i.e. that EMPC commits a tortious act under Belgian and EU law, will not create an impediment for EMPC to continue participating in this Arbitration. The same applies to a decision on the Ancillary Claims.[183]

147. In any case, the Declaratory Claim and the Ancillary Clams are not concerned with the merits of the investment dispute raised by EMPC, but focus exclusively on the question of whether EU law precludes the Netherlands from giving consent to intra-EU investor-State arbitration under Article 26(2)(c) of the ECT.[184]

148. The Netherlands argues that it is common ground that the exclusivity of ICSID arbitration as articulated in Article 26 of the ICSID Convention is a right that is capable of requiring protection.[185] The 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.[186] 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.[187]

149. The Netherlands also states that the Antwerp Proceedings are not in breach of Article 41 of the ICSID Convention. It argues that the Declaratory Claim and the Ancillary Claims do not infringe Article 41 of the ICSID Convention, because these claims do not preclude the Tribunal from being the 'judge' of its own competence. Regardless of the decision of the Antwerp Court on the relevant claims, the Tribunal retains the authority to decide on its own competence. [188] Thus, not only does the relief requested in the provisional, declaratory and ancillary relief not impinge on the Tribunal's authority to decide on its competence

[182] Respondent's Observations, ¶ 105.
[183] Respondent's Observations, ¶ 106.
[184] Respondent's Observations, ¶ 107.
[185] Respondent's Rejoinder, ¶ 47.
[186] Respondent's Rejoinder, ¶ 48.
[187] Respondent's Rejoinder, ¶ 49.
[188] Respondent's Observations, ¶ 108.

under the ICSID Convention or the ECT, its *Kompetenz-Kompetenz* is left unaffected by virtue of the nature of the relevant claims in the Antwerp Proceedings.[189]

150. Furthermore, the Respondent states that EU Member States like the Netherlands and Belgium are under an obligation to ensure that issues of interpretation and application of EU law are put before the EU courts. This follows from Article 19 of the TEU as well as Articles 267 and 344 of the TFEU. This has also been confirmed in the judgments of the CJEU in the matters of *Achmea*, *Komstroy* and *PL Holdings*.[190]

151. The Respondent also argues that nothing in the ICSID Convention precludes the Netherlands from complying with its obligation under EU law to ensure that issues of interpretation and application of the EU Treaties are put before EU courts. The *Uniper* tribunal came to the same conclusion.[191]

152. The Netherlands argues that the Tribunal does not have jurisdiction over the domestic law tort claim against EMPC. Neither has the Tribunal jurisdiction in respect to questions of EU law that need to be answered in the Antwerp Proceedings. The decision on the Declaratory Claim will simply express what already applies as a matter of Belgian law in conjunction with EU law.[192]

153. According to the Respondent, it is established in ICSID jurisprudence that Article 41 of the ICSID Convention does not provide that the Tribunal has the exclusive authority to decide on all matters that may be relevant to its decision on competence. For example, the *Southern Pacific Properties* tribunal found that the question of whether another method of dispute resolution – ICC arbitration – had been agreed on, was a question preliminary to a finding of competence by the ICSID tribunal.[193] Similarly, the Netherlands' request for the Antwerp Court to find that EMPC has committed a domestic law tort does not infringe upon Article 41 of the ICSID Convention.[194]

154. The Respondent contends that, in any case, the Declaratory Claim and the Ancillary Claims do not block this Arbitration and do not interfere with this Arbitration. After all, they and the claims of EMPC in this Arbitration are governed by different systems of law. The Netherlands' position in the Antwerp Proceedings would therefore also not (necessarily) "*fall apart*" – as EMPC alleges in the Application – if the Tribunal in this Arbitration were

[189] Respondent's Observations, ¶ 109.
[190] Respondent's Observations, ¶ 110.
[191] Respondent's Observations, ¶ 111.
[192] Respondent's Observations, ¶ 112.
[193] *Southern Pacific Properties (Middle East) Limited* v. *Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Preliminary Objections to Jurisdiction, 27 November 1985, ¶¶ 79-86 (**RL-19**).
[194] Respondent's Observations, ¶ 113.

to assume jurisdiction and to accept that there exists a valid arbitration agreement under public international law between EMPC and the Netherlands. [195]

155. Moreover, the Respondent states that it is common ground that Article 41 of the ICSID Convention codifies the principle of *Kompetenz-Kompetenz*, which is a right capable of requiring protection.[196] However, in *Uniper*, the tribunal held that the principle of *Kompetenz-Kompetenz* was not engaged, as any ruling by the German court on the tribunal's jurisdiction would have no effect on the tribunal's authority to decide that question for itself under the ECT and the ICSID Convention, in respect of which the Netherlands had given assurances.[197]

156. In *RWE*, the tribunal accepted the Netherlands' submission to the German court that the question before the court was not one of the ICSID Convention, but one of EU and German law, and again, during the arbitral proceedings, the Netherlands clearly accepted that the German court would not be able to rule on the arbitral tribunal's competence under the ICSID Convention or the ECT.[198]

157. Therefore, the Respondent concludes that the Antwerp Proceedings – a *fortiori* in their revised form – do not threaten the exclusivity of the ICSID proceedings, nor the principle of *Kompetenz-Kompetenz*. Just as in *Uniper* and *RWE*, the Antwerp Proceedings will not purport to decide an issue in the Tribunal's competence, and do not purport to decide or hinder the Tribunal's freedom to decide the same based on the following:[199]

> "*(a) … the Netherlands had no choice but to commence the Antwerp Proceedings because it is required to do so under EU law.*
>
> *(b) … the claim brought in the Antwerp Proceedings is a Belgian law claim in tort, which has no nexus with the present arbitration because each of the Antwerp Business Court and the Tribunal will make its decision under a different law and for a different purpose*[.]
>
> *(c) In the Antwerp Proceedings, the Netherlands only argues that the commencement of the arbitration proceedings was contrary*

[195] Respondent's Observations, ¶ 114.
[196] Respondent's Rejoinder, ¶ 57.
[197] *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV 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, ¶ 94 (**CL-023**).
[198] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No ARB/21/4, Decision on the Claimants' Request for Provisional Measures, 16 August 2022, ¶ 84 (**CL-024**).
[199] Respondent's Rejoinder, ¶ 60.

> *to Belgian law, in conjunction with EU law. This is clear from the very headings in the summons. The summons before the Antwerp Business Court does not seek a determination on the Tribunal's jurisdiction pursuant to the ECT and/or the ICSID Convention, nor do the Netherlands' reply submissions in the Antwerp Proceedings, contrary to what is argued by EMPC. It follows that just as in Uniper, only the Tribunal will determine the question of its competence under the ECT and the ICSID Convention, such that the Antwerp Proceedings do not purport to decide an issue that is within the competence of the Tribunal. The Netherlands has given assurances in this respect.*
>
> *(d) The Antwerp Proceedings, if allowed to continue, will not hinder the Tribunal's ability to decide on its jurisdiction and EMPC's ability to pursue its claim. Just as in Uniper and RWE, no injunctive relief is sought before the Antwerp Business Court. In this respect, as indicated above:*
>
> > *(i) The Netherlands is in the process of withdrawing its request for provisional measures before th*
> >
> > *Antwerp Business Court and amending the request on the merits that EMPC be ordered to withdraw the arbitration;*
> >
> > *(ii) The Netherlands confirms that it will, prior to the issuance of the final award, refrain from initiating any further judicial proceedings before the Belgian Courts to request that EMPC withdraw or suspend this arbitration.*"

158. The Netherlands concludes that EMPC has not established that the right to exclusivity of ICSID proceedings or the principle of *Kompetenz-Kompetenz* require protection so as to warrant the grant of provisional measures by the Tribunal.[200]

c. No Necessity

159. The Netherlands states that there is no necessity or urgency to grant the provisional measures requested. ICSID Rule 47(3) provides that, "*[i]n deciding whether to recommend provisional measures, the Tribunal shall consider all relevant circumstances, including […] whether the measures are urgent and necessary*." Provisional measures can only be considered "*necessary*" and "*urgent*" when there is an imminent threat of actual harm to

[200] Respondent's Rejoinder, ¶ 61.

the rights invoked by the applicant that cannot be met with meaningful relief in the award.[201]

160. The Netherlands argues that there is no actual threat to the rights invoked by EMPC in the present case. The *Uniper* and *RWE* tribunals denied the applications for provisional measures in those cases for lack of necessity and/or urgency.[202] In essence, EMPC's Application is based on the premise that "*[t]he Netherlands cannot provide the representations that comforted the RWE and Uniper tribunals because the relief sought in the Antwerp Action is incompatible with those declarations*."[203]

161. However, the Netherlands submitted that it is indeed willing to provide EMPC and the Tribunal with certain assurances to achieve a similar outcome.[204] In its letter of 2 September 2025 to the Tribunal, the Netherlands provided the following assurances:[205]

> "• *The Netherlands confirms that it intends to comply with all its obligations under international law, including the ICSID Convention and the Energy Charter Treaty. The Netherlands confirmed, at the hearing on provisional measures, that this assurance extends to compliance by the Netherlands with Articles 53 and 54 of the ICSID Convention.*
>
> • *The Netherlands confirms that it commenced the Antwerp Proceedings in a good faith effort to meet what it views as its obligations under the EU Treaties and not to challenge the Kompetenz-Kompetenz of the Tribunal.*
>
> • *The Netherlands confirms that, during the hearing on 23 September 2025, it will request the Antwerp Business Court to record the Netherlands' withdrawal of its application for interim relief and amendment of the relief sought on the merits in order to remove the request that EMPC be ordered to withdraw this arbitration, in the event that the Antwerp Business Court has not formally done so before such date.*

[201] Respondent's Observations, ¶ 115.

[202] *RWE AG and RWE Eemshaven Holding II BV* v. *Kingdom of the Netherlands*, ICSID Case No. ARB/21/4, Decision on Claimants' Request for Provisional Measures, 16 August 2022, ¶ 89 (**CL-024**); *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V.* v. *Kingdom of the Netherlands*, ICSID Case No. ARB/21/22, Decision on the Claimants' Request for Provisional Measures, 9 May 2022, ¶ 102 (**CL-23**).

[203] Respondent's Observations, ¶ 116.

[204] Respondent's Observations, ¶ 116.

[205] See the Respondent's Letter to the Tribunal dated 2 September 2025.

> *• The Netherlands confirms that it will not argue before any forum that any decision that might be rendered by the Antwerp Business Court constitutes anything other than a finding of a tort under Belgian law, in conjunction with EU law.*
>
> *• The Netherlands confirms that, prior to the issuance of the final award in this arbitration, it will refrain from initiating any further judicial proceedings against EMPC before any domestic court to request that EMPC withdraw or suspend this arbitration.*"

162. The Netherlands further contends that in the case of *WOC v. Spain* – which is mentioned by EMPC in its Application – the Tribunal ordered Spain to cease the proceedings it had commenced before the German courts, essentially because Spain was unwilling to provide the same assurances as the Netherlands had given in *Uniper* and *RWE*. Now that the Netherlands undertakes similar assurances, the decision in the matter of *WOC v. Spain* is not on point.[206]

163. The Netherlands adds that the Tribunal does not need to consider the merits of the Netherlands' claims in the Antwerp Proceedings at this stage, as a hearing there is unlikely to take place for at least 1.5 years, with a judgment taking even longer. Therefore, the Tribunal may issue its jurisdictional decision well before the Antwerp Court rules on the merits.[207]

164. The Netherlands also affirms that the traditional position under public international law is that a provisional measure is "*necessary*" only if it is required to prevent irreparable harm, i.e., harm not adequately repaired by an award of damages. However, some investment treaty tribunals have set a lower threshold of a material risk of serious or grave harm to the requesting party's right. [208]

165. According to the Netherlands, EMPC's proposition that an even lower threshold ought to be adopted, namely that provisional measures are required "*to avoid harm or prejudice being inflicted upon the applicant*", is plainly wrong. It is contradicted by the very authority it quotes in support thereof. [209] The Respondent refers to the decision on provisional measures in *Quiborax v. Bolivia,* quoted by EMPC, in which the tribunal was merely setting out the parties' agreement that there needed to be harm or prejudice. When quoted in full, the passage makes clear that the parties did not agree as to the nature of the harm and that

[206] Respondent's Observations, ¶ 117.
[207] Respondent's Observations, ¶ 118.
[208] Respondent's Rejoinder, ¶ 62.
[209] Respondent's Rejoinder, ¶ 63.

the tribunal held that the harm had to be irreparable, that is to say, not capable of being repaired by way of damages.[210]

166. The Netherlands argues that EMPC has not demonstrated that the provisional measures are necessary to prevent serious or irreparable harm to its rights under Articles 26 and 41 of the ICSID Convention:[211]

> "*(a) There is no harm to the integrity of the arbitration. Just as in Uniper and RWE, the Antwerp Proceedings do not purport to decide the question of the jurisdiction of the Tribunal …*
>
> *(b) …[t]he Netherlands has provided sufficient assurances.*
>
> *(c) Moreover, the Netherlands is in the process of withdrawing its Antwerp PM Application and amending its request for relief on the merits, which were the only aspects of the Antwerp Proceedings that EMPC asserted could have interfered with its right to pursue the ICSID arbitration (quod non). It follows that EMPC's allegation that the Antwerp Proceedings pose an existential threat to the arbitration is manifestly incorrect. It is also incorrect that the case at hand can be distinguished, in EMPC's favour, from Uniper and RWE …*"

d. No Urgency

167. In addition, the Netherlands argues that it is not urgent to recommend provisional measures compelling the Netherlands to withdraw its Provisional Claim.[212] It states that under Belgian law, a decision on the Provisional Claim is not binding on the Antwerp Court in later stages of the Antwerp Proceedings. Hence, in case the court were to decide for the purpose of the Provisional Claims that, *prima facie*, no valid arbitration agreement exists between EMPC and the Netherlands under EU law, the Antwerp Court could take a different view thereon in the proceedings on the merits. Nevertheless, it is still important for the Netherlands that the Provisional Claim is decided upon by the Antwerp Court, as this would allow the Netherlands to rely on the *res judicata* effect of the decision on the Provisional Claim in other court proceedings. [213]

[210] *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶¶ 155-156 (**CL-0014**).
[211] Respondent's Rejoinder, ¶ 65.
[212] Respondent's Observations, ¶ 119.
[213] Respondent's Observations, ¶ 120.

168. The Respondent contends that it has an interest in obtaining a decision with *res judicata* effect that, *prima facie*, EMPC has committed a tort under Belgian law. The Netherlands has such interest for inter alia the following three reasons:[214] (i) such a decision would confirm that a court of a Member State of the EU finds, albeit provisionally, that Arbitration in this case is precluded under EU law, (ii) the Netherlands can brief the Tribunal with the help of that decision on the interpretation and application of EU law. As stated by the tribunal in the case of *RWE* in comparable circumstances, it was "*credible and reasonable*" for the Netherlands to use a decision from the German courts in making a defence before that tribunal, and (iii) the Netherlands wishes to reserve the right to invoke the *res judicata* effect of any decision of the Antwerp Court on the Declaratory Claim in ancillary or follow-up proceedings before national courts.[215]

169. The Netherlands argues that should the Tribunal assume that it has *prima facie* jurisdiction, the Netherlands undertakes to pursue the Provisional Claim only for the purpose of the *res judicata* effect of the judgment in which the Provisional Claim is decided upon.[216] It affirms that it has no intention to preclude EMPC from continuing to participate in the present Arbitration. Nor is there a concept of contempt of court in Belgian law that could apply to EMPC and that could result in some other form of impediment.[217]

170. As held by the *Quiborax* tribunal, "*irreparable harm is a harm that cannot be repaired by an award of damages.*"[218] In this case, EMPC faces no such harm from the Provisional Claim, as long as the Netherlands does not enforce a favorable ruling. Additionally, unlike typical Belgian practice, the Netherlands has not sought penalty payments for non-compliance, meaning EMPC would face no financial consequences if it does not comply with any Belgian court decision.[219]

171. The Netherlands argues that EMPC's assertion that a potential finding by the Antwerp Court that it violated that court's order would harm its reputation and thereby constitute irreparable damage, is incorrect. As similarly held by the *Uniper* tribunal, a potential ruling by the Antwerp Court does not inflict significant reputational harm upon EMPC, and EMPC does not substantiate why this might be the case. In any event, the protection of one's purported reputation is not a right, still less a right that could warrant the order of provisional measures.[220]

[214] Respondent's Observations, ¶ 122.
[215] Respondent's Observations, ¶¶ 123, 124.
[216] Respondent's Observations, ¶ 124.
[217] Respondent's Observations, ¶ 125.
[218] *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 156 (**RL-21**).
[219] Respondent's Observations, ¶ 126.
[220] Respondent's Observations, ¶ 127.

172. Furthermore, the Netherlands contends that it is common ground between the Parties that a provisional measure is urgent if it cannot await the outcome of the award on the merits.[221] Moreover, it adds:[222]

> *(a) The Netherlands is now in the process of withdrawing the Antwerp PM Application, and will request formal confirmation of the same from the Antwerp Business Court at the hearing scheduled for 23 September 2025; and*
>
> *(b) The Netherlands is in the process of amending its request for relief in the Antwerp Merits Procedure to request only a declaration that the institution of an intra-EU investment arbitration by EMPC was contrary to Belgian law, in conjunction with EU law, and compensation for arbitration costs provisionally estimated as EUR 1. The matter will be heard at the earliest within one year of institution of the proceedings and a judgment will be issued within three to five months of that hearing.*

173. According to the Netherlands, it follows a *fortiori* that there is plainly no urgency to EMPC's request for provisional measures.[223]

e. No Proportionality

174. The Netherlands contends that the requested provisional measures are disproportionate as ICSID Rule 47(3) provides that the Tribunal shall consider the effect that the measures may have on each party in deciding whether to recommend provisional measures. This requirement calls upon the Tribunal to weigh not only the potential harm to the Claimant but also the harm caused to the Respondent if the provisional measure were granted. [224]

175. The Netherlands argues that the harm which EMPC alleges it will suffer does not outweigh the harm caused to the Netherlands if EMPC's Application were to be granted. If the provisional measures were granted, this would result in a recommendation that would call on the Netherlands to breach its obligations under the EU Treaties. This follows from the CJEU's *PL Holdings* judgment which affirms that the Netherlands must uphold EU Treaty obligations by ensuring EU courts handle matters involving interpretation and application

[221] Respondent's Rejoinder, ¶ 66.
[222] Respondent's Rejoinder, ¶ 67.
[223] Respondent's Rejoinder, ¶ 68.
[224] Respondent's Observations, ¶ 128.

of the Treaties and challenging any efforts to bypass the EU judicial system in such disputes. [225]

176. In the *Uniper* and *RWE* cases, the European Commission communicated that halting German proceedings could trigger an EU law compatibility review. Conversely, in the EMPC case before the Antwerp Court, the Commission acknowledged that the Netherlands was acting in line with its EU obligations – specifically under Articles 4(3), 19(1) of the TEU, and 267, 344 TFEU – by defending the integrity of Union law and judicial cooperation.[226]

177. In both the *RWE* and *Uniper* cases, the tribunals acknowledged that the Netherlands initiated legal proceedings in Germany based on its obligations under EU law. These actions were taken under Article 1032(2) of the German arbitration act (ZPO) to seek a ruling that the arbitrations were inadmissible. Importantly, the tribunals respected the parallel German court proceedings and did not intervene, allowing both tracks to proceed simultaneously.[227] Such relief cannot, however, be obtained in the Antwerp Proceedings. Therefore, the Netherlands seeks the aforementioned, alternatively worded, declaratory relief. [228]

178. The Netherlands explains that if the Tribunal grants EMPC's Application, the Netherlands must breach its EU law obligations. The Netherlands is striving to comply with all its international law obligations, including EU law as the *RWE* tribunal noted the responsibilities and pressures facing the Netherlands and was reluctant to second-guess its position, relying on the CJEU's decision in *PL Holdings v. Poland* that it was obligated under EU law to initiate the German Proceedings.[229]

179. It also argues that it is disproportionate to recommend provisional measures in light of the jurisdictional objections which the Netherlands will raise as held by the *Biwater Gauff* tribunal.[230] In that regard, the Netherlands' jurisdictional objections should be an additional factor on the basis of which the Tribunal should not exercise its discretion to recommend provisional measures.[231]

[225] Respondent's Observations, ¶ 130.
[226] Respondent's Observations, ¶¶ 130-131.
[227] Respondent's Observations, ¶ 132.
[228] Respondent's Observations, ¶ 133.
[229] Respondent's Observations, ¶ 135.
[230] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006, ¶ 70 (**CL-8**).
[231] Respondent's Observations, ¶ 136.

180. Moreover, the harm to the Netherlands if the measures are granted far outweighs any potential harm to EMPC if the measures are refused as:[232]

(a) EMPC's measures would force the Netherlands to drop the Antwerp Proceedings. The Netherlands has a sovereign right to seek remedies in EMPC's home court under Belgian tort and EU law. Since these do not affect EMPC's arbitration rights and fall outside the Tribunal's jurisdiction, blocking them would be disproportionate as several tribunals have rejected provisional measures to halt domestic criminal proceedings.

(b) Furthermore, a withdrawal of the Antwerp Proceedings in their entirety would put the Netherlands in breach of its EU law obligations as the Netherlands would not be protected by the mere fact that this Tribunal would have issued provisional measures and EMPC's disagreement with the Netherlands and the Commission as to the scope and nature of the Netherlands' obligations under EU law, does nothing to alleviate the prejudice that would be suffered by the Netherlands, should it be forced to terminate the Antwerp Proceedings.

(c) It is not correct, as EMPC alleges, that the Tribunal can grant the Netherlands the relief it needs to comply with its EU law obligations. The Netherlands' obligation entails pursuing proceedings before a domestic court with jurisdiction.

(d) By contrast, should the provisional measures be refused, the prejudice to EMPC would be minimal. As to which:

(i) There is no risk that the Antwerp Business Court orders EMPC to suspend or withdraw the Antwerp Proceedings, *a fortiori* in light of the fact that the Netherlands is in the process of amending the request for relief in the Antwerp Merits Procedure and withdrawing the Antwerp PM Application.

(ii) Further, the Netherlands has assured that it will, prior to the issuance of the final award, refrain from initiating any further judicial proceedings before the Belgian Courts to request that EMPC withdraw or suspend this Arbitration.

(iii) It is true that EMPC will still have to defend the lawfulness of its conduct under Belgian law, in the context of the Antwerp Merits Procedure. However, its prejudice is limited to the costs it incurs in the Antwerp Proceedings, which can, if the mere fact of incurring those costs violates the ECT (*quod non*), be repaired by way of monetary award.

(iv) The Antwerp Merits Procedure is ultimately deciding a question of Belgian law,

[232] Respondent's Rejoinder, ¶ 70.

in conjunction with EU law, and does not interfere with the Tribunal's *Kompetenz-Kompetenz*.

(v) The Antwerp Merits Procedure only requests the payment by EMPC of Arbitration costs provisionally estimated as EUR 1 and, in any event, any such monetary award is, by definition, a prejudice that can be compensated by way of damages by the Tribunal.

181. As to EMPC's allegation that the Tribunal can take comfort that EMPC's request that the Tribunal prevent a domestic action from proceeding finds support in decisions from many other tribunals, the Netherlands argues that EMPC's reference to the "*numerous examples*" cited in its Application, where tribunals enjoined domestic proceedings, is of no assistance. Each decision requires an examination of the relationship or nexus between the two proceedings, which is a fact sensitive exercise. [233]

182. Two of the five provisional measures decisions cited by EMPC – *Agility v. Pakistan* and *Tokios Tokéles v. Ukraine* – are not useful for drawing conclusions in the current case. First, in *Agility*, the decision is referenced through secondary sources and is not publicly available, leaving key details about Pakistan's domestic proceedings and their connection to arbitration unknown. Second, in *Tokios Tokéles*, the decision is brief and lacks specifics about Ukraine's domestic proceedings.[234]

183. By contrast, the Netherlands argues that in the case of *Uniper*, the tribunal considered essentially the same issue as in the case at hand, namely whether proceedings commenced by the Netherlands in Germany, in those cases for a declaration that the tribunal had no jurisdiction under German and EU law, breached Article 26 of the ICSID Convention and refused to grant any provisional measures against the Netherlands.[235] Similarly, the *RWE* tribunal ruled that German court proceedings did not interfere with its authority under the ICSID Convention, nor with the claimants' rights or the arbitration process. This decision was based on the uncertain outcome of the German proceedings and assurances from the Netherlands affirming the tribunal's jurisdiction and the claimant's right to continue the arbitration.[236]

184. The Netherlands admits that it is correct that the tribunal in *WOC v. Spain* reached a different conclusion to that in *Uniper* on another similar application before a German Court.[237] However, the tribunal in *WOC* only considered the distinction between the governing law in the German proceedings and that in the ICSID proceedings in the context

[233] Respondent's Rejoinder, ¶ 50.
[234] Respondent's Rejoinder, ¶ 51.
[235] Respondent's Rejoinder, ¶ 52.
[236] Respondent's Rejoinder, ¶ 53.
[237] Respondent's Rejoinder, ¶ 54.

of deciding whether the German proceedings were to be considered a remedy for the purposes of Article 26 of the ICSID Convention. Contrary to the tribunal in *Uniper*, the *WOC* tribunal did not consider whether the fact that each of the German Court and the Tribunal would make its decision under a different law meant that there was not a sufficient nexus between the two proceedings.[238]

185. Further, the Respondent explains that a key difference between the *Uniper* and *RWE* cases, on the one hand, and *WOC*, on the other, as pointed out by EMPC itself, was that the Netherlands, unlike Spain, had provided broad assurances to the respective tribunals.[239]

186. The Netherlands discusses whether the relief sought[240] as submitted by EMPC is reasonable and appropriate. It argues that:[241]

> "*139. Under para. 90(a) of the Application, EMPC requests a declaration that the Tribunal has exclusive competence and authority to hear and resolve any objections to its jurisdiction pursuant to Articles 26 and 41 ICSID Convention. This is, however, not a provisional measure and EMPC has also not indicted why it would be necessary or urgent to obtain such a declaration.*
>
> *140. Under para. 90(b), EMPC primarily requests the Tribunal, simply put, to order the Netherlands to withdraw with prejudice the Antwerp Proceedings. For that purpose, EMPC insists that the Netherlands should sign and submit to the Antwerp Court a document in the form of Appendix A to the Application.*

[238] Respondent's Rejoinder, ¶ 55.
[239] Respondent's Rejoinder, ¶ 56.
[240] See the Claimant's First Relief Sought, which is as follows:
"*90. EMPC respectfully requests that the Tribunal preserve its rights by granting provisional measures. Specifically, the Claimant requests that the Tribunal:*
(a) DECLARE that pursuant to Articles 26 and 41 of the ICSID Convention, it has exclusive competence and authority to hear and resolve any objections to its jurisdiction;
(b) ORDER the Netherlands to withdraw with prejudice the Antwerp Action by signing, within three business days of this order, the submission to the Antwerp Court in the form of Appendix A to the Claimant's Application (or, the alternative relief described in paragraph 22 above);
(c) ORDER the Netherlands to refrain from initiating any further proceeding before national or EU courts, relating in any way to this Arbitration or seeking to restrain the Claimant from continuing this Arbitration or otherwise participating fully in this Arbitration, whether by injunctive relief or any other action;
(d) ORDER the Netherlands to bear all fees and expenses incurred by both parties, ICSID and the Tribunal in connection with the Application; and,
(e) GRANT any further or alternative provisional relief that the Tribunal considers just and appropriate." (Claimant's Application, ¶ 90).
[241] Respondent's Observations, ¶¶ 139-144.

> *141. EMPC seeks a decision which disproportionately burdens the Netherlands, due to the permanent nature of EMPC's requested relief. After all, Annex A requires the Netherlands to permanently waive its rights,96 while the relevant rights do not fall within the jurisdiction of the Tribunal.*
>
> *142. Similarly, the alternative relief requested by EMPC under para. 90(b) should be rejected in light of what the Netherlands stated before in this submission. There is no legal basis to order the Netherlands to suspend the Antwerp Proceedings. In addition, the Netherlands has offered significant confirmations and undertakings to the Tribunal so as to ensure that the Netherlands will honour its obligations both with respect to this arbitration and to the Antwerp Proceedings.*
>
> *143. In addition, EMPC's request under para. 90(c), that the Netherlands should be ordered to refrain from initiating any further proceedings before national or EU courts relating in any way to this Arbitration, imposes nothing less than a blanket ban on access to justice. Such relief exceeds the nature of a provisional measure.*
>
> *144. In respect of EMPC's request under para. 90(d), it follows from the above that there is also no basis to order the Netherlands to bear all fees and expenses incurred by both parties, ICSID and the Tribunal in connection with the Application. To the contrary, it is EMPC that should be ordered to the bear the said costs and expenses, as the party whose Application should be rejected in full, at least in most part.*"

(2) Costs

187. The Netherlands submits that no order should be made as to the costs of the application at this stage. However, the Netherlands reserves the right to seek recovery of its costs, including all fees and expenses incurred and the costs of ICSID and the Tribunal in connection with the application at a later juncture.[242]

[242] Respondent's Rejoinder, ¶ 72.

IV. TRIBUNAL'S ANALYSIS

A. LEGAL FRAMEWORK

188. The Tribunal's power to rule on the Claimant's Application for Provisional Measures is enshrined in the ICSID Convention and in the ICSID Arbitration Rules. Article 47 of the ICSID Convention establishes that:

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

189. In addition, Rule 47 of the ICSID Arbitration Rules provides that:

> "*(1) A party may at any time request that the Tribunal recommend provisional measures to preserve that party's rights, including measures to:*
>
> *(a) prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process;*
>
> *(b) maintain or restore the* status quo *pending determination of the dispute; or*
>
> *(c) preserve evidence that may be relevant to the resolution of the dispute.*
>
> *(2) The following procedure shall apply:*
>
> *(a) the request shall specify the rights to be preserved, the measures requested, and the circumstances that require such measures;*
>
> *(b) the Tribunal shall fix time limits for submissions on the request;*
>
> *(c) if a party requests provisional measures before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request so that the Tribunal may consider the request promptly upon its constitution; and*

> *(d) the Tribunal shall issue its decision on the request within 30 days after the later of the constitution of the Tribunal or the last submission on the request.*
>
> *(3) In deciding whether to recommend provisional measures, the Tribunal shall consider all relevant circumstances, including:*
>
> *(a) whether the measures are urgent and necessary; and*
>
> *(b) the effect that the measures may have on each party.*
>
> *(4) The Tribunal may recommend provisional measures on its own initiative. The Tribunal may also recommend provisional measures different from those requested by a party.*
>
> *(5) A party shall promptly disclose any material change in the circumstances upon which the Tribunal recommended provisional measures.*
>
> *(6) The Tribunal may at any time modify or revoke the provisional measures, on its own initiative or upon a party's request.*
>
> *(7) A party may request any judicial or other authority to order provisional measures if such recourse is permitted by the instrument recording the parties' consent to arbitration.*"

190. Article 41(1) of the ICSID Convention provides that:

> "*(1) The Tribunal shall be the judge of its own competence.*"

191. Moreover, Article 26 of the ICSID Convention reads as follows:

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

192. Furthermore, Article 26 of the Energy Charter Treaty (ECT) reads:

> "*(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter*

in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

(5) (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.*"

193. As to the requirements for granting provisional measures, the Tribunal concurs with the Parties[243] that the following criteria must be satisfied cumulatively. However, the Parties diverge in their views as to whether these requirements are fulfilled in the present Application, a matter which will be addressed in the following section. The requirements are as follows:

> *(a) whether the Tribunal has* prima facie *jurisdiction;*
>
> *(b) whether the Application engages rights requiring protection;*
>
> *(c) whether there is "urgency";*
>
> *(d) whether the requested measures are "necessary"; and*
>
> *(e) whether the requested measures are "proportionate."*

194. The Tribunal agrees with the Netherlands' argument that the burden of proof lies with the party seeking the provisional measure,[244] and this was not contested by EMPC, and has been affirmed by a number of arbitral tribunals.[245]

195. Finally, the Tribunal is persuaded that, although Article 47 of the ICSID Convention and Rule 47(1) of the ICSID Arbitration Rules state that tribunals may "*recommend*" provisional measures, such "*recommendations*" are indeed legally binding.

B. TRIBUNAL'S DISCUSSION

196. In this section, the Tribunal will address the Parties' positions outlined above to determine whether the provisional measures requested by the Claimant are warranted in the current circumstances. The Tribunal will not, and indeed cannot at this stage, make any determination on the underlying jurisdictional issues or the merits of the case. Thus, the

[243] Claimant's Application, ¶ 28; Respondent's Observations, ¶ 81.
[244] Respondent's Observations, ¶ 82.
[245] See for example: *Libra LLC and others v. Republic of Azerbaijan*, ICSID Case No. ARB/23/46, Decision on the Claimants' Request for Provisional Measures, 8 July 2024, ¶ 57 (**RL-36**); See also: *Sergei Viktorovich Pugachev v. The Russian Federation*, (UNCITRAL) Interim Award, 7 July 2017, ¶ 216 (**RL-31**).

Tribunal's analysis is based solely on the record as it presently stands, and should not be interpreted as prejudging any future findings of fact or conclusions of law.

(1) Overlap Between this Arbitration and the Antwerp Proceedings

197. At the outset, and without making any determination in this respect, the Tribunal acknowledges and fully understands the Netherlands' efforts to comply with its obligations under EU law, including by initiating the Antwerp Proceedings. Moreover, the Tribunal notes with appreciation that the Netherlands has been cooperative in the present proceedings and its conduct has not evidenced any bad faith.

198. The first question to be addressed in considering the Parties' positions is whether and, if so, to what extent there is an overlap between this Arbitration and the Antwerp Proceedings. For the reasons explained below, having considered the nature and scope of the Antwerp Proceedings and this Arbitration in the light of the Parties written and oral submissions, the Tribunal finds that there is indeed a significant overlap between this Arbitration and the Antwerp proceedings in terms of the parties involved, the subject matter, and the applicable legal framework.

199. ***First,*** as to the parties, it is evident that the Parties to this Arbitration are identical to those participating in the Antwerp proceedings.

200. ***Second,*** as to the scope and substance of both sets of proceedings, it is clear that the basic premise underlying the Antwerp Proceedings is that the Tribunal lacks jurisdiction to hear EMPC's claims. Thus, the Antwerp Proceedings involve a determination of issues that directly pertain to the jurisdiction of this Tribunal, even if the cause of action may be structured as a claim in tort under Belgian law. The Netherlands' position is that:

> "*The Netherlands argue that, by initiating intra-EU investment arbitration proceedings notwithstanding the incompatibility of the arbitration clause in Article 26, para. 2, (c) of the ECT with Articles 267 and 344 on the Treaty on the Functioning of the European Union, as established by case law of the Court of Justice of the European Union, committed an unlawful act within the meaning of Article 1382 of the old Belgian Civil Code*."[246]

201. Thus, for the Antwerp Court to assess whether EMPC committed an unlawful act, it must necessarily examine issues that fall within the exclusive jurisdiction of this Tribunal. The Claimant submits that the alleged tort depends exclusively on a finding by the Antwerp Court whether this Tribunal has jurisdiction. This is the exact same question that has to be

[246] Legal opinion by Alexander Hansebout and Roel Verheyden (Altius), 1 July 2025, p. 2, ¶ 2 (**RL-8**).

addressed by this Tribunal.[247] According to Articles 26 and 41 of the ICSID Convention, such jurisdictional matters are to be determined **exclusively** by the Tribunal. The Antwerp Court itself states: "[...] *The arguments put forward by EMPC regarding the jurisdiction of ICSID, may be relevant to this court in assessing whether it has the required jurisdiction, but they do not necessitate the suspension of the proceedings*."[248]

202. Furthermore, the relief sought by the Netherlands in the Antwerp Proceedings includes a request to have EMPC ordered to pay the costs of the ICSID Arbitration.[249] This also falls within the Tribunal's authority and should be decided in this Arbitration.

203. ***Third,*** with respect to the applicable legal framework, the Tribunal observes that the Antwerp Court will adjudicate the matter primarily under Belgian law, EU law and the ECT.[250] In parallel, as both Parties acknowledged during the Hearing,[251] this Tribunal is mandated to assess its jurisdiction in accordance with *inter alia* the ICSID Convention, the ECT, and EU law. This consideration of overlapping issues by both fora gives rise to a material overlap in legal standards and interpretive approaches. In the Antwerp Proceedings, the Netherlands specifically argues that the offer to arbitrate on which EMPC relies in this Arbitration is invalid. The offer to arbitrate is contained in Article 26 of the Energy Charter Treaty and its alleged invalidity arises from the Netherland's EU law arguments. It is, therefore, impossible for the Antwerp Court to make findings regarding the Tribunal's jurisdiction without reaching conclusions regarding the ECT and EU law which unavoidably overlap with the question of the Tribunal's jurisdiction in this Arbitration and under the ICSID Convention.

204. ***Fourth,*** during the Hearing, the Netherlands itself acknowledged that there is an overlap, though it referred to this as a "*limited overlap*" between the Antwerp proceedings and this Arbitration.[252]

205. ***Fifth,*** most importantly as a matter of law and reasoning, given that the tort invoked by the Netherlands before the Antwerp Court is that EMPC has acted in a manner incompatible with EU law by commencing this Arbitration before a tribunal that lacks jurisdiction, the Tribunal is persuaded that the Antwerp Court cannot make a finding of tort without

[247] Antwerp Court, Netherlands Summons, 10 January 2025 (**C-67**), ¶¶ 12 and 39; Hearing Transcript, Claimant's First Application for Provisional Measures, 26 August 2025, pp. 119:20-22, 120:1-10.
[248] Antwerp Commercial Court, Antwerp division, Judgment, 19th Chamber, 30 September 2025, pp.4-5 (**C-0129-ENG**).
[249] Respondent's Rejoinder, ¶ 28.
[250] Antwerp Court, Netherlands Summons, 10 January 2025 (**C-67**), ¶¶ 25-26.
[251] Hearing Transcript, Claimant's First Application for Provisional Measures, 26 August 2025, Claimant: pp. 125:2-9, 126:1-11, 127:12-16, 128:9-16, 130:16-22, 131:1-9, 168:5-13; Respondent: pp. 122:18-22, 123:1-6, 172:21-22, 173:1-6.
[252] Hearing Transcript, Claimant's First Application for Provisional Measures, 26 August 2025, p. 128:18-22, 129:1-7.

addressing the validity of commencing this Arbitration and thus the question of the jurisdiction of this Tribunal. However, the jurisdiction and the issue of validity of commencing this Arbitration are matters that fall exclusively within the competence of this Tribunal according to Articles 26 and 41(1) of the ICSID Convention. The exclusive jurisdiction of this Tribunal was recognized by the Netherlands at the Hearing.[253]

206. In view of the foregoing, the Tribunal finds that the proceedings before the Antwerp Court and this Tribunal are not only procedurally concurrent but also substantively interlinked. This reinforces the conclusion that both fora will engage with the same legal questions and will operate within overlapping normative frameworks. Accordingly, the identity of the Parties in both fora, the substantive focus on jurisdictional questions central to this Tribunal's mandate, and the concurrent consideration and application of EU law create a significant legal overlap that cannot be disregarded.

(2) Legal Authorities and Cases

207. The Tribunal has considered carefully the legal authorities and cases submitted by the Parties in their respective submissions, and notes that, in particular, three cases are of direct relevance. These are: *Uniper v. Netherlands*, *RWE v. Netherlands*, and *WOC v. Spain*. Nevertheless, the present proceedings exhibit some distinctive features when compared to those legal authorities, as outlined below.

208. ***First,*** the nature of the relief sought in the present case differs materially from that which was pursued in the domestic proceedings in *Uniper*[254], *RWE*[255], and *WOC*[256] cases. In those cases, the respondents sought declaratory relief under German procedural law, specifically requesting a judicial determination that the claimants' arbitration claims were inadmissible due to their alleged incompatibility with EU law. The German procedural framework allowed the respondents to seek declaration without alleging wrongdoing or liability. By contrast, in this Arbitration, as explained by the Netherlands, the Respondent has initiated proceedings under Belgian law in conjunction with EU law, alleging that EMPC committed an unlawful act by commencing ICSID arbitration. The claim is grounded in Article 1382

[253] Hearing Transcript, Claimant's First Application for Provisional Measures, 26 August 2025, p. 129:7-10.
[254] *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV v. Kingdom of the Netherlands*, ICSID Case No ARB/21/22, Procedural Order No. 2, Decision on the Claimants' Request for Provisional Measures, (Uniper v. Netherlands, PO2), 9 May 2022, ¶ 29 (**CL-23**).
[255] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands,* ICSID Case No ARB/21/4, Decision on the Claimants' Request for Provisional Measures, (RWE v. Netherlands, Decision on PM Request), 16 August 2022, ¶¶ 4-5 (**CL-24**).
[256] *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, ¶ 34 (**CL-25**).

of the Belgian Civil Code, thereby introducing a liability-based cause of action rather than a purely declaratory one.[257]

209. ***Second,*** the Tribunal notes that while the Netherlands succeeded in submitting identical assurances in the *Uniper*[258] and *RWE* proceedings[259], Spain did not submit comparable assurances in the *WOC* case. In the present Arbitration, the Tribunal attaches considerable weight and expresses appreciation to the assurances provided by the Netherlands, most recently in its letter of 2 September 2025, and views that as a reflection of the Netherlands' commitment to upholding its obligations under international law. The Tribunal has no reason to question the good faith in which these assurances were given or the fact that the Netherlands will respect them. But the Tribunal notes that the assurances submitted in this Arbitration are not identical in form or substance to those provided in the *Uniper* and *RWE* cases. One significant difference is that, whereas in this Arbitration the concurrent consideration and application of EU law, acknowledged by both Parties, creates a significant legal overlap between the two proceedings, in *Uniper* and *RWE* the assurances given clearly distinguished the applicable legal frameworks in each proceeding. It is on this basis that the Uniper tribunal concluded that it was not concerned about any potential overlap.[260] The Tribunal will address the nature and implications of these assurances in a separate section below.

210. ***Third,*** the Tribunal notes that the relief sought by the Respondent in the Antwerp Proceedings includes a request that EMPC be ordered, by way of compensation for damages by means of equivalent restoration, to pay the costs incurred by the Netherlands in the arbitration proceedings initiated by EMPC against the Kingdom of the Netherlands before the International Centre for Settlement of Investment Disputes, registered under number ARB/24/44, provisionally estimated at EUR 1; and further, to have EMPC ordered to pay the costs of the Antwerp proceedings, including the costs of the summons and the indexed statutorily prescribed contribution towards the other party's legal representation costs. [261] Such a claim for compensation was not advanced in the domestic proceedings in *Uniper*, *RWE*, or *WOC* cases, and therefore constitutes a notable distinction in the nature and scope of the relief pursued.

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[257] Legal opinion by Alexander Hansebout and Roel Verheyden (Altius), 1 July 2025, p. 2-4, ¶¶ 3-5 (**RL-8**).
[258] *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV 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, ¶ 93 (**CL-23**).
[259] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands,* ICSID Case No ARB/21/4, Decision on the Claimants' Request for Provisional Measures, (RWE v. Netherlands, Decision on PM Request), 16 August 2022, ¶ 86 (**CL-24**).
[260] *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV 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, ¶¶ 88-89 (**CL-23**).
[261] Respondent's Rejoinder, ¶ 28.

211. In light of the foregoing, the Tribunal considers that the present case is distinguished from the *Uniper*, *RWE*, and *WOC* cases in several material respects, including the nature of the relief sought, the form and substance of the assurances provided, and the scope of the Respondent's claims in the Antwerp proceedings. These differences have informed the Tribunal's assessment of the potential impact of the Antwerp Proceedings on the integrity of this Arbitration and the necessity of the provisional measures requested.

(3) Requirements for Provisional Measures

212. The Tribunal will now examine each of the requirements for granting provisional measures, as set out below.

a. The existence of a prima facie *case*

213. To advance an application for provisional measures, it is common ground that the Claimant must establish *prima facie* jurisdiction. In addition, other tribunals have also considered whether there is a *prima facie* case on the merits. In the present case, the Tribunal will assess both elements.[262]

(i) Prima facie jurisdiction

214. The Tribunal agrees that for it to find that it has *prima facie* jurisdiction over this dispute, it is sufficient that "*the provisions invoked appear prima facie to afford a basis for jurisdiction to decide the merits*."[263] In conducting such *prima facie* analysis, the Tribunal examines "*the facts alleged by the applicant [for provisional measures] [. . .] without it being necessary […] to verify them and analyse them in depth*." [264]

215. Having reviewed the Parties' arguments and submissions, the Tribunal is satisfied that it has *prima facie* jurisdiction to hear the present dispute. The Tribunal considers that the test applied by the arbitral tribunal in *Nova Group v. Romania*,[265] is useful, and the Tribunal

[262] See for example: *Fouad Alghanim & Sons Co for General Trading & Contracting, WLL and Mr Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No ARB/13/38, Order on Application for the Grant of Provisional Measures, 24 November 2014, ¶ 30 (**CL-17)**; *Sergei Paushok, CJSC Golden East Company and CJSCVostokneftegaz Company v. The Government of Mongolia*, (UNCITRAL) Order on Interim Measures, UNICTRAL, 2 September 2008, ¶ 45 (**CL-10**).

[263] *Hydro Srl and others v. Republic of Albania*, ICSID Case No ARB/15/28, Order on Provisional Measures, 3 March 2016, ¶ 3.8 (**CL-19**).

[264] *Millicom International Operations BV and Sentel GSM SA v. Republic of Senegal,* ICSID Case No ARB/08/20, Decision on the Application for Provisional Measures Submitted by the Claimants on 24 August 2009, 9 December 2009, ¶ 42 (**CL-13**).

[265] *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7 Concerning the Claimant's Request for Provisional Measures, 29 March 2017, ¶¶ 258-262 (**RL-9**).

adopts this test to arrive at the conclusion that it has *prima facie* jurisdiction for the following reasons.[266]

216. ***First***, it appears undisputed that the case involves a "*legal dispute*" arising out of an investment, within the meaning of Article 25 of the ICSID Convention.

217. **Second**, the Claimant also meets the definition of a "National of another Contracting State" under Article 25 of the ICSID Convention**,** which includes "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration."

218. ***Third***, it is equally undisputed that Belgium, which the Tribunal understands to be the incorporation state of EMPC, and the Netherlands are both Contracting States to the ICSID Convention and the ECT for the purpose of the present proceedings.

219. ***Fourth***, the Claimant, on a purely *prima facie* basis, appears to qualify as an "*Investor*" under Article 1(7)(a)(ii) of the ECT, which defines an investor as "*a company or other organisation organised in accordance with the law applicable in that Contracting Party*."

220. Although the Tribunal is indeed open to considering developments that may affect the Netherlands' consent to arbitration, such developments do not, on a *prima facie* basis, appear to impact the *prima facie* jurisdictional test for the purpose of the requested relief.

221. For the avoidance of doubt, the Tribunal is not persuaded that, at this stage, an analysis of the implications of recent developments in intra-EU arbitration, including relevant case law, the *Inter Se* Declaration, and/or the *Inter Se* Agreement are necessary for the fulfillment of a ***prima facie*** jurisdiction to consider the requested relief. However, all these issues are indeed relevant to the substance of the Netherland's jurisdiction and admissibility objections, which are yet to be considered and determined, once the Tribunal is fully briefed thereon by the Parties in the course of the present proceedings. The assertion of *prima facie* jurisdiction, exclusively for present purposes, in no way prejudges the Tribunal's conclusions on any preliminary objections of a jurisdictional character that the Respondent may raise in due course.

(ii) Prima facie case on the merits

222. As to whether there is a prima facie case on the merits, the Tribunal is of the view that, as stated in Paushok v. Mongolia, it "need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the

[266] For the avoidance of doubt, the elements relied upon by the Tribunal to establish *prima facie* jurisdiction are not intended to address, prejudge, or determine any issue pertinent to the merits of any jurisdictional and/or admissibility objections, as well as any issue pertinent to the merits of EMPC's claims.

conclusion that an award could be made in favor of Claimants."[267] The Tribunal "needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal."[268]

223. In its Request for Arbitration, EMPC invokes Article 10(1) of the ECT, which obliges the Netherlands to accord EMPC "*fair and equitable treatment*," among other protections. Based on the allegations presented, the Tribunal finds that it is possible – if (*and only if*) the alleged facts are proven – that a violation of the ECT may be established.[269] Furthermore, in its Application, EMPC identified specific acts which, in the Tribunal's view, satisfy the requirement of a *prima facie* case on the merits for the purpose of considering this application for interim relief.[270]

224. Needless to say, the Tribunal is yet to be briefed by the Parties on the issues of jurisdiction, admissibility and the merits, and so this *prima facie* view that the claims do not appear to be frivolous or outside the Tribunal's competence is yet to be considered, verified and tested in the course of this Arbitration.

225. In sum, the Tribunal concludes that it has *prima facie* jurisdiction and that a *prima facie* case on the merits appears to exist with respect to both the dispute and the Application.

b. Right to be preserved

226. EMPC emphasizes the importance of preserving its rights and the integrity of these proceedings as a requirement for granting provisional measures under the ICSID Convention, focusing on two aspects: (i) the preservation of the exclusivity of ICSID arbitration pursuant to Article 26 of the ICSID Convention, and (ii) the preservation of the Tribunal's exclusive competence to rule on its own jurisdiction under Article 41 of the ICSID Convention. The Netherlands does not dispute that these are rights that merit protection, but it rather questions their applicability in the present case.

227. The Tribunal agrees with the Parties that, in principle, the rights identified are subject to preservation through provisional measures. It is also appropriate to recall that the

[267] *Sergei Paushok, CJSC Golden East Company and CJSCVostokneftegaz Company v. The Government of Mongolia,* (UNCITRAL) Order on Interim Measures, UNICTRAL, 2 September 2008, ¶ 55 (**CL-10**).
[268] *Ibid*.
[269] Request for Arbitration, ¶ 11.
[270] Claimant's Application, ¶ 36.

restoration[271] or maintenance[272]of the *status quo*, specifically, the non-aggravation of the dispute, is a right warranting protection. This principle has been consistently recognized and upheld by ICSID tribunals in various cases.[273]

228. The Tribunal will address each of these rights in turn, noting that the existence of only one right requiring protection may justify the granting of provisional measures.

(i) Preservation of the exclusivity of ICSID arbitration under Article 26 of the ICSID Convention

229. The Tribunal is of the view that, as stated in Perenco v. Ecuador, the object of Article 26 of the ICSID Convention "is to ensure that an ICSID Tribunal, duly constituted, has exclusive jurisdiction over any dispute of which it is seized […]."[274] The Tribunal also agrees with the position adopted by the tribunal in Churchill Mining v. Indonesia that: "It is undisputed that the exclusivity of ICSID proceedings is a procedural right which may find protection by way of provisional measures under Article 47 of the ICSID Convention. As stated in Tokios Tokéles: 'Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative'."[275]

230. This was also affirmed by the tribunal in Awdi v. Romania where it was held that: "the Tribunal has confirmed that the exclusivity of the ICSID proceedings gives it the 'exclusive power to rule upon the legal issues brought before it' and that 'an ICSID tribunal has to

[271] See for example: *Evrobalt LLC v. Republic of Moldova*, SCC Case No. EA 2016/082, Award on Emergency Measures, 30 May 2016, ¶ 37 (https://www.italaw.com/cases/4179); *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, ¶ 97 (**RL-10**).

[272] See for example: *Klesch Group Holdings Limited and Raffinerie Heide GmbH v. Federal Republic of Germany*, ICSID Case No. ARB/23/49, Decision on Provisional Measures, 23 July 2024, ¶ 47 (**CL-26**); *Libra LLC and others v. Republic of Azerbaijan*, ICSID Case No. ARB/23/46, Decision on the Claimants' Request for Provisional Measures, 8 July 2024, ¶ 69 (**RL-36**); *Nasib Hasanov v. Georgia*, ICSID Case No. ARB/20/44, Decision on Claimant's Application for Provisional Measures, 14 June 2022, ¶ 60 (**RL-35**).

[273] See for example*: Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No ARB/10/15, and *Border Timbers Limited and others v. Republic of Zimbabwe*, ICSID Case No ARB/10/25, Directions Concerning Claimants' Application for Provisional Measures of 12 June 2012, 13 June 2012, ¶¶ 7-8 (**CL-16**); *Perenco Ecuador Ltd v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No ARB/08/6, Decision on Provisional Measures, 8 May 2009, ¶ 28 (**CL-11**); *Nasib Hasanov v. Georgia*, ICSID Case No ARB/20/44, Procedural Order No 3, 15 April 2021, ¶¶ 19-20 (**CL-21**).

[274] *Perenco Ecuador Ltd v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No ARB/08/6, Decision on Provisional Measures, 8 May 2009, ¶ 61 (**CL-11**).

[275] *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Procedural Order No. 9 (Provisional measures), 8 July 2014, ¶ 83 (https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2723/DC4652_En.pdf).

ensure that its exclusive jurisdiction is not, in law or in fact, impaired or undermined by the criminal proceedings conducted in the host State' […]"[276]

231. Based on the above, the Tribunal believes that the exclusivity of ICSID arbitration under Article 26 of the ICSID Convention is a fundamental principle worthy of protection, and that this exclusivity could, in some circumstances, be impacted by domestic procedures, where such procedures pose risks to the Tribunal's exclusive power to rule upon the legal issues brought before it. The tribunal in *RWE v. Netherlands,* for example, had to consider whether the domestic procedures in the specific circumstances of that case "*infringe on its exclusive authority to determine its own competence under the ICSID Convention, the Claimants' substantive rights, or the procedural integrity of this arbitration*."[277]

232. The Tribunal recalls that the Respondent stated that the Netherlands was in the process of withdrawing its Antwerp PM Application in full and withdrawing its request in the Merits Procedure that EMPC be ordered to withdraw the Arbitration proceedings, such that the relief on merits sought in the Antwerp Proceedings will thereafter be:[278]

> *"(a)* ***to hear it ruled that EMPC committed an unlawful act vis-à-vis the Netherlands by instituting an intra-EU investment arbitration dispute before an arbitral tribunal;*** **[...]**
>
> *(d) to hear EMPC ordered, by way of compensation for damages by means of equivalent restoration, to pay the costs incurred by the Netherlands in the arbitration proceedings initiated by EMPC against the Kingdom of the Netherlands before the International Centre for Settlement of Investment Disputes, known there under number ARB/24/44, provisionally estimated at EUR 1;*
>
> *(e) to hear EMPC ordered to pay the costs of the proceedings, including the costs of the summons and the indexed statutorily prescribed contribution towards the other party's legal representation costs; and*

[276] *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Decision on the Admissibility of the Respondent's Third Objection to Jurisdiction and Admissibility of Claimants' Claims, 26 July 2013, ¶ 82 (https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/10/13).

[277] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands,* ICSID Case No ARB/21/4, Decision on the Claimants' Request for Provisional Measures, 16 August 2022, ¶ 88 (**CL-0024**).

[278] Respondent's Rejoinder, ¶ 28.

> *(f) to declare the judgment to be rendered enforceable notwithstanding appeal or opposition, even in the event of default of appearance.*" [Emphasis added]

233. In this context, the Tribunal recalls that the record includes examples of cases which demonstrate that ICSID tribunals may order provisional measures to prevent interference from domestic courts. The Tribunal accepts that ICSID tribunals have granted such relief where domestic proceedings risk interfering with ICSID's exclusive jurisdiction or otherwise compromise the procedural integrity of the arbitration,[279] but the matter remains to be assessed on a case-by-case basis.

234. The Tribunal has previously established that there is a significant overlap between the Antwerp Proceedings and this Arbitration.[280] Such overlap qualifies the Antwerp Proceedings as parallel proceedings for the purposes of this Arbitration, as set out below.

235. In respect of what constitutes 'parallel proceedings', the Tribunal notes that the International Law Association (**ILA**) describes it as:[281]

> "[P]*roceedings pending before a national court or another arbitral tribunal in which the parties and one or more of the issues are the same or substantially the same as the ones before the arbitral tribunal in the Current Arbitration*."

236. In *Tatneft v. Ukraine*, the tribunal concluded that:[282]

> "*In deciding cases of concurrent jurisdiction it is of the essence to ascertain whether the same, or related, parties and the same, or related, issues are in dispute, for otherwise there will be no conflict of rules. A Resolution adopted in 2003 by the Institut de Droit International on the doctrine of forum non conveniens in private international law, concluded that '[p]arallel litigation in more than one country between the same, or related, parties, in relation to the same, or related, issues, should be discouraged.'* ***It can be similarly concluded here that any concurrent international legal title to jurisdiction would require identical***

[279] Claimant's Application, ¶¶ 74-81.
[280] See *supra*, Section (1) Overlap Between this Arbitration and the Antwerp Proceedings, p. 55, ¶¶ 197-206.
[281] International Law Association, Resolution No.1/2006, Annex 1: International Law Association Recommendations on Lis Pendens and Arbitration, ¶ 1.
[282] *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Partial Award on Jurisdiction, 28 September 2010, ¶ 92.

> ***parties and issues, and that even then parallel litigation should be discouraged***." [Emphasis added]

237. Moreover, in *Quiborax v. Bolivia*, the tribunal noted that:[283]

> "*…the practice of ICSID tribunals has been to consider that other proceedings are parallel for purposes of Art. 26 of the ICSID Convention when such proceedings deal with the same subject matter as the ICSID dispute. This was the criterion adopted by the tribunal in* Perenco v. Ecuador*, for instance*."

238. More importantly, in *Perenco v. Ecuador,* the tribunal stated that:[284]

> "…*Unless and until the Tribunal rules that it has no jurisdiction to entertain this dispute, if its jurisdiction is hereafter challenged, or the Tribunal delivers a final award on the merits, none of the parties may resort to the domestic courts of Ecuador to enforce or resist any claim or right which forms part of the subject matter of this arbitration*."

239. In light of the foregoing, the Tribunal concludes that domestic proceedings which involve the same or substantially similar parties, issues and legal framework as those before the ICSID tribunal constitute parallel proceedings and pose a risk of interfering with the exclusive jurisdiction and procedural integrity of the arbitration. The jurisprudence cited – particularly from *Tatneft v. Ukraine*, *Quiborax v. Bolivia*, and *Perenco v. Ecuador* – demonstrates a consistent approach among ICSID tribunals to discourage such parallel litigation and, where appropriate, to grant provisional measures aimed at preserving the autonomy and effectiveness of the arbitral process.

240. As discussed above,[285] the Tribunal finds that: (i) the parties involved in the Antwerp Proceedings are the same as those in this Arbitration; (ii) the cause of action in the Antwerp proceedings concerns the existence of a consent to arbitrate under the ECT – a matter that falls squarely within the jurisdiction of this Tribunal;[286] (iii) the Antwerp Court and this Tribunal will need to apply a significantly overlapping legal framework, in particular EU law and the ECT, to the question of the jurisdiction of this Tribunal, as acknowledged by

[283] *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 131 (**CL-014**).
[284] *Perenco Ecuador Ltd v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No ARB/08/6, Decision on Provisional Measures, 8 May 2009, ¶ 61 (**CL-11**).
[285] *Supra.* ¶¶ 197-206.
[286] Antwerp Commercial Court, Antwerp division, Judgment, 19th Chamber, 30 September 2025, p.4 (**C-0129-ENG**).

both Parties during the Hearing;[287] and (iv) the Netherlands itself has acknowledged that there is an overlap between the Antwerp proceedings and this Arbitration but labels this as a "*limited overlap*."[288]

241. In light of the above, the Tribunal is persuaded that the Antwerp proceedings, as commenced by the Respondent and the relief sought therein, represents a significant overlap and poses a risk of interference with this Arbitration, in a manner that triggers a need for protecting the exclusivity of this Arbitration as required by Article 26 of the ICSID Convention.

(ii) Preservation of the Tribunal's exclusive jurisdiction to rule on its own jurisdiction under Article 41 of the ICSID Convention

242. The Parties agree that Article 41 of the ICSID Convention codifies the principle of Kompetenz-Kompetenz and "it is for the Tribunal, as the judge of its competence and not for […] national courts, to determine the basis of that competence […]."[289] The Tribunal also agrees that the Kompetenz-Kompetenz principle can be protected through provisional measures.[290] Moreover, in Inceysa v. El Salvador, the tribunal found that:[291]

> "*148.* […] *Consequently, the ICSID Convention recognizes the 'Kompetenz-Kompetenz' principle and imperatively obligates the Arbitral Tribunal to decide the issues formulated on this subject.*
>
> *149. It is obvious that because the ICSID Convention obligates the Arbitral Tribunal to decide on its own competence, it implicitly gives the Tribunal the right to analyze all factual and legal matters that may be relevant in order to fulfill this obligation.*
>
> *150. In this context, it must be noted that, in general terms, competence means the power or capacity of a Tribunal to hear and decide on a certain matter*."

[287] Hearing Transcript, Claimant's First Application for Provisional Measures, 26 August 2025, Claimant: pp. 124:20-22, 125:1-9, 125:20-22, 126:1-11, 127:12-16, 128:9-16, 130:16-22, 131:1-9, 168:5-13; Respondent: pp. 122:18-22, 123:1-6, 172:21-22, 173:1-6.

[288] Hearing Transcript, Claimant's First Application for Provisional Measures, 26 August 2025, pp. 128:21-22, 129:1-7.

[289] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 5.30 (**CL-15**).

[290] *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, ¶ 93 (**CL-25**).

[291] *Inceysa Vallisoletana S.L. v. Republic of El Salvador,* ICSID Case No. ARB/03/26, Award, 2 August 2006, ¶¶ 148-150 (https://www.italaw.com/cases/562).

243. Given that the underlying basis of the Netherlands' tort action is that EMPC violated the general standard of due care by instituting an intra-EU investment dispute with an arbitral tribunal that has no jurisdiction in this matter, the Netherlands has to argue and the Antwerp Court has to rule on the validity of the arbitration agreement and the consent to arbitrate, which raises the important question of which forum has jurisdiction to decide on this question.

244. Accordingly, the Tribunal finds that the Antwerp Proceedings, insofar as they seek to adjudicate the question of the consent to arbitrate this dispute, which forms the exclusive basis for the tortious cause of action, do compromise the exclusivity of the ICSID proceedings and interfere with the principle of *Kompetenz-Kompetenz*. Such interference is incompatible with the ICSID Convention. It follows that the Tribunal's exclusive jurisdiction to rule on its own competence under Article 41 of the ICSID Convention is engaged in the present case.

(iii) Restoring or maintaining the status quo (non-aggravation of the dispute)

245. In defining the concept of "*rights*" requiring protection, the tribunal in *Plama v. Bulgaria* held that:[292]

> "*The rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out. Thus the rights to be preserved by provisional measures are circumscribed by the requesting party's claims and requests for relief. They may be general rights, such as the rights to due process or the right not to have the dispute aggravated, but those general rights must be related to the specific disputes in arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date*."

246. Thus, the Tribunal holds that provisional measures can be granted in order to avoid aggravation of a dispute as also held by the tribunal in *Occidental v. Ecuador*, where it was stated that:[293]

[292] *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Order on Provisional Measures, 6 September 2005, ¶ 40 (**CL-007**).
[293] *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, ¶ 96 (**RL-10**).

> "*It is not contested that provisional measures can be granted in order to avoid aggravation of a dispute, and international tribunals have often done so. This general principle has been invoked by the tribunal in the following terms in the ICSID case of Victor Pey Casado v. Chile: 'It relates to the general principle, frequently affirmed in international case-law, whether judicial or arbitration proceedings are in question, according to which 'each party to a case is obliged to abstain from every act or omission likely to aggravate the case or to render the execution of the judgment more difficult'*."

247. Consequently, the Tribunal considers that provisional measures may be granted either to restore or maintain the status quo, and to prevent the aggravation of the dispute. This position was also adopted in *Evrobalt v. Moldova*:[294]

> "*Interim measures may seek either to restore something that has been taken away or to maintain something that exists at present and risks imminently to be taken. The term 'status quo' must be read in a manner that achieves that objective. It is a flexible notion, seeking merely to identify a state of affairs - past or present - that is the object of interim measures.*"

248. Moreover, in *Klesch v. Germany*, it was stated that:[295]

> "*Rule 47(1)(b) expressly empowers the Tribunal to recommend provisional measures to 'maintain … the status quo pending determination of the dispute'. This is based on the principle that once a dispute has been submitted to arbitration, the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award.*"

249. In *Biwater Gauff v. Tanzania,* as cited by the Claimant, the tribunal stated that:[296]

> "*It is now settled in both treaty and international commercial arbitration that an arbitral tribunal is entitled to direct the parties*

[294] *Evrobalt LLC v. Republic of Moldova,* SCC Case No. EA 2016/082, Award on Emergency Measures, 30 May 2016, ¶ 37 (https://www.italaw.com/cases/4179).
[295] *Klesch Group Holdings Limited & Raffinerie Heide GmbH v. Federal Republic of Germany*, ICSID Case No. ARB/23/49, Decision on Provisional Measures, 23 July 2024, ¶ 47 (**CL-26**).
[296] *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶ 135 (**CL-9**).

> *not to take any step that might (1) harm or prejudice the integrity of the proceedings, or (2) aggravate or exacerbate the dispute*."

250. In light of the foregoing jurisprudence, the Tribunal concludes that the authority to recommend provisional measures aimed at preventing the aggravation of the dispute and preserving the status quo is well-established under international law and in ICSID practice. The consistent recognition of this principle in cases such as *Occidental v. Ecuador*, *Victor Pey Casado v. Chile*, *Evrobalt v. Moldova*, and *Klesch v. Germany* underscores the Tribunal's power to safeguard the integrity of the proceedings and ensure that neither party takes steps that could prejudice the arbitration or render the eventual award ineffective. Accordingly, the Tribunal affirms that provisional measures may be granted where necessary to uphold these procedural protections.

251. In the present case, the Tribunal considers that the Netherlands' requested relief before the Antwerp Court, primarily, "to hear it ruled that EMPC committed an unlawful act vis-à-vis the Netherlands by instituting an intra-EU investment arbitration dispute before an arbitral tribunal", may well result in: (i) an aggravation or exacerbation of the dispute; and/or (ii) prejudicing the integrity or the execution of the award.

252. It should also be noted that, at the time this Arbitration was registered on 21 October 2024, the Antwerp Proceedings had not yet been commenced, having only been initiated on 10 January 2025. The subsequent initiation of those proceedings introduces a parallel and overlapping track that risks unsettling the procedural equilibrium and escalating the dispute.

253. It is indeed true that the exclusion and withdrawal of certain relief from the Antwerp Proceedings and the provision of certain assurances by the Netherlands have been found to be helpful and demonstrative of the Netherlands good faith. Nevertheless, the significant overlap between both sets of proceedings and the need to preserve the *status quo*, to prevent the aggravation of the dispute, and to protect the exclusivity of the ICSID proceedings in respect of considering and determining the consent to arbitrate, militate against disregarding the Antwerp Proceedings and in favor of a suspension of the Antwerp Proceedings pending the determination of the Tribunal's jurisdiction and ruling on the Netherlands' jurisdictional objections in this Arbitration.

254. The Tribunal now turns to the remaining conditions for granting interim relief to ascertain whether they are present in the current circumstances of this Arbitration or not.

c. Necessity

255. The Tribunal agrees with the Netherland's assertion that "the traditional position under public international law is that a provisional measure is 'necessary' only if it is required to

prevent irreparable harm, i.e., harm not adequately repaired by an award of damages."[297] The Tribunal considers, however, that a serious threat to the procedural integrity of the arbitral proceedings can satisfy the test of irreparability.

256. The Tribunal agrees with the analysis established in *Rotalin v. Moldova*, in response to a similar argument, where the tribunal concluded that:[298]

> "[…] *even though it is true that monetary compensation could in certain circumstances mean that harm caused to a claimant's investment is reparable because damages can be awarded equivalent to the harm caused to the investment, it is not clear that an award of damages will adequately repair procedural rights that are at risk of being endangered. This is particularly true because where procedural rights are violated, that also affects a party's ability to secure the monetary compensation*."

257. In *Quiborax v. Bolivia*, cited by both Parties,[299] the tribunal after having considered that an irreparable harm is a harm that cannot be repaired by an award of damages, held that:[300]

> "*Following this standard, Claimants submit that the provisional measures requested are necessary because the harm caused would not be adequately repaired by an award of damages. The Tribunal agrees with Claimants in this respect: any harm caused to the integrity of the ICSID proceedings, particularly with respect to a party's access to evidence or the integrity of the evidence produced could not be remedied by an award of damages.*"

258. The Tribunal observes that the Antwerp Proceedings are expressly aimed at securing a finding that EMPC committed a tort by initiating this Arbitration, which is based on the premise that this Tribunal has no jurisdiction, before the matter has even been pleaded before or decided by this Tribunal. As noted earlier, the issues and applicable legal frameworks significantly overlap.[301] This means that the domestic litigation before the Antwerp Court is in direct conflict with the exclusivity of the Tribunal's jurisdiction under

[297] Respondent's Rejoinder, ¶ 62.
[298] *RTI Rotalin Gas Trading AG and Rotalin Gaz Trading S.R.L. v. Republic of Moldova*, ICSID Case No. ARB(AF)/22/4, Procedural Order No. 6, Decision on the Claimants' Second Request for Provisional Measures, 15 July 2024, ¶ 108 (https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C10716/DS19793_En.pdf) .
[299] Respondent's Rejoinder, ¶ 64.
[300] *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶¶ 156-157 (**CL-014/RL-21**).
[301] *Supra,* ¶¶ 200, 201, and 205.

the ICSID Convention. Such conflict risks frustrating the integrity and exclusivity of this Arbitration as regards the determination of the Tribunal's jurisdiction.

259. Moreover, the Tribunal considers the potential "*res judicata"* effect arising from the Antwerp Proceedings to be contributing to the aggravation of the dispute, and may also adversely impact the integrity, exclusivity and finality of ICSID proceedings. According to the Respondent:

> "*The findings of the Antwerp Business Court in relation to the provisional measure, including any (implicit) finding that no valid arbitration agreement exists under EU law, will have* res judicata *effect (*rebus sic stantibus*) between EMPC and the Netherlands*."[302]

260. This procedural stance introduces a direct risk that determinations made in the domestic forum may pre-empt or conflict with issues reserved for the Tribunal's exclusive competence under the ICSID Convention.

261. While the Respondent has characterized the alleged tort as a "one-off" act arising from EMPC's initiation of arbitration,[303] it is the existence of pending proceedings addressing an issue over which this Tribunal has exclusive jurisdiction that constitutes a threat to the integrity of this Arbitration. The Tribunal notes that the Antwerp Court will need to engage with issues central to its jurisdiction and the validity of EMPC's consent. Until this Tribunal decides the issue of whether it can assert jurisdiction or not over the present dispute, the interference arising from ongoing proceedings before the Antwerp Court constitutes a continuous threat to the exclusive jurisdiction of this Tribunal, despite the one-off nature of the alleged tort.

262. In light of the Tribunal's findings, it follows that the "necessity" condition is satisfied in this case.

d. Urgency

263. With respect to urgency, the Tribunal accepts the *Burlington v. Ecuador* test that the criterion of urgency is satisfied when "*a question cannot await the outcome of the award on the merits*."[304]

[302] Legal opinion by Alexander Hansebout and Roel Verheyden (Altius), 1 July 2025, p. 5, ¶ 9 (**RL-8**).
[303] See the Respondent's Letter to the Tribunal dated 2 September 2025.
[304] *Burlington Resources Inc and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for

264. On the evidence in the record, a determination by the Antwerp Court regarding the jurisdiction of this Tribunal, under a significantly overlapping legal framework, is likely to intervene before this Tribunal has been fully briefed and has made its own determination over this issue. In its order of 30 September 2025, the Antwerp Court decided not to use its discretion to stay the proceedings and, instead, to "[…] *reinstat*[e]*, if only because the decision to suspend the case, which has an impact on the right to a judgment within a reasonable period of time, is best taken after the parties have set out their arguments in their statements*."[305] The Court subsequently adopted the briefing schedule proposed by the Netherlands, which provides for the Antwerp Action to be fully briefed in writing by 31 March 2026. Moreover, the Court indicated that the hearing will be scheduled no later than two months following the final deadline for submissions, with formal notification to be issued to the Parties. [306] These developments demonstrate that the Antwerp proceedings are advancing rapidly and substantively, ahead of the agreed schedule in this Arbitration not only for the determination of the merits but also of any preliminary objections concerning the Tribunal's jurisdiction. The pursuit of the Antwerp proceedings therefore creates an urgent risk of prejudicing the rights at issue in this Arbitration absent timely provisional relief.

265. The Tribunal further notes that the fact that, as the Parties observed during the Hearing,[307] a decision from the Antwerp Court could be appealed or be subject to some other recourse within the Belgian legal system, and therefore could take additional time, does not detract from the fact that the Antwerp Court would have rendered a decision addressing an issue – the jurisdiction of this Tribunal under *inter alia* the ICSID Convention, the ECT and EU law – over which the Tribunal has exclusive jurisdiction. The fact that the Antwerp Court may potentially decide to stay its own proceedings, after having fully heard the Parties, cannot be excluded. The Antwerp Court noted that a decision on a stay of proceedings would be "*best taken after the parties have set out their arguments in their statements*" [308] but it is uncertain at the current stage of the proceedings and therefore leaves open the question of an interference with this Arbitration if the Antwerp Action follows its course pursuant to the currently fixed procedural calendar.

266. Based on the foregoing analysis and in light of the impact of the Antwerp Proceedings and the significant overlap with this Arbitration as explained above, the Tribunal finds that the requirement of urgency is satisfied.

Provisional Measures, 29 June 2009, ¶ 73 *citing* Christoph SCHREUER, "*The ICSID Convention: A Commentary*", Cambridge University Press, 2001, p. 751 ¶ 17 (**CL-12**).

[305] Antwerp Commercial Court, Antwerp division, Judgement, 19th Chamber, 30 September 2025, ¶ 3 (**C-0129-ENG**).
[306] *Ibid*, pp. 5-6 (**C-0129-ENG**).
[307] Hearing Transcript, Claimant's First Application for Provisional Measures, 26 August 2025, pp. 152-154.
[308] Antwerp Commercial Court, Antwerp division, Judgement, 19th Chamber, 30 September 2025, ¶ 3 (**C-0129-ENG**).

e. Proportionality

267. The Tribunal agrees with the Parties' position that proportionality, also known as the test of balance of (in)convenience,[309] is a requirement for granting provisional measures. The Tribunal agrees with the Netherlands that Rule 47(3) of the ICSID Arbitration Rules provides that the Tribunal shall consider the effect that the measures may have on each party in deciding whether to recommend provisional measures. This requirement calls upon the Tribunal to assess not only the potential harm to the Claimant but also the potential prejudice to the Respondent that may arise if the provisional measure requested is granted.[310] This was also confirmed by other tribunals, including those in *Uniper v. The Netherlands*,[311] *RWE v. The Netherlands*[312] and *WOC v. Spain*.[313] More recently, in *Mainstream Renewable Power v. Germany*, the tribunal held that:[314]

> "*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', 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'*."

268. In weighing the Parties' positions regarding the potential harm arising from the granting or refusal of provisional measures, the Tribunal has given particular and due regard to the Netherlands *bona fide* assurances and cooperation, and it has also duly noted and considered the following.

269. On one hand, the harm alleged by EMPC primarily stems from the impact of the Antwerp Proceedings on the integrity of this Arbitration and the exclusive jurisdiction of this Tribunal to determine its own jurisdiction, noting that the Netherlands may indeed raise any jurisdictional and admissibility objections, including under Article 26 of the ECT and

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[309] *Grenada Private Power Limited and WRB Enterprises, Inc. v. Grenada*, ICSID Case No. ARB/17/13, Decision on Provisional Measures, 26 September 2018, ¶ 16 (https://www.italaw.com/sites/default/files/case-documents/italaw11346.pdf); *Lao Holdings N.V. v. Lao People's Democratic Republic (I),* ICSID Case No. ARB(AF)/12/6, Decision on Claimant's Amended Application for Provisional Measures, 17 September 2013, ¶ 26 (https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2462/DC10457_En.pdf).

[310] Respondent's Observations, ¶ 128.

[311] *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV 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, ¶¶ 65, 74 (**CL-23**).

[312] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands,* ICSID Case No ARB/21/4, Decision on the Claimants' Request for Provisional Measures, 16 August 2022, ¶ 76 (**CL-24**).

[313] *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, ¶¶ 76, 108-109 (**CL-25**).

[314] *Mainstream Renewable Power, Ltd., and others v. Federal Republic of Germany*, ICSID Case No. ARB/21/26, Procedural Order No. 8, 17 July 2023, ¶ 76 (**RL-44**).

EU law, in this Arbitration. Also, the Netherlands' claim for costs in defending against this Arbitration falls within the Tribunal's competence and should be properly pursued in this Arbitration rather than in the Antwerp Proceedings.[315]

270. On the other hand, being mindful of the Netherlands' commitment to EU law, and being appreciative (without making a finding or a determination in this regard) of the Respondent's declaration that a withdrawal of the Antwerp Proceedings in their entirety would put the Netherlands in breach of its EU law obligations,[316] the Tribunal considers that an order that the Antwerp Proceedings be terminated would not be proportionate or necessary. This is because it would deprive the Respondent of a remedy, namely a tort claim under Belgian law, which this Tribunal could not possibly decide or grant. A proportionate measure to prevent the interference of the Antwerp Proceedings with this Tribunal's exclusive determination of its own jurisdiction under the significantly overlapping legal frameworks noted earlier would not need to go beyond the suspension of the Antwerp Proceedings pending a determination by the Tribunal of its jurisdiction and the validity (or invalidity) of the consent to arbitrate in this Arbitration. The jurisdiction of this Tribunal, or the lack thereof, is a fundamental prerequisite for the tort claim in the Antwerp Proceedings. So, this Tribunal must first determine those issues pertinent to jurisdiction and the consent to arbitrate before any national court can consider whether a tort exists or not.

271. The potential harm, *if any*, suffered by the Netherlands from the suspension would, in the Tribunal's view, not be disproportionate, given that the Parties are in agreement that the Respondent is able to bring its intra-EU Objection before this Tribunal to be decided in this Arbitration. Also, such suspension would not prejudice the Netherlands in respect of its contention that ordering any provisional measures would compel the Netherlands to breach its obligations under the EU Treaties. The Respondent confirmed, during the Hearing and in response to a question on the understanding of paragraph 52 of the decision of the Court of Justice of the European Union in *PL Holdings*,[317] the following: "… *our instructions are, indeed, that the validity of the arbitration clause should be challenged in this Arbitration before this Tribunal and only before this Tribunal*."[318] Moreover, the Netherlands has already commenced the Antwerp Proceedings, albeit after the commencement of this Arbitration, and a suspension of the Antwerp Proceedings causes no prejudice, as such proceedings would remain in place, but in abeyance, until the Tribunal has determined its jurisdiction and the validity of the consent to arbitrate under the ECT.

[315] Claimant's Application, ¶¶ 68-69.
[316] Respondent's Rejoinder, ¶ 70.
[317] *PL Holdings S.a.r.l. v. Poland*, SCC Case No. V 2014/163, Judgment of the Grand Chamber of the European Court of Justice, 26 October 2021, ¶ 52 (**RL-3**).
[318] Hearing Transcript, Claimant's First Application for Provisional Measures, 26 August 2025, p. 174:14-17.

272. Thus, having considered all the circumstances and after weighing the Parties' competing interests, the Tribunal concludes that the harm faced by EMPC if no provisional measure is granted outweighs the potential harm suffered by the Netherlands if the Tribunal orders that the Netherlands request the suspension of the Antwerp Proceedings. It follows that, whereas the requirement of proportionality may not be met for a withdrawal order at this stage, it is met if the Tribunal orders a suspension.

273. By and large, the Tribunal considers that all necessary conditions for granting the recommended provisional measure are satisfied, and it remains to address and analyze the assurances provided by the Netherlands to determine whether and to what extent certain interim relief is warranted or not.

(4) The Respondent's Assurances

274. In this section, the Tribunal examines the assurances provided by the Respondent to ascertain whether they are sufficient to deny the Application.[319]

275. At the outset, the Tribunal notes that in the *Uniper*, *RWE,* and *WOC* cases, the respective tribunals assessed the representations submitted by the respondents to determine whether they were adequate to address the claimants' concerns. In each instance, the tribunal accepted the assurances only upon being satisfied that they sufficiently addressed the situation and the concerns raised. Conversely, assurances were rejected when deemed insufficient or inadequate. This explains the divergence in outcomes between the different arbitral tribunals. In the *Uniper* and *RWE* cases, the tribunals accepted the assurances and deemed them sufficient, whereas in the *WOC* case, the tribunal did not deem the assurances sufficient.

276. As explained above,[320] the Tribunal considers that this Arbitration and the Application are distinguished from all three cases (i.e. the *Uniper*, *RWE,* and *WOC* cases).

277. In terms of the nature of the relief sought, the respondents in the *Uniper* and *RWE* cases pursued declaratory relief under German procedural law, specifically Article 1032(2) of the German Arbitration Act, which permitted a request for a declaration that the arbitration agreement was invalid under EU law. This procedural framework allowed the respondents to seek certain declarations without alleging liability. By contrast, in this Arbitration, the Respondent has initiated proceedings before the Antwerp Court alleging that EMPC committed an unlawful (tortious) act under Belgian law, in conjunction with EU law, by relying on Article 26 of the ECT to initiate this ICSID Arbitration.[321] This difference in the

[319] The Respondent's Letter to the Tribunal dated 2 September 2025.
[320] See *supra*, Section (2) on Legal Authorities and Cases, ¶ 207.
[321] Legal opinion by Alexander Hansebout and Roel Verheyden (Altius), 1 July 2025, p. 2-4, ¶¶ 3-5 (**RL-8**).

nature of the domestic proceedings and the cause of action also impacts the scope and the sufficiency of the assurances required to preserve the integrity of this Arbitration.

278. Moreover, while EMPC asserts that "none of the Respondent's assurances ensure the preservation of the Claimant's rights under Articles 26, 41, 53, and 54 of the ICSID Convention", [322] the Tribunal recognizes that the Netherlands has indeed made efforts to offer formal commitments with a view to mitigate the Claimant's concerns. The Tribunal considers that these efforts are demonstrative of the Netherlands' constructive engagement in this Arbitration. The evidence on the record regarding the actions undertaken by the Netherlands in relation to the withdrawal of certain requests for relief before the Antwerp Court demonstrates the good faith of the Netherlands. As noted earlier, the Tribunal has no reason to believe that the Respondent will not abide by the assurances it provided in its letter of 2 September 2025, even when the Antwerp Proceedings are suspended.

279. But this does not lead to the conclusion that, in the specific circumstances of this case, the assurances given by the Netherlands address all potential concerns in relation to the significant overlap between the Antwerp Proceedings and this Arbitration. While the assurances provided militate against an order to withdraw or terminate the Antwerp Proceedings, they remain insufficient in terms of avoiding the overlap between this Arbitration and the Antwerp Proceedings and in dispensing with the associated risks as detailed above. In fact, the Antwerp Court itself expressly stated:[323]

> "*The arguments put forward by EMPC regarding the jurisdiction of ICSID, **may be relevant to this court in assessing whether it has the required jurisdiction**, but they do not necessitate the* suspension of the proceedings." [Emphasis added]

280. Accordingly, it is clear that the Antwerp Court itself recognizes the overlap and the relevance of the issue of the ICSID jurisdiction, which falls exclusively to be decided by this Tribunal and not the Antwerp Court.

281. In respect of comparing the assurances made in this Arbitration and those made in both the *Uniper* and *RWE* cases, the Tribunal is of the view that the assurances submitted in this Arbitration differ in certain relevant respects from those submitted in the *Uniper* and *RWE* cases.

282. ***First***, in the *Uniper* and *RWE* cases, the Respondent provided a comprehensive set of commitments addressing not only its intention to comply with international law, but also the limited scope of the domestic proceedings, the declaratory nature of the relief sought,

[322] EMPC's Letter to the Tribunal dated 2 September 2025, p. 9.
[323] Antwerp Commercial Court, Antwerp division, Judgment, 19th Chamber, 30 September 2025, ¶ 2 (**C-0129-ENG**).

and explicit recognition of the Tribunal's exclusive competence under the ICSID Convention.[324]

283. By contrast, the assurances offered in this Arbitration, though similarly framed in terms of good faith and compliance with international obligations, do not replicate the same level of specificity or breadth. Notably, the Respondent neither confirmed that the Antwerp Court is not being asked (and will not) adjudicate matters under the ICSID Convention, nor has it provided equivalent assurances regarding the non-impact of any domestic judgment on the Claimant's participation in this Arbitration. This distinction, both in scope and substance, is consequential to the Tribunal's assessment of whether the Respondent's representations sufficiently safeguard the procedural integrity, exclusivity and jurisdictional autonomy of the present proceedings.

284. ***Second***, in the *Uniper* and *RWE* cases, the tribunals gave considerable attention to the nature and legal implications of the domestic proceedings, emphasizing the declaratory character of the anticipated judgments. In both cases, the Respondent (being the same respondent in those cases and in this Arbitration) submitted identical assurances, affirming the following:

> "*…in the German Proceedings, i. It seeks only a declaration as to EU law, as required by its understanding of its EU Treaty obligations; ii. It does not seek determinations under the ICSID Convention; and iii. As noted above, it has expressly advised the German Court of this position, specifically stating to the German Court that the Court 'is not called upon to decide a question of the ICSID Convention, but to clarify a question of EU law and German law'…*"[325]

285. Based on these representations, the tribunal in *RWE* concluded:

> "*In light of the present uncertainties, and particularly in light of the Netherlands' many affirmative statements, the Tribunal cannot find at the present time that the German Proceedings infringe on its exclusive authority to determine its own competence under the ICSID Convention, the Claimants'*

[324] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No ARB/21/4, Decision on the Claimants' Request for Provisional Measures (RWE v. Netherlands, Decision on PM Request), 16 August 2022, ¶ 86 (**CL-24**). See also *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV v. Kingdom of the Netherlands*, ICSID Case No ARB/21/22, Procedural Order No 2 Decision on the Claimants' Request for Provisional Measures (Uniper v. Netherlands, PO2), 9 May 2022, ¶ 93 (**CL-23**).

[325] *Ibid*.

> *substantive rights, or the procedural integrity of this arbitration*."[326]

286. Similarly, in *Uniper*, the tribunal held:

> "*The Tribunal is given comfort by these express and binding representations of the Respondent, in circumstances where, without them, a* prima facie *violation of Articles 26 and 41 of the ICSID Convention might well have been established and a recommendation to withdraw the German Proceedings could have been justified*."[327]

287. In contrast, the Tribunal in this Arbitration finds that the Netherlands has not provided sufficiently equivalent assurances, including the assurance that the Antwerp Court will not be called upon to decide any question of jurisdiction that is relevant to the ICSID Convention.

288. ***Third***, the Tribunal places significant weight on the nature and implications of the Antwerp Proceedings, which differ significantly from the German Court proceedings examined in the *Uniper* and *RWE* cases. Unlike the German Proceedings in those cases, where the respondent sought only declaratory relief under EU law, the Antwerp Court is expected to adjudicate substantive issues concerning the validity of the arbitration agreement and the jurisdiction of this Tribunal. These matters fall squarely within the exclusive competence of the Tribunal under Articles 26 and 41 of the ICSID Convention. The Netherlands' position is that:

> "*The Netherlands argue that, by initiating intra-EU investment arbitration proceedings notwithstanding the incompatibility of the arbitration clause in Article 26, para. 2, (c) of the ECT with Articles 267 and 344 on the Treaty on the Functioning of the European Union, as established by case law of the Court of Justice of the European Union, committed an unlawful act within the meaning of Article 1382 of the old Belgian Civil Code*."[328]

[326] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No ARB/21/4, Decision on the Claimants' Request for Provisional Measures (RWE v. Netherlands, Decision on PM Request), 16 August 2022, ¶ 88 (**CL-24**).

[327] *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV v. Kingdom of the Netherlands*, ICSID Case No ARB/21/22, Procedural Order No 2 Decision on the Claimants' Request for Provisional Measures (Uniper v. Netherlands, PO2), 9 May 2022, ¶ 94 (**CL-23**).

[328] Legal opinion by Alexander Hansebout and Roel Verheyden (Altius), 1 July 2025, p. 2, ¶ 2 (**RL-8**).

289. In its letter of 2 September 2025, the Respondent did not offer express assurances comparable to those submitted in *Uniper* and *RWE* cases, such as:

> "• *That in the German Proceedings,*
>
> […]
>
> *ii. It does not seek determinations under the ICSID Convention; and*
>
> *iii. As noted above, it has expressly advised the German Court of this position, specifically stating to the German Court that the Court 'is not called upon to decide a question of the ICSID Convention, but to clarify a question of EU law and German law';*
>
> *• That the ECT is a source of international law and identifies the body competent to determine jurisdiction under that treaty;*
>
> *• That this Tribunal is the body competent to determine its own jurisdiction under the ICSID Convention and that it may take into consideration the forthcoming judgment of the German Court and judgments of the CJEU*."[329]

290. In its submissions, the Respondent did confirm "*that only this Tribunal can determine the question of its competence under the ECT and the ICSID Convention*."[330] This was confirmed again at the Hearing although with less clarity as regards the applicable law for the determination of jurisdiction "[t]*his Tribunal has exclusive competence over issues of its competence and jurisdiction, and it will do with the Antwerp Court's decision what it wants, whether it's a decision founded in EU law and Belgian law or a decision founded in ICSID Convention, the ECT, or some combination thereof*."[331] Yet, there is no evidence on the record, and no specific assurances were given as to any indication to the Antwerp Court that it should confine its analysis to certain sources of law to avoid overlap with the jurisdictional assessment to be exclusively conducted by the Tribunal. This is a significant difference with this Arbitration, where, as noted earlier, the concurrent consideration and

[329] *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV v. Kingdom of the Netherlands*, ICSID Case No ARB/21/22, Procedural Order No 2 Decision on the Claimants' Request for Provisional Measures (Uniper v. Netherlands, PO2), 9 May 2022, ¶ 93 (**CL-23**); *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No ARB/21/4, Decision on the Claimants' Request for Provisional Measures (RWE v. Netherlands, Decision on PM Request), 16 August 2022, ¶ 86 (**CL-24**).
[330] Respondent's Rejoinder, ¶ 9.
[331] Hearing Transcript, Claimant's First Application for Provisional Measures, 26 August 2025, p. 129:7-13.

application of EU law was acknowledged by both Parties, thereby creating a significant legal overlap between the two proceedings.

291. By contrast, in *Uniper* and *RWE*, the assurances given clearly sought to distinguish the applicable legal frameworks in each proceeding. It is on this basis that the Respondent argued, by reference to the reasoning of the tribunal in *Uniper*, that: "[t]*he crux of the tribunal's reasoning was that the German court was not being asked the same jurisdictional question that the tribunal was required to resolve. The German court was being asked to determine a question based upon EU law, whereas the tribunal would determine its jurisdiction based upon the ECT and the ICSID Convention*."[332] The *Uniper* tribunal could conclude, on such basis, that there was no overlap.[333] By contrast, in this Arbitration the overlap has been expressly acknowledged by the Parties given that, in the Antwerp Court proceedings, the jurisdictional question arises in a manner that overlaps, including in the application of the ECT and EU law, with the jurisdictional determination of this Tribunal. The Tribunal will not venture into whether this is a necessary feature of the structure of the argument made before the Antwerp Court, as it differs from those before German courts. But it cannot ignore the significant overlap between the Antwerp Proceedings and this Arbitration regarding the need to determine the Tribunal's jurisdiction or the lack any assurances regarding specifications made to the Antwerp Court similar to those made to German courts.

292. ***Fourth***, the Tribunal acknowledges the Respondent's submission that:

> "*The Netherlands confirms that it commenced the Antwerp Proceedings in a good faith effort to meet what it views as its obligations under the EU Treaties and not to challenge the Kompetenz-Kompetenz of the Tribunal*."[334]

293. While this statement reflects an intention not to undermine the Tribunal's authority, the Tribunal notes the absence of a clear and unequivocal express commitment from the Respondent that it will refrain from taking any steps in the Antwerp Proceedings that could interfere with the Tribunal's exclusive competence under the ICSID Convention. In this regard, the Claimant stated that this assurance is "[…] *simply an explanation for why it decided to pursue the Antwerp Action, which it says was a good-faith attempt to comply with its EU law obligations*."[335]

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[332] Respondent's Rejoinder, ¶ 52(b).

[333] *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV 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, ¶¶ 88-89 (**CL-23**).

[334] The Respondent's Letter to the Tribunal dated 2 September 2025.

[335] Hearing Transcript, Claimant's First Application for Provisional Measures, 26 August 2025, p. 41:9-12.

294. Unlike in the *Uniper* and *RWE* cases, where the Respondent explicitly assured that it would not seek determinations under the ICSID Convention,[336] no comparable express assurance has been provided in this Arbitration. It is not obvious to this Tribunal, reading the Antwerp Court's order of 30 September 2025, that the interpretation and application of the ICSID Convention would be excluded from its remit, and how this may (or may not) affect the Antwerp Court's judgment.[337]

295. ***Fifth***, the Tribunal finds that the Respondent has not provided any express assurances comparable to those submitted in the *Uniper* and *RWE* cases regarding the Claimant's continued ability to participate in the ICSID proceedings. In those cases, the Netherlands offered detailed and unequivocal commitments that domestic proceedings would not interfere with the arbitration or undermine the claimants' rights. By contrast, the assurances in the present case, while acknowledging compliance with international law and characterizing the cause of action in the Antwerp Proceedings as a claim in tort, do not address the potential procedural consequences with the same clarity or scope. This concern echoes the conclusion reached in *WOC v. Spain*, though it remains a distinguished case, where the tribunal stated:

> "*The Tribunal shares the concern expressed by both the RWE and Uniper tribunals as to the potentially grave implications for claimants of the type of application which we see again in this case in the German Proceedings... In the absence of any assurances from the Respondent analogous to those given by The Netherlands, the Tribunal finds it is necessary and proportionate to recommend relief by way of Provisional Measures*."[338]

296. In this Arbitration, while the Respondent has given some welcomed assurances, certain express, comprehensive and specific assurances are missing, particularly those safeguarding the Claimant's ability to continue participating in the arbitration without interference. This is of particular significance given that the Respondent has confirmed that it intends to rely on any *res judicata* effect of a judgment by the Antwerp Court in proceedings between the Parties.[339] The fact that the Respondent has given as specific assurance that "*prior to the issuance of the final award in this arbitration, it will refrain*

[336] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands,* ICSID Case No ARB/21/4, Decision on the Claimants' Request for Provisional Measures (RWE v. Netherlands, Decision on PM Request), 16 August 2022, ¶ 86 (**CL-24**); *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV v. Kingdom of the Netherlands*, ICSID Case No ARB/21/22, Procedural Order No. 2, Decision on the Claimants' Request for Provisional Measures (Uniper v. Netherlands, PO2), 9 May 2022, ¶ 93 (**CL-23**).

[337] Antwerp Commercial Court, Antwerp division, Judgment, 19th Chamber, 30 September 2025, ¶ 2 (**C-0129-ENG**).

[338] *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, ¶ 110 (**CL-25**).

[339] Respondent's Observations, ¶ 123.

from initiating any further judicial proceedings against EMPC before any domestic court to request that EMPC withdraw or suspend this arbitration" does not cover the possible interference arising from the Antwerp Proceedings themselves with the Claimant's ability to participate in this Arbitration until the moment when this Tribunal makes a determination on its jurisdiction.

297. ***Sixth***, the Respondent did not provide any assurances regarding the potential "*res judicata*" effect arising from the Antwerp Proceedings.[340] This underscores the insufficiency of the Respondent's assurances in mitigating the prejudicial impact those proceedings may have on the integrity of this Arbitration.

298. ***Finally***, the Tribunal is not informed of any prior notice given to the Claimant regarding the initiation of the Antwerp Proceedings. In *WOC* v. *Spain*, the tribunal emphasized the risk posed by domestic proceedings commenced "*without notice or without sufficient notice to enable an application for provisional measures to be heard and determined in a meaningful and effective way*."[341] That tribunal found such conduct to endanger the claimants' rights and justified the recommendation of provisional measures. In the present case, it appears that the Respondent did not notify the Claimant in advance of its application before the Antwerp Court, nor did it provide sufficient opportunity for the Claimant to seek protective relief before the proceedings were initiated. While this reason is of lesser importance and is not determinative of the Tribunal's decision on the Application, it remains among the factors that ought to be taken into consideration, especially that the Antwerp Proceedings involve an alteration of the status quo and an aggravation of the Parties' dispute.

299. Based on the above, while the Tribunal appreciates the fact that the assurances provided by the Netherlands may have mitigated the need to recommend the withdrawal or termination of the Antwerp Proceedings, they remain insufficient given the overlap between the Antwerp Action and this Arbitration and they fall short of guaranteeing the exclusivity of dealing with the relevant issues of jurisdiction and the consent to arbitrate in this Arbitration.

300. In light of all the above, while the Tribunal reaffirms that it has no reason to question whether the Respondent will abide by the assurances it provided in its letter of 2 September 2025, such assurances do not address all the concerns arising from the significant overlap between the Antwerp Proceedings and this Arbitration with respect to the determination of its jurisdiction. Given the assurances provided by the Netherlands, and after having weighed the Parties' interests and prejudices, the Tribunal does not consider that an order

[340] Legal opinion by Alexander Hansebout and Roel Verheyden (Altius), 1 July 2025, p. 5, ¶ 9 (**RL-8**).
[341] *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, ¶ 110 (**CL-25**).

to terminate or withdraw the Antwerp Proceedings is necessary in the present circumstances. But it does consider that an order to suspend the Antwerp Proceedings is warranted, proportionate and justified to remove the risks to the integrity of this Arbitration until the Tribunal reaches a determination on its own jurisdiction.

301. Finally, the Tribunal notes that the Netherlands has provided an undertaking that this Tribunal has exclusive competence to resolve any objections to its jurisdiction and that the Netherlands will refrain from initiating further proceeding before national or EU courts relating to this Arbitration or seeking to restrain the Claimant from continuing or participating in this Arbitration. Therefore, it is not necessary for the Tribunal to rule on these matters.

V. ORDER

302. For the foregoing reasons, the Arbitral Tribunal recommends that:

(a) The Respondent shall request the suspension of the Antwerp proceedings before the Antwerp Court until the Tribunal has rendered its decision on jurisdiction in this Arbitration;

(b) The Respondent shall promptly (and in any event before 31 December 2025) inform the Tribunal and the Claimant of the steps taken to suspend the Antwerp Proceedings, as well as of any material developments in the Antwerp Proceedings or in any other related legal proceedings that may affect the conduct or integrity of this Arbitration; and

(c) The Tribunal reserves its decision on the costs of this Application for a later stage of the proceedings.

For and on behalf of the Tribunal,

[signed]

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Prof. Dr. Mohamed Abdel Wahab
President of the Tribunal

31 October 2025